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Keller Sucharow

THE LIAISON

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2024 YEAR-END REPORT

CONTENTS

IN THIS ISSUE

P 3 EXECUTIVE SUMMARY

P 4 NOTEWORTHY DEVELOPMENTS

- P 4 *BARCLAYS* LAYS DOWN THE LAW ON RELIANCE IN THE UNITED KINGDOM
- P 12 HOW EXPORTABLE ARE U.S. SECURITIES LAWS OVERSEAS?
- P 20 TROUBLE IN PARADISE: WHAT IS HAPPENING WITH BRAZILIAN
SHAREHOLDER ARBITRATIONS?

P 25 NEW MATTERS

- P 25 DOMINO'S PIZZA ENTERPRISES LTD (AUSTRALIA)
- P 26 BRITISH AMERICAN TOBACCO PLC (ENGLAND AND WALES)

P 28 TRENDS IN NON-U.S. SECURITIES LITIGATION

P 29 GLOBAL LITIGATION SNAPSHOT

P 30 CONTACT US

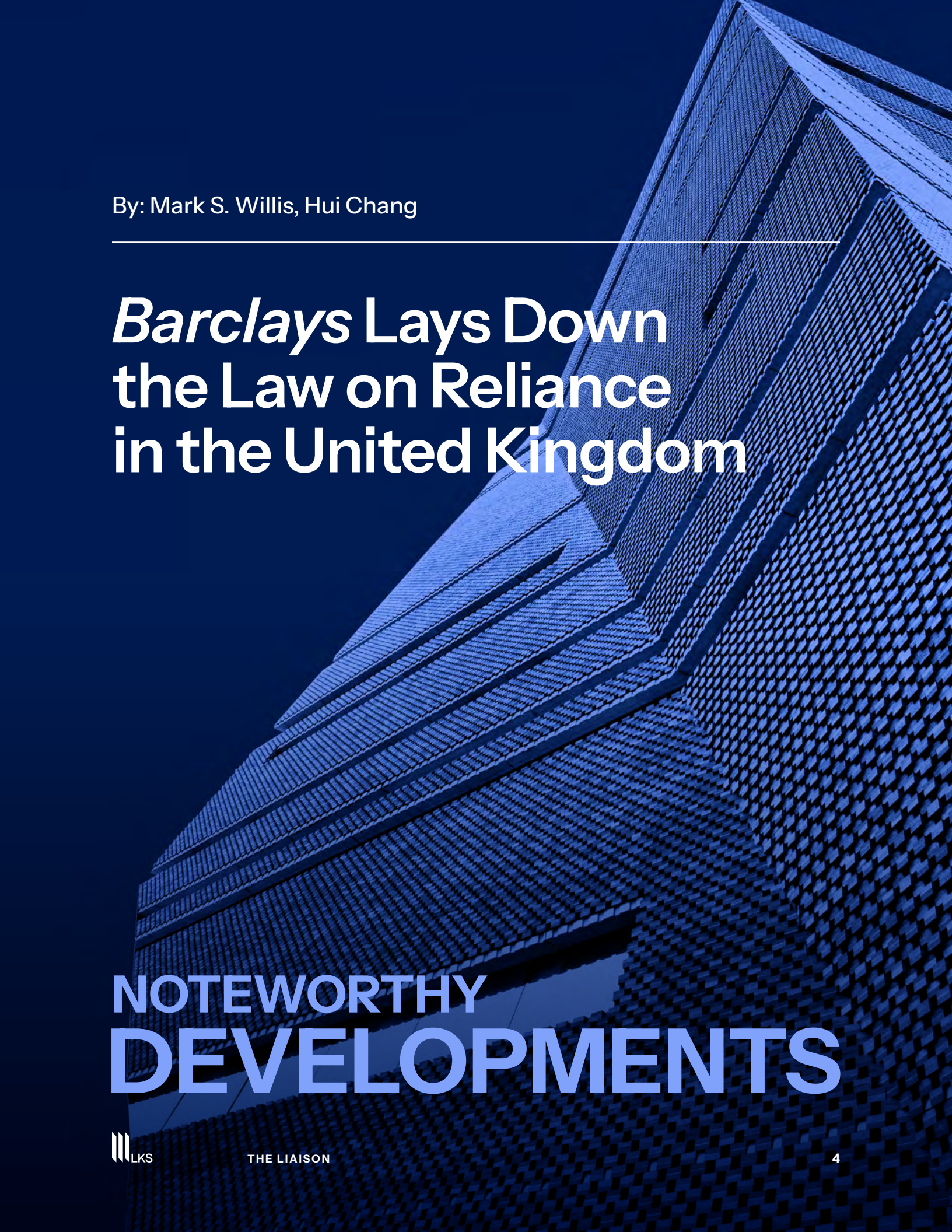
EXECUTIVE SUMMARY

Labaton Keller Sucharow is pleased to present *The Liaison: 2024 Year-End Report*. The Firm has been a pioneer in protecting clients' interests in non-U.S. litigation. With more than 20 years of experience abroad and deep relationships with law firms around the world, Labaton Keller Sucharow has a unique perspective on investment-related issues and recovery opportunities outside the United States.

Featured in this edition:

- ✕ A UK ruling that may make launching investor claims more difficult;
- ✕ Analysis for American investors seeking to understand their non-U.S. options;
- ✕ An update on the Brazilian arbitration regime and the potential fallout from a company-friendly ruling in *Petrobras*;
- ✕ New actions launched against British American Tobacco and Domino's; and
- ✕ Global trends in non-U.S. securities actions.

We would be happy to provide more comprehensive assessments and recommendations with regard to any of the topics discussed or highlighted in *The Liaison*.



By: Mark S. Willis, Hui Chang

Barclays Lays Down the Law on Reliance in the United Kingdom

NOTEWORTHY DEVELOPMENTS

Investor actions in the United Kingdom have been both prolific—think *Tesco*, *Glencore*, *Barclays*, *Petrofac*, and *Standard Chartered*, among others—and, in some instances, successful. But one issue has repeatedly created frustration for shareholders and their counsel: how to plead reliance. Investors are required to show they *relied* in some way on a defendant’s misrepresentations, but the governing statute is silent on how to do this, and no English court had directly weighed in.¹ Some clarity was recently provided by Justice Leech in the pending *Barclays* action. There, he sought to fill this void by illustrating how reliance *may* be proven. At the same time, he also set the parameters of how a parallel dishonest delay claim must be pled.

Helpfully, Justice Leech confirmed that claimants need not show that they directly relied (*i.e.*, an investor need not have reviewed a defendant’s alleged misrepresentation before investing). But he also confirmed that claimants cannot merely invoke a U.S.-style fraud-on-the-market demonstration of price reliance either. Although he provided some guidance on the soft middle between these two, a clear-cut rule remains somewhat elusive. The *Barclays* decision is significant because it is the first to address reliance in a group investor action, and because of that distinction it is also likely to be followed by High Court judges overseeing other such proceedings. In other words, any investor that is part of a pending or potential UK investor action should take note.

STUMBLING IN THE DARK

Most of the investor group actions launched in the United Kingdom have alleged claims under Section 90A of the Financial Services and Markets Act 2000 (“FSMA”), a general anti-fraud statute that prohibits the dissemination of false and misleading statements in the open market, similar to Section 10(b) of the Securities and Exchange Act of 1934 in the United States. Section 90A requires that claimants show they reasonably *relied* in some way on the misstatements and/or omissions that ultimately caused them harm.² Because both the statute and English courts were silent on this, and because prior actions had settled before the issue was

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¹In the *Autonomy* case, Justice Hildyard did consider reliance in the context of the takeover of an English public company, but it was not a group action, and factually, it was sufficiently distinguishable that it was not considered precedent in *Barclays*.

²Both misstatements and omissions fall under paragraph 3 of Schedule 10A of FSMA.

even adjudicated, counsel in *Barclays* and other pending actions remained in the dark about how to plead the reliance of a diverse group of investors.

In response to this uncertainty, many English counsel took a broad approach in an effort to include as many claimants as possible. This often involved sorting claimants into tranches based on their different reliance claims and trading behavior. For example:

- ✕ Tranche 1 might include claimants who could demonstrate some sort of direct reliance (e.g., the claimant or its investment manager read a statement or spoke to a company representative).
- ✕ Tranche 2 might include a form of indirect reliance (e.g., the claimant did not review the false statements but someone else did and other factors were considered in making the investment decision).
- ✕ Tranche 3 might include completely passive investors (e.g., pure tracker funds or other investors who could not show any reliance or human involvement, or who claimed to have relied solely on the market price of the shares. This type of price reliance is the simplest and most inclusive option, and it is how reliance is demonstrated in U.S. class actions. But it has yet to be adopted by any English court.

PRICE PLUS . . . SOMETHING ELSE

In the *Barclays* decision, Justice Leech was presented with similar tranches and arrived at a somewhat strict standard. He held that a claimant can only show reliance under Section 90A if:

- ✕ It read the document or publication that contained the alleged misrepresentation or omission;

- ✕ The “gist” of the document was communicated to it by a third party (e.g., through an analyst report); or
- ✕ It relied on a third party (e.g., an investment advisor) who read and relied on the document.

For now, *Barclays* has clearly shut the door on a full-throated acceptance of U.S.-style pure price reliance. At the same time, it left open other indirect reliance options. For example, not only did Justice Leech confirm that an investor need not itself have read the misstatement, and that reliance can be attributed to a third party (such as an investment manager), but he suggested that other forms of reliance might be possible as well (e.g., AI or algorithmic decision making).

One of the Justice’s concerns in *Barclays* seemed to be that claimants’ counsel had not effectively coupled a price reliance claim with literally any other form of direct or indirect reliance. Since he’d concluded that claims based on price reliance alone were unsupportable, investors in Tranche 3 (*i.e.*, completely passive investors who only advocated price reliance) were dismissed. Yet, he seemed to suggest that if these claims had been based on the share price plus something else, that might have been sufficient. But what is that “something else?” Justice Leech didn’t provide many clues, but he didn’t foreclose other options either. In other words, *Barclays* seems to suggest that investors and their English counsel will still be able to propose alternative reliance options so long as they don’t solely argue price reliance. These “price plus something else” arguments could possibly include, for example, a “buy” recommendation from an analyst or the fact that an investor was induced simply because there was no negative news about the company at the time of purchase. A logical extension coming out of this might be an investor who buys because it sees a big advisor like BlackRock buying and assumes that “BlackRock must have done its due diligence.” Even a tracker fund might be safe if it used some type of AI or algorithm-driven investment strategy.

DISHONEST DELAY SAYS RELIANCE

Because the requirements for proving reliance have been so opaque, English counsel have often sought to protect claimants by including a dishonest delay claim as an alternative, stand-alone charge in case the reliance-based claim fails. Under Section 90A, a dishonest delay claim arises where there is evidence a company deliberately *delayed* disseminating material information to the market.³

Importantly, it has no reliance requirement. Both claims were pled in *Barclays*. But while Justice Leech's determination on reliance was strict, it still left investors with a degree of optimism. In contrast, his ruling on dishonest delay was not only harsh but puzzling. He held that a dishonest delay claim can only be used when a company deliberately delays publication of market sensitive information and then ultimately publishes the truth itself (in other words, makes the corrective disclosure). Based on this ruling, it is not enough if the market becomes aware of the truth through, for example, a newspaper article or if a regulatory body announces an enforcement proceeding. Of course, this creates a perverse incentive. If a company can only be liable for dishonestly delaying the publication of information when it discloses its own malfeasance, it will be motivated to let the media or regulators do that instead. In *Barclays*, because claimants' counsel asserted that Barclays had never acknowledged the alleged wrongdoing, this claim was dismissed.

Although fatal in *Barclays*, Justice Leech's ruling need not negatively affect all other pending cases with the same dishonest delay claim. Many issuers will be motivated to make the requisite corrective disclosure because they remain subject to normal disclosure obligations under the London Stock Exchange's Listing Rules and other regulations. But it also seems Justice Leech may have just gotten it wrong by mandating that an issuer itself disseminate the corrective disclosure. Other justices may interpret Section 90A differently, and as lawyers and legal commentators continue to absorb the full effect of this part of the *Barclays* decision, there could be a push for Parliamentary review and an amendment to the statute.

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³ Dishonest delay claims fall under paragraph 5 of Schedule 10A of FSMA.

WILL OTHER COURTS FOLLOW *BARCLAYS*?

Barclays is just one of many pending shareholder actions being overseen by other judges in London's High Court. Justice Leech's decision is not binding on them, but custom suggests it is likely to be highly persuasive and thus may still set the standard for UK-based investor actions going forward. With that in mind, there may be ways of pleading Section 90A misrepresentation claims that address some of the decision's sharper edges:

- ✕ First, for courts that follow *Barclays*, the clear-cut rule is that claimants will not be able to exclusively plead price reliance (as they can in the U.S. under the fraud-on-the-market theory).
- ✕ Second, while some form of investor reliance must be pled, what that constitutes remains somewhat ambiguous. What will definitely pass muster is a showing of direct reliance, which can be from the claimant itself or through a third party (such as an external manager).
- ✕ Third, *Barclays* clearly suggests that beyond direct reliance there are other options where the claimant relied on the price of the shares plus something else. That "something else" will likely be clarified by subsequent cases from other High Court judges. However, the plus may include any manner of indirect reliance factors, such as basic company fundamentals, ESG credentials, reputation, management competence, a simple "buy" recommendation from an analyst, or the fact that there was no negative news about the company at the time of purchase.
- ✕ Fourth, although claimants who purchased through a tracker fund will remain highly vulnerable to dismissal if their cases are presented in a substantially similar way to *Barclays*, there may be an opening for those that can show that they used some type of AI or algorithm-driven investment strategy or if there was some human element or manual

input in the construction of the index or management of the tracker. Moreover, if one tracker fund within an organization can show it undertook due diligence in its investment, an argument could be made that under *Barclays* other trackers within the same organization that mimicked that tracker might be acceptable as well.

It is, however, also possible that *Barclays* could have a limited impact. The same reliance arguments were subsequently made in *Standard Chartered*, which is before a different judge in the High Court and on different facts. That judge in *Standard Chartered* may interpret the reliance standard differently than did Justice Leech. Even if he does not, an appeal of that decision would put the interpretation of reliance under Section 90A before the Court of Appeals, and any decision by that body would be binding on the various High Court justices overseeing pending Section 90A investor actions.

BEYOND THE *BARCLAYS* DECISION

There is no question that the *Barclays* decision made launching investor claims in the United Kingdom more difficult. A claimant or its agent who reviews a company's misrepresentation will satisfy the reliance burden; a claimant whose reliance is based exclusively on the share price will not. It will be up to other High Court justices who follow *Barclays* to determine where reliance has been satisfied between these two extremes.

For future reliance-based claims under Section 90A, litigation funders and English counsel will almost certainly want to undertake more due diligence into a claimant's reliance before permitting them to join an action, even if the claimant only pursues a dishonest delay claim. What has become increasingly clear in the past few years is that capable counsel can (and will) undertake much of this burden on their own, finding that much of the necessary information can be obtained through online searches rather than lengthy client questionnaires. English counsel may seek to confirm their research findings, but this approach should alleviate any

significant client burden. If the claimant relied on external managers, those confirmations would need to come from them. In sum, by the time a funding agreement is signed, English counsel will likely have already completed its due diligence and concluded whether it feels the claimant can satisfy its post-*Barclays* reliance burden under Section 90A.

Despite the challenges, it is unlikely the *Barclays* decision will dramatically reduce the number of UK investor actions. Not only are there multiple law firms still wishing to represent claimants in these matters, but funders and insurance carriers (who provide protection against the adverse costs risk) do not seem to be walking away from this market in its wake. In fact, some English counsel consider that *Barclays* will promote better quality cases being brought, supporting significantly higher settlement recoveries. Time will tell.

By: Mark S. Willis, Hui Chang

How Exportable Are U.S. Securities Laws Overseas?

NOTEWORTHY DEVELOPMENTS

The U.S. class action system has made it far easier and less costly for investors to recover monies collectively than by launching claims individually. This has made it their primary vehicle for asset recovery. The success of these actions might suggest that other countries would pattern their shareholder protection regimes along the same lines. But that has not necessarily been the case, and many jurisdictions have stridently eschewed the American example in favor of home-grown models, even if they contain additional risks, costs, and inefficiencies. Indeed, on issues such as the class action structure itself, standing, contingent fees, adverse costs, and reliance, the streamlined and effective U.S. model has not been embraced globally. This has sometimes created challenges for American investors trying to understand their non-U.S. options.

A CLASS ACT

For decades, the U.S. has relied on class actions to help police its securities markets. While individual actions remain viable, the class action is king in America's investor litigation space. The efficiencies of this system are clear. It enables large groups of claimants to litigate collectively, with a representative (or Lead) Plaintiff overseeing the action while all other eligible investors remain purely passive. It also creates a streamlined approach. If multiple actions are filed against the same company alleging the same or similar wrongdoing, the presiding judge will simply consolidate them so there is only one litigation against, for example, companies like Nike, Meta, and Tesla.

U.S.-style shareholder class actions have only been effectively replicated in a few countries, including Australia and Canada, which also tend to be two of the most active. While clearly the progeny of U.S. class actions, the Australian and Canadian models also differ from the American original in key ways. Both largely follow the American opt-out format, meaning an investor who meets the class eligibility requirements is automatically included without taking any further action. Yet, a judge overseeing an Australia opt-out class action can, and often will, transform it into an opt-in proceeding, requiring investors to

affirmatively register in order to claim any settlement recoveries. In the U.S., shareholder class actions are brought in federal court, whereas in Canada and Australia they are more frequently filed in state or provincial courts. U.S. courts will consolidate parallel actions, appointing a Lead Plaintiff and class counsel, to ensure that one single, orderly class action proceeds. The Australian approach is similar, but with a court permanently staying competing actions (rather than consolidating them). In Canada, if competing actions are filed in separate provinces, one judge may stay her proceedings in deference to another. If actions are filed in the same provincial court (e.g., Toronto superior court), alleging the same or similar causes of action, one will be designated to proceed and the others stayed.

There are parallels between all three jurisdictions in how the leadership structure is set. In the U.S., the Lead Plaintiff model is utilized, wherein the presiding judge will not only consolidate any parallel actions but appoint one or more investors to represent the consolidated class. In Canada, if two or more competing actions are filed in the same court, a judge must determine which counsel will have “carriage” of (*i.e.*, lead) the action. In these “carriage motions,” similar to a U.S. Lead Plaintiff motion, counsel for each competing action will seek to persuade the court why its group is best suited to lead. The court will consider factors such as litigation strategy, case theory, and fee arrangements. The process is similar in Australia.

Beyond Canada and Australia, U.S.-style shareholder class actions have not traveled well abroad. In most other jurisdictions, including Europe, the United Kingdom, and Japan, shareholders must use the group action device—opt-in proceedings where investors must affirmatively join and will not automatically be included, as they would in the U.S.. If several competing actions are brought against the same defendant and allege the same claims, they will likely be coordinated but will not be consolidated and may not necessarily be stayed. This means an investor can only join one and often must choose between

competing actions. One hybrid of the class action and group action models is Germany's KapMuG system, which has been used in many high-profile cases, including *Volkswagen*, *Porsche*, and *Daimler*. After investors file their individual actions with the trial court, one of the claimants is selected to serve as a model (lead) plaintiff, and that investor's claim proceeds while all of the other investors' claims are stayed. The model plaintiff litigates the common legal and factual questions and evidence, which are then applied to each claimant whose action has been stayed, although each claimant must prove its own damages. If the model plaintiff and defendants enter into a settlement, all claimants in the stayed actions will be bound unless they opt out.

IT'S CONTINGENT

U.S. shareholder class actions are brought on a contingent fee basis, enabling class counsel to front the costs of a case and forgo any fee until monies are recovered for investors. In practical terms, a contingent fee system allows lawyers to both fund *and* litigate an action. Combining the funding and litigation components into one entity means there is one less mouth to feed, so less is deducted from a claimant's recovery. But this is another hallmark of U.S. practice that has proven difficult to export. Canada and the Australian State of Victoria are notable adopters. In the United Kingdom, contingent fees are now permitted and come in the form of a damages-based agreement, where a solicitor firm fronts the cost of a litigation in exchange for a percentage of the claimant's recovery. Yet, they remain the exception in most other jurisdictions.

Without contingent fees, claimants are forced either to pay their lawyers directly or to hire third-party litigation funders to step in and finance an action. In that scenario, the funder hires counsel to litigate and compensates them on an hourly basis. In some jurisdictions, conditional fees are permitted. These allow counsel to charge an uplift to their time billed in the case, generally to a maximum of 100%. Either way, the involvement of a funder will often mean more is deducted from a claimant's recovery because now both the funder

and counsel must be paid. For example, a funder might charge a 28% contingent fee, plus its expenses. Where overseas counsel's time is one of those expenses, that will account for by far the largest percentage of overall costs. In the U.S., by contrast, because counsel both litigate and finance an action, the same 28% contingent fee would *include* counsel's time, and expenses would be a comparatively small additional deduction. To make their offerings more competitive, a few funders offer "all in" contingent fees in non-U.S. actions, where the percentage covers *all* fees and costs. In that scenario, the hypothetical 28% would be the maximum amount deducted from a claimant's recovery.

LOSER PAYS

In U.S. shareholder class actions, there are no adverse costs; if the action is unsuccessful, claimants are not responsible for paying any of a defendant's legal fees if they lose. Adverse costs are also generally not applied to shareholders in Australian or Canadian class actions. But in most other countries the threat is real that the losing party can be ordered to pay a portion of the other side's costs. Funders and overseas counsel know that most claimants won't join an action unless they are protected against this threat through a contractual agreement by the funder or counsel, who then often reinsure that risk by buying insurance. But the cost of the insurance premiums, particularly in the United Kingdom, can be high and is ultimately born by claimants; a funder will pay the premiums and then deduct that amount as a cost from any recovery before funds are distributed. In some situations, a funder might opt to pay a lower up-front premium in exchange for guaranteeing the carrier a percentage of any recovery. The degree of the adverse cost risk can vary dramatically by jurisdiction. In contrast to the UK's high adverse costs risk, the cost of protecting against it in jurisdictions like the Netherlands and Germany is substantially lower simply because the amount of costs that can be assessed is lower. Irrespective of the amount, adverse costs remain a threat not born by shareholders in U.S. class actions.

I'LL STAND BY YOU

In U.S. class actions, standing is almost never a concern. Because these are representative proceedings, absent class members are never challenged as to whether they have legal standing to participate in the claims brought.

A Lead Plaintiff is sometimes challenged as to its adequacy to represent the class of investors, but it is largely immune from standing challenges so long as it purchased the shares of the company in question during the relevant period. This low bar is another characteristic of U.S. actions that has not been exported to many other jurisdictions. In the United Kingdom, Germany, Sweden, and Japan, for example, fairly strict standing requirements have been imposed, and defendants there have increasingly used standing challenges to narrow or even eliminate an investor's claim.

Standing challenges abroad arise in various forms. First, a defendant might request a certification from the claimant's custodian bank, verifying that the claimant purchased and held the shares in question during the relevant period, something not required of absent class members in U.S. actions. Second, a defendant might question whether the named claimant is, in fact, the proper party to bring the claim. Verifying this can sometimes involve producing articles of incorporation, a trust agreement, or a charter or statutes showing how an institution was established. Third, a defendant might challenge whether the claimant was properly named. This rarely happens in U.S. class actions but is increasingly being raised in shareholder proceedings abroad. For instance, does a pension fund's constitutional documents indicate whether it has the capacity to sue, and is it the legal or beneficial owner of the shares? If this authority is vested in a board of directors, then the board may need to be named instead. If trust documents stipulate that title to shares vests in the trustees, then they would need to be named individually, "acting solely in their capacity as trustees of the trust." Because board members and trustees are not named in their personal capacities, the risk of personal liability does not arise.

RELY ON ME

Reliance is an element of a shareholder claim under Section 10(b) of the Securities and Exchange Act of 1934, the statute governing most U.S. investor class actions. The burden of proving reliance within the class action context was simplified greatly by the U.S. Supreme Court's adoption of the fraud-on-the-market presumption, which holds that where securities trade in an efficient market, there will be a rebuttable presumption that investors relied on the alleged misrepresentation. Fraud-on-the-market reliance has not been broadly endorsed outside the United States. In the United Kingdom, it was recently specifically rejected. There, the statute governing most investor group actions has a reliance requirement, but until recently no English judge had opined on exactly what was required to plead it. That changed in *Barclays* (discussed in detail in this edition of *The Liaison*) where Justice Leech held that both direct and some forms of indirect reliance were sufficient, but he firmly shut the door for now on a full-throated acceptance of U.S.-style pure price reliance. Although the *Barclays* decision is not binding on other justices in London's High Court (who are overseeing pending investor group actions such as *Standard Chartered* and *Petrofac*), because it is the first to specifically address the reliance issue in a group action setting, it will likely be highly persuasive.

FOLLOWING THEIR OWN PATH

Even though the U.S. shareholder class action system has for decades been a highly efficient way for investors to recover monies lost due to corporate misconduct, most other jurisdictions have tended to reject it and stick with their own litigation structures. This is a natural result of their desire to maintain local legal culture and traditions, the existence of a pro-corporate culture in many countries, and a fear of importing a U.S. system sometimes viewed as overly litigious. It is true that shareholder class actions are now part of the fabric of Australian and Canadian litigation, but they don't exist in the United Kingdom, Europe, Asia, or South America. Other aspects of U.S. practice—*e.g.*, contingent fees (with some exceptions), the absence of adverse costs, limited standing

requirements, and an extremely streamlined way of pleading reliance—have also not gained a broader audience within the global legal community. Whether this is likely to change remains uncertain. Non-U.S. actions have proliferated over the past fifteen years. As some of these cases continue to be successfully resolved, lawmakers, attorneys, and litigation funders may ask why they need to look to the U.S. model for guidance. Although its efficiencies are indisputable, if they conclude the non-U.S. model isn't broken, then there will be less motivation to consider U.S. class actions as a fix.

By: Mark S. Willis, Hui Chang

Trouble in Paradise: What is Happening with Brazilian Shareholder Arbitrations?

NOTEWORTHY DEVELOPMENTS

Over the past fifteen years, non-U.S. investor actions have sprouted up all over the world, from class actions in Australia and Canada to group opt-in actions in the United Kingdom, Europe, Japan, and elsewhere. Brazil's approach to investor protection has been different. Rather than the civil actions launched in other jurisdictions, the available remedy for many shareholders in Brazilian companies is arbitration. Since 2016, investors have joined these proceedings to recover monies lost due to corporate wrongdoing, the first of which was an arbitration involving oil and gas giant Petrobras. It was also the first to be resolved—but against investors.

In a January 2025 ruling, the arbitration panel in *Petrobras* determined that under Brazilian law minority shareholders—e.g., pension funds and asset managers—are unable to seek remedies for so-called indirect damages (i.e., a loss resulting from a drop in the share price) from a company itself. Instead, claims for wrongful acts must be pursued against the controlling shareholders or the managers of the company. This determination is not binding on other arbitration panels, who may come to a different view on the law and facts before them. But because of its position as the first of its kind, the *Petrobras* ruling may be accorded some influence in pending and future Brazilian arbitrations.

THE SHAREHOLDER ARBITRATION SAMBA

While most other countries permit investors to use civil law to address grievances, Brazil is unusual in forcing them to arbitrate. For companies listed in certain special corporate governance segments on the São Paulo Stock Exchange (e.g., the Novo Mercado), shareholders must use arbitration as their exclusive remedy for resolving shareholder disputes. Even companies listed on other segments of the São Paulo Stock Exchange can stipulate the same arbitration requirement in their bylaws, thus providing an effective protection against the type of shareholder enforced accountability seen in the U.S., the United Kingdom, Europe, Australia, Canada, and elsewhere.

Brazilian arbitrations take place through the Market Arbitration Chamber and have a three-person panel—one selected by each side and a third jointly selected by the other two arbitrators. Once the panel is selected, a “term of reference” will be negotiated between the parties, setting forth the rules and procedures of the arbitration. There are definitely upsides to these proceedings. They are inexpensive to run, carry a low adverse costs risk (which can be contractually undertaken by an outside funder), and are anonymous. But clear downsides exist as well. They can go on for years without any significant progress. This slow tempo is due, in part, to delay tactics from defendants, but it is also a result of the challenge at times of successfully empaneling the arbitrators. Brazil has a smaller pool of qualified candidates and some who are selected may later end up being rejected due to conflicts of interest. In addition, because there had been no substantive decision on investor arbitrations until *Petrobras*, there was significant uncertainty as to how arbitration panels would approach protecting shareholder rights.

Although *Petrobras* was the first of its kind, a number of other shareholder arbitrations have since been commenced in an effort to hold other Brazilian companies accountable, including against Lojas Americanas, a retail chain accused of accounting fraud; IRB Brasil, a reinsurance company allegedly engaged in fraudulent financial misconduct by its former executives; BRF S.A., a food processing company that, like *Petrobras*, was allegedly engaged in a bribery scandal; and Vale S.A., an iron ore mining venture where the alleged fraud involved misconduct leading to the collapse of one of its dams.

A majority of the Brazilian arbitrations launched (e.g., *Petrobras*, *BRF*, and *Vale*) were follow-ons to parallel U.S. class actions against the same companies that alleged the same or similar misconduct and were brought by investors who purchased shares in the United States. Each of the U.S. actions settled—*BRF* and *Vale* for \$40 million and \$25 million, respectively, and *Petrobras* in 2014 for a whopping \$2.95 billion (plus an additional \$50 million from its former auditor). Yet, the success of these U.S. actions has not translated into success in the corresponding Brazilian

arbitrations thus far, where legal uncertainty and lack of formal precedent can lead to unpredictable results even on nearly identical allegations. Indeed, even in the wake of the massive Petrobras corruption and bribery scandal that resulted in one of the largest class action recoveries in U.S. history, that company could not be held accountable by shareholders in its home country.

PETROBRAS BECOMES FIRST PAST THE POST

Petrobras was the first of a group of arbitrations involving Brazilian companies, and it took more than eight years for the panel to issue a decision. In the ruling, the three-person tribunal determined that under Brazilian law minority shareholders were unable to seek remedies for what they deemed indirect damages (*i.e.*, a loss resulting from a drop in the share price) directly from Petrobras, but rather that claims could only be filed against the controlling shareholders or the managers of the company for wrongful acts.

While the specifics were not disclosed by Petrobras nor the investors (arbitrations in Brazil are strictly confidential), local media outlets have publicly reported that the arbitrators had perceived the company as a “victim” in the scandal, and that it would be harmed again if it had to compensate shareholders for stock price losses, after having already done so for shares purchased in the U.S.. It was also reported that the tribunal found it problematic that some participating shareholders had increased their positions despite the company’s market decline. All claims were dismissed, and there is limited recourse to appeal the ruling. In Brazil, arbitration awards cannot be reviewed again on the merits and can only be nullified in exceptional circumstances, for example where a serious violation of procedure occurred.

If the panel in *Petrobras* inexplicably did view the company as a “victim” it may have been the result of a massive backlash against its wrongdoing, both in Brazil and the U.S.. The U.S. Department of Justice and the Securities and Exchange Commission found that senior executives at Petrobras had conspired with contractors and suppliers to inflate the costs of infrastructure projects by billions in exchange for significant kickbacks.

The scheme resulted in the company overstating assets by a massive \$2.5 billion. In a settlement with U.S. authorities, Petrobras eventually admitted that it failed to uphold accurate records and that its senior executives had signed false accounting certifications while involved in the bribery and bid rigging scheme. In the end, Petrobras paid \$1.78 billion in combined fines to U.S. and Brazilian authorities, plus \$2.95 billion to shareholders. It's quite possible that the arbitration panel felt the company had been punished enough at that point. Similarly, both BRF and Vale were fined by the Brazilian authorities in addition to the U.S. class action settlement monies paid out. But those totals collectively paled in comparison, so perhaps there will be less reluctance by the *BRF* and *Vale* panels to follow *Petrobras*.

DOES THIS APPLY TO ME?

Petrobras was the biggest and best known of the Brazilian scandals, and that particular panel's decision was the first of its kind. But why did this panel diverge so much from the result in the corresponding U.S. shareholder class action? Brazilian law is unclear about the legal liability of companies, so another panel in a separate arbitration might arrive at a different conclusion (*Petrobras* is reportedly still facing four arbitrations with similar claims). In a pending arbitration against a different Brazilian company, for example, the alleged wrongdoing emanated from controlling shareholders, not just the company. There, the *Petrobras* holding would seem to be inapplicable. Moreover, the *Petrobras* decision is not controlling on any other panel, and the members of the panel in *Petrobras* are not participating in several of the other pending arbitrations. Even so, *Petrobras* may have a chilling effect on litigation funders' willingness to put their money behind future arbitrations, at least until *Vale*, *BRF*, and some of the other pending matters resolve. Time will tell whether Brazil is a robust jurisdiction for prosecuting investor claims, or one that shields its home-grown companies from accountability.

NEW MATTERS

By: Mark S. Willis, Hui Chang

Domino's Pizza Enterprises Ltd (AUSTRALIA)

TICKER: DMP

ISIN: AU0000000DMP0

SEDOL: B07SFG7

RELEVANT PERIOD: August 18, 2021 to November 3, 2021

ACTION TYPE: Class Action

STATUS: Active

A class action has been filed against Domino's Pizza Enterprises Ltd ("Domino's") in the Federal Court of Australia, Victoria on behalf of shareholders who acquired shares on the Australian Securities Exchange or had exposure to Domino's shares by entering into equity swap confirmations during the relevant period. The class action centers on allegations that the company made misrepresentations about its expected performance in Japan. The company had expanded quickly in the Japanese market, opening multiple stores every few days at one point, but by September 2021, after COVID-related lockdowns were lifted, Domino's started experiencing negative year-on-year sales. On November 3, 2021, the pizza chain disclosed that "sales growth ha[d] been uneven across regions, with operations affected by local conditions including lockdowns and ongoing changes in customer behavior, making short-term forecasts challenging." On this news, the company's share price dropped by 18 percent, thereby injuring investors.

NEW MATTERS

By: Mark S. Willis, Hui Chang

British American Tobacco PLC (England And Wales)

TICKER: BATS

ISIN: GB0002875804

SEDOL: 0287580

RELEVANT PERIOD: August 1, 2007 to December 31, 2023

ACTION TYPE: Opt-in Group Action

STATUS: Potential

An opt-in group action is currently being organized against multinational manufacturer British American Tobacco plc (“BAT”) in the United Kingdom. The proposed action will focus on allegations that BAT conducted illegal business with North Korea via the company’s Singaporean subsidiary, BAT Marketing Singapore (“BATMS”), in violation of U.S. sanctions.

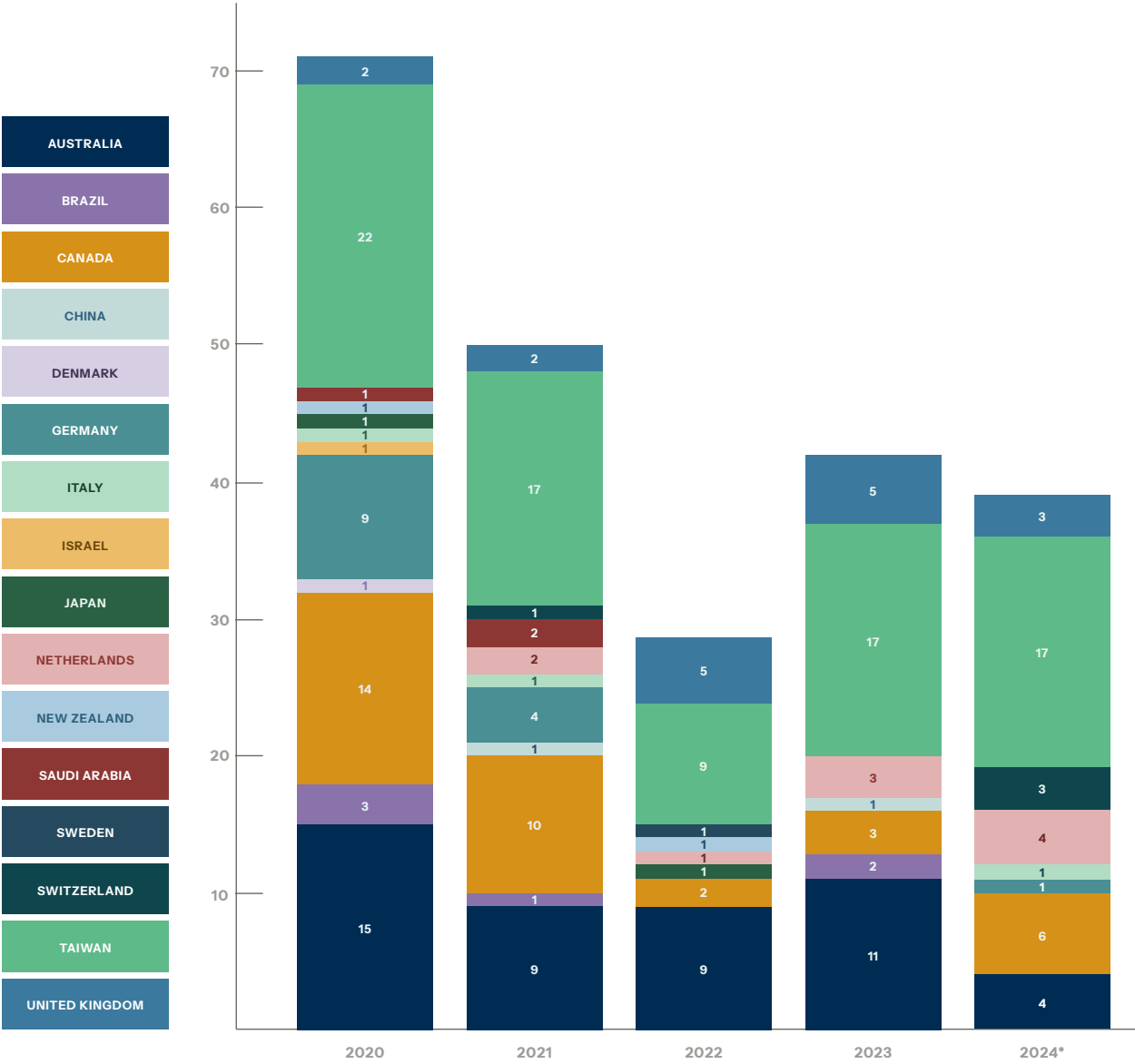
Specifically, in 2007, BAT issued a press statement that it was no longer selling tobacco in North Korea after it spun off its local business to a third-party company. In truth, BAT and BATMS continued to maintain control of the North Korean business for the next decade and ran payments for the sale of its products in North Korea through third-party facilitators, resulting in \$418 million in earnings for the company. U.S. authorities also accused BAT of conspiring to defraud financial institutions to get them to process transactions on behalf of North Korean entities.

In April 2023, BAT and BATMS agreed to pay U.S. authorities (the U.S. Department of Justice and the U.S. Treasury Department's Office of Foreign Assets Control) combined penalties and fines of more than \$629 million plus interest to resolve bank fraud and sanctions charges. During that time, Jack Bowles, BAT's then-Chief Executive, said, "On behalf of BAT, we deeply regret the misconduct arising from historical business activities that led to these settlements, and acknowledge that we fell short of the highest standards rightly expected of us." Following these revelations, BAT's share price fell substantially, damaging investors.

Labaton Keller Sucharow would be happy to discuss the specifics of these filed actions and investors' options for recovery abroad.

TRENDS IN NON-U.S. SECURITIES LITIGATION

NON-U.S. SECURITIES LITIGATION FILINGS 2020-2024



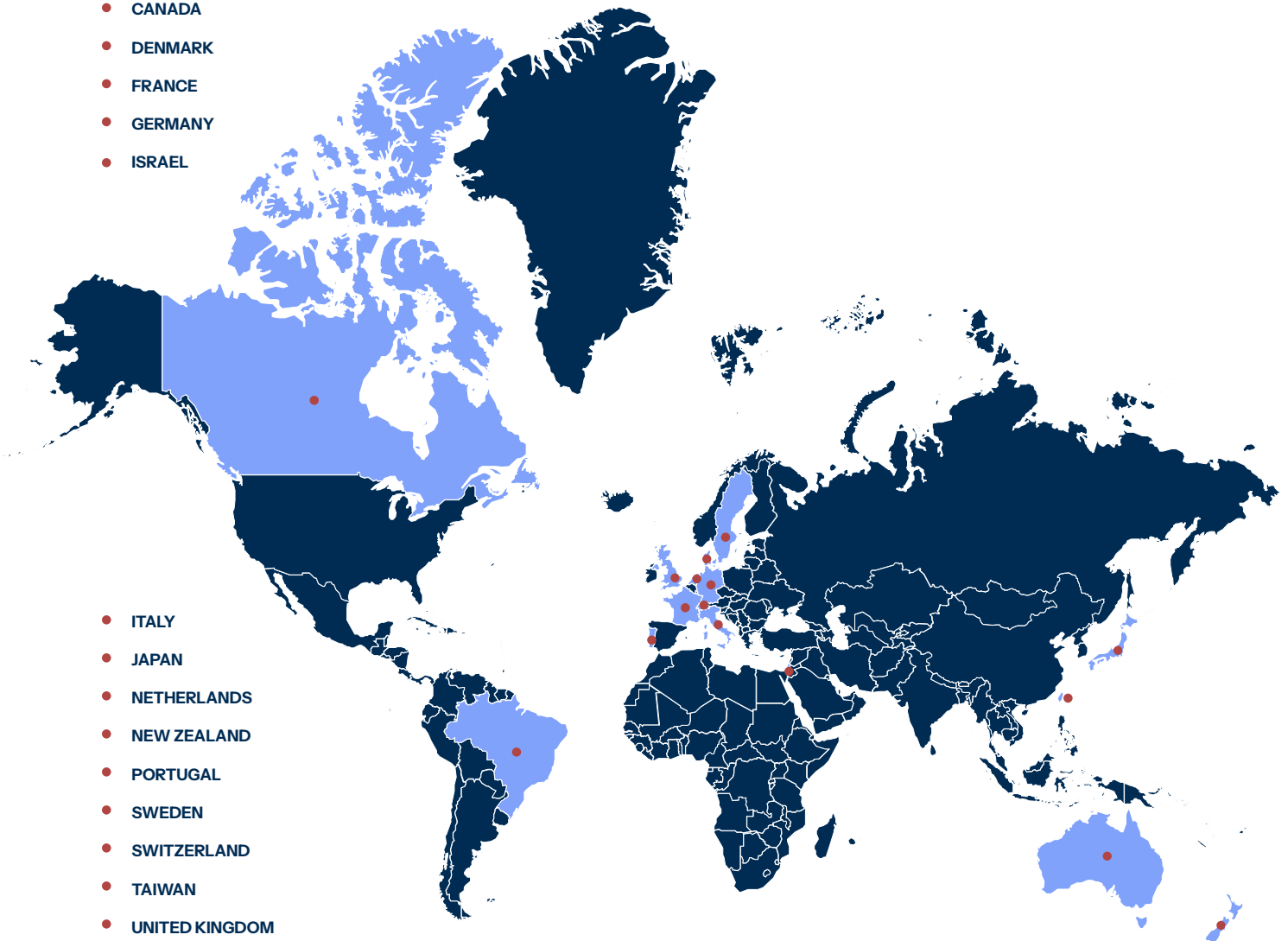
*ACCURATE AS OF DECEMBER 31, 2024

GLOBAL LITIGATION SNAPSHOT

SECURITIES ACTIONS ARE PENDING IN THE
FOLLOWING NON-U.S. JURISDICTIONS

- AUSTRALIA
- BRAZIL
- CANADA
- DENMARK
- FRANCE
- GERMANY
- ISRAEL

- ITALY
- JAPAN
- NETHERLANDS
- NEW ZEALAND
- PORTUGAL
- SWEDEN
- SWITZERLAND
- TAIWAN
- UNITED KINGDOM



CONTACT US

Labaton Keller Sucharow's Non-U.S. Securities Litigation Practice is dedicated to analyzing potential claims in international jurisdictions and offering advice on the risks and benefits of proceeding with litigation in non-U.S. forums. Our attorneys are available to address any questions you may have regarding non-U.S. securities litigation. Please contact the Labaton Keller Sucharow lawyer with whom you usually work or a member of our non-U.S. litigation team.



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