

Comparative Civil Enforcement in Securities Law, 19 – 20 March 2009

A common feature of securities laws in developed countries is that they provide various types of private actions to enforce securities laws. In some countries recent law reform activity has added to the range of private law remedies available to investors. This trend suggests that policymakers are receptive to the view that laws facilitating private enforcement benefit stock markets.

Yet the incidence of private enforcement actions varies considerably from country to country. This has the consequence that nationally-focused debates can have different priorities: whereas in some countries the most pressing questions may be about curbing private enforcement so as to protect international capital markets competitiveness, in others the priorities may be about what more needs to be done to ensure that civil enforcement evolves beyond 'law on the books' to become an important actively-used mechanism of investor protection.

This conference sought to explore private enforcement from an international and comparative approach. Leading scholars and practitioners from around the world led discussions aimed at furthering our understanding of crucial questions including: what can high and low intensity jurisdictions learn from each other's experience of civil enforcement in securities law; can we expect country-by-country differences in enforcement to erode? and what are the factors promoting (or hindering) convergence?

Paul Davies (LSE), the author of a review for HM Treasury on issuer liability for disclosure failures, and William Janeway (Warburg Pincus), opened the conference. Their introductory remarks provided an overview of the issues from both an academic and a practical perspective.

Eilís Ferran (University of Cambridge) presented a paper entitled "Are US-Style Investor Suits Coming to the UK?". Ferran considered how the new civil liability regime in UK securities law shapes up when compared to the position in Canada and Australia and when set against the backdrop of current US debate on reforming investor actions. Her conclusion was that the UK is unlikely to see a surge of investor claims alleging issuer disclosure failures. She suggested that the new regime is not well-designed to fill the gap should public enforcement struggle to achieve the optimal level of deterrence.

Rachael Mulheron (Queen Mary) examined the case for better collective redress to be available within English civil procedure and the implications that such developments would have for securities law. She provided a valuable overview of the Civil Justice Council's work on collective redress and of discussions on civil procedure at the European level.

Michael Klausner (Stanford) asked "Are Securities Class Actions "Supplemental" to SEC Enforcement?". Klausner used his data set comprising 746 securities class actions

brought between 2000 and 2003 to consider whether class actions target serious violations and whether the outcomes of class actions promote enforcement policy. While still a work in progress, Klausner suggested that the data appeared to point to the conclusion that outcomes of class actions were not supplemental to public enforcement.

Priya Huskins (Woodruff-Sawyer) presented a paper on “The Mismatch Between D&O Protection and Cross-Border Securities Law Enforcement”. She argued that cross-border listings can lead to mismatches between a country’s securities law enforcement regime and the personal protections available to individual directors and officers. This was illustrated by reference to detailed data on the available types of D&O protection (insurance, indemnification, corporate governance). Huskins put forward some suggestions for reform based on better co-ordination of home/host country issues.

Elizabeth Boros (Monash) presented a paper entitled “Public and private enforcement of disclosure breaches in Australia”. She examined enforcement of disclosure breaches by listed companies. She argued that while there have been relatively few actions in relation to disclosure breaches to date, either public or private, there have been several key developments in this field in recent years. The first was the enactment of a legislatively-based continuous disclosure obligation. The second was the introduction of dedicated class action procedures in the Victorian Supreme Court and the Federal Court of Australia. The third factor mentioned by Boros was the High Court's acceptance that it is not an abuse of process for a litigation funder to fund litigation with a view to making a profit. Boros suggested that in combination, these factors make it more likely that enforcement activity will increase in the future in Australia.

The position in Canada was considered in a paper by Chris Nicholls (Western Ontario) entitled “Statutory Civil Liability for Continuous Disclosure in Canada: Content and Context”. Nicholls examined recent legislative developments in Ontario (later followed in other provinces) that provide statutory civil liability for continuous disclosure. Complementary developments (increase in availability of class actions in Canada; contingency fees for lawyers) were also considered. Nicholls concluded that the restrictions placed on the new provisions make it unlikely that it will lead to an explosion of class action litigation in Canada.

Other speakers were Dirk Zetsche (Heinrich Heine) and Erik Vermeulen (Tilburg) who gave a paper on aspects of corporate and securities law enforcement in Germany and Holland, Hans Tjio (National University of Singapore), who provided some Asian examples of enforcement options, and Andrew Tuch (Harvard) who commented on Klausner’s paper.

Papers from the conference are to be published in the *Journal of Corporate Law Studies* (October 2009).

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