THE SECURITIES LITIGATION REVIEW

Fourth Edition

Editor
William Savitt

THE LAWREVIEWS

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PREFACE

This fourth edition of *The Securities Litigation Review* is a guided introduction to the international varieties of enforcing rights related to the issuance and exchange of publicly traded securities.

Unlike most of its sister international surveys, this review focuses on litigation – how rights are created and vindicated against the backdrop of courtroom proceedings. Accordingly, this volume amounts to a cross-cultural review of the disputing process. While the subject matter is limited to securities litigation, which may well be the world's most economically significant form of litigation, any survey of litigation is in great part a survey of procedure as much as substance.

As the chapters that follow make clear, there is great international variety in private litigation procedure as a tool for securities enforcement. At one extreme is the United States, with its broad access to courts, relatively permissive pleading requirements, expansive pretrial discovery rules, readily available class-action principles and generous fee incentives for plaintiffs' lawyers. At the other extreme lie jurisdictions like China, where private securities litigation is complex, expensive, seldom remunerative and accordingly quite rare. As the survey reveals, there are many intermediate points in this continuum, as each jurisdiction has evolved a private enforcement regime reflecting its underlying civil litigation system, as well as the imperatives of its securities markets.

This review reveals an equally broad variety of public enforcement regimes. Canada's highly decentralised system of provincial regulation contrasts with Brazil's Securities Commission, a powerful centralised regulator that is primarily responsible for creating and enforcing Brazil's securities rules. Every country has its own idiosyncratic mixture of securities lawmaking institutions; each provides a role for self-regulating bodies and stock exchanges but no two systems are alike. And while the European regulatory schemes have worked to harmonise national rules with Europe-wide directives – an effort now challenged by the imminent departure of the United Kingdom from the European Union – few countries outside Europe have significant institutionalised cross-border enforcement mechanisms, public or private.

We should not, however, let the more obvious dissimilarities of the world's securities disputing systems obscure the very significant convergence in the objectives and design of international securities litigation. Nearly every jurisdiction in our survey features a national securities regulatory commission, empowered both to make rules and to enforce them. Nearly every jurisdiction focuses securities regulation on the proper disclosure of investment-related information to allow investors to make informed choices, rather than prescribing investment rules. Nearly every jurisdiction provides both civil penalties that allow wronged investors

to recover their losses and criminal penalties designed to punish wrongdoers in the more extreme cases.

Equally notable is the fragmented character of securities regulation in nearly every important jurisdiction. Alongside the powerful national regulators are subsidiary bodies – stock exchanges, quasi-governmental organisations, trade and professional associations – with special authority to issue rules governing the fair trade of securities and to enforce those rules in court or through regulatory proceedings. Just as the world is a patchwork of securities regulators, so too is virtually each individual jurisdiction.

The ambition of this volume is to provide readers with a point of entry to these wide varieties of regulations, regulatory authorities and enforcement mechanisms. The country-by-country treatments that follow are selective rather than comprehensive, designed to facilitate a sophisticated first look at securities regulation in comparative international perspectives, and to provide a high-level road map for lawyers and their clients confronted with a need to prosecute or defend securities litigation in a jurisdiction far from home.

A further ambition of this review is to observe and report important regulatory and litigation trends, both within and among countries. This perspective reveals several significant patterns that cut across jurisdictions. In the years since the financial crisis of 2008, nearly every jurisdiction has reported an across-the-board uptick in securities litigation activity. Many of the countries featured in this volume have seen increased public enforcement, notably including more frequent criminal prosecutions for alleged market manipulation and insider trading, often featuring prosecutors seeking heavy fines and even long prison terms.

Civil securities litigation has continued to be a growth industry as the 2008 crisis has given rise to a new normal in the private enforcement of securities laws. While class actions are a predominant feature of US securities litigation, there are signs that aggregated damages claims are making significant inroads elsewhere. Class claims are now well established as part of the regulatory landscape in Australia and Canada, and there appears to be accelerating interest around the world in securities class actions and other forms of economically significant private securities litigation. Whether and where this trend takes hold will be one of the important securities law developments to watch in coming years.

This suggests the final ambition for *The Securities Litigation Review*: to annually reflect where this important area of law has been, and where it is headed. Each chapter contains both a section summarising the year in review – a look back at important recent developments – and an outlook section, looking towards the year ahead. The narrative here, as with the book as a whole, is of both divergence and convergence and divergence, continuity and change – with divergence and change particularly predominant in recent years, following political upheaval in the United States and Britain that could herald a sharp break from international cooperation and forceful government regulation in the global finance capitals of New York and London.

An important example is the matter of cross-border securities litigation, treated by each of our contributors. As economies and commerce in shares become more global, every jurisdiction is confronted with the need to consider cross-border securities litigation. The chapters of this volume show jurisdictions grappling with the problem of adapting national litigation systems to a problem of increasingly international dimensions. How the competing demands of multiple jurisdictions will be satisfied, and how jurisdictions will learn to work with one another in the field of securities regulation will be a story to watch over the coming years. We look forward to documenting this development and other emerging trends in securities litigation around the world in subsequent editions.

Many thanks to all the superb lawyers who contributed to this fourth edition, which covers more countries than ever before. For the editor, reviewing these chapters has been a fascinating tour of the securities litigation world, and we hope it will prove to be the same for our readers. Contact information for our contributors is included in Appendix 2. We welcome comments, suggestions and questions, both to create a community of interested practitioners and to ensure that each edition improves on the last.

William Savitt
Wachtell, Lipton, Rosen & Katz
New York
June 2018

Chapter 21

SWEDEN

David Ackebo and Jacob Frank[1]

I OVERVIEW

i Sources of law

The Swedish legal framework governing securities has undergone major changes since the beginning of the millennium and onwards as a result of increasingly extensive and detailed EU legislation. The current legislation in the field of securities law is largely based on EU acts, the most important being the Markets in Financial Instruments Directive (2004/39/EC) (MiFID I), its successors MiFID II and MiFIR,[2] and Regulation (EU) No. 596/2014, the Market Abuse Regulation (MAR).

EU directives are implemented in Sweden via acts passed by the parliament. The EU legal element means that courts, authorities and other practitioners and users must always interpret national laws and regulations implementing the directive in conformity with EU law and principles. EU regulations on the other hand are directly binding and applicable once they have been adopted by the EU Parliament and the European Council. EU regulations therefore apply in the same manner as acts passed by the Swedish parliament.

The principal pieces of legislation in the field of securities law are:

a the Securities Market Act (2007:528);
b the Financial Instruments Trading Act (1991:980);
c the Notification Requirement Act (2000:1087);
d the Act on Public Takeover Offers (2006:4);
e the Market Abuse Act (2016:1307);
f the Act Complementing the EU's Market Abuse Regulation (2016:1306);
g the SFSA Regulations; and
h the rules of the relevant stock exchange (e.g., the Rulebook for Issuers and the Takeover Rules published by Nasdaq Stockholm Stock Exchange).[3]

There are also several statutes potentially relevant in the context of securities litigation that do not deal specifically with securities. These include, *inter alia*, the Companies Act (2005:551), the Code of Judicial Procedure (1942:740) and various items of consumer protection legislation.

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1 David Ackebo is a partner and Jacob Frank is an associate, currently on leave for court service, at Hannes Snellman Attorneys Ltd.

2 Markets in Financial Instruments Directive 2014/65/EU (MiFID II) and Markets in Financial Instruments Regulation (EU) No. 600/2014 (MiFIR).

3 All as amended from time to time to ensure consistency with EU requirements.

ii Regulatory authorities

Regulatory authority – the SFSA

The Swedish Financial Supervisory Authority (SFSA)[4] is the central competent regulatory authority responsible for supervision, regulation and authorisation of financial markets and their participants. The SFSA has a comprehensive range of supervisory and administrative enforcement powers. It is also authorised to issue regulations and guidelines to supplement the fundamental provisions set out in the parliamentary acts.

Self-regulatory bodies

The Nasdaq OMX Stockholm Exchange

Sweden has two stock exchanges. The largest and by far most dominant exchange is the Nasdaq OMX Stockholm Exchange (NSE). Although the SFSA has been given a more active supervisory role during the past few years with regard to the supervision of listed companies,[5] self-regulation is still an essential and distinctive feature of the Swedish securities market. In particular, the role of the main stock exchange, the NSE, remains significant. According to the Securities Market Act (SMA) a stock exchange shall have clear and transparent rules for the admission to trading of financial instruments on a regulated market.[6] The SMA also stipulates that a stock exchange must have rules regarding takeover bids for shares admitted to trading on a regulated market operated by the relevant stock exchange.[7] The listing and takeover rules of the NSE indirectly implement several EU Acts, and the stock exchange is responsible for monitoring compliance with its rules.

The Swedish Securities Council

Another self-regulatory body is the Swedish Securities Council (SSC), which essentially is an equivalent of the Takeover Panel in the United Kingdom, but with a much larger scope. Its mission is to promote good practices in the Swedish stock market in any relevant aspect, including in relation to public takeovers. The SFSA has delegated certain duties under the Act on Public Takeover Offers to the SSC. Additionally, the NSE has delegated to the SSC the right to decide on exemptions from the provisions in the NSE's takeover rules and how these rules are to be interpreted.

Judicial authorities

The district courts (courts of first instance)

There are no specialist courts or specialist judges for securities litigation. Rather, the Swedish district courts have jurisdiction to handle both civil and criminal actions relating to improper securities activities.

4 Sw. Finansinspektionen.

5 Especially as a result of the Market Abuse Regulation.

6 Chapter 15, Section 1.

7 Chapter 13, Section 8.

The administrative courts

As in several other European countries, Sweden has a judicial system with administrative courts that deal with cases relating to various types of disputes between primarily private persons and authorities. For most of the administrative sanctions imposed by the SFSA, appeals are to heard before the administrative courts.

The Swedish National Economic Crimes Authority

The Swedish National Economic Crimes Authority (SNECA) is the relevant prosecutorial body in relation to criminal enforcement of securities laws. It is a specialist authority within the public prosecution service and handles all sorts of economic crimes, including insider trading, market abuse and market manipulation.

iii Common securities claims

Insider dealing and market manipulation

Rules relating to prohibitions on insider trading, unlawful disclosure of insider information and market manipulation are set out in the Market Abuse Act.[8]

Inside information is defined as information of a precise nature that has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.[9]

The Market Abuse Act prohibits any person who has obtained insider information from acquiring or disposing of the financial instruments to which the information relates, and from advising or in any other manner causing any third party to acquire or dispose of those financial instruments.[10]

The Market Abuse Act also prohibits any person from disclosing information that constitutes insider information, unless the disclosure occurs in the normal course of the exercise of a person's employment, profession or duties, or where the information is placed into the public domain simultaneously with its disclosure.[11]

Furthermore, the Market Abuse Act prohibits any person, in conjunction with trading on the securities market or otherwise, from acting in a manner that gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of financial instruments.[12]

Insider trading and market manipulation are both offences that are often difficult to investigate, partly because they are usually committed by persons who are much more familiar with securities and trading than the prosecutors and, particularly, the members of the

8 Whereas the Market Abuse Act regulates criminal enforcement proceedings relating to market abuse, MAR and the Act Complementing MAR (2016:1306) regulate administrative enforcement proceedings of market abuse.

9 MAR Article 17.1.a. Information shall be deemed to be of a 'precise nature' if it indicates a set of circumstances that exists or that may reasonably be expected to come into existence, or an event that has occurred or that may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instrument (Article 17.2).

10 Chapter 2, Section 1.

11 Chapter 2 Section 3.

12 Chapter 2 Section 4.

court. Statistics from the past four years reveal that on average approximately 200 suspected insider trading cases and 150 suspected market manipulation cases per year are investigated by the SFSA, and nearly all of them are reported to the SNECA.[13] However, few cases lead to prosecution and even fewer lead to convictions.

MAR entered into effect on 3 July 2016, thereby repealing the Market Abuse Directive in its entirety. This definitely reflects one of the most significant changes in the field of securities law in Sweden in the past years. To begin with, MAR is an EU Regulation and not a Directive. This means that its provisions are directly applicable and binding.[14] Furthermore, MAR imposes new requirements on listed issuers and introduces more comprehensive procedural powers for the competent national authorities (in Sweden the SFSA). MAR is also broader in scope compared to its predecessor, encompassing a wider range of financial instruments and trading facilities.

Some of the key changes for listed issuers include:

a more extensive and detailed record-keeping obligations in relation to insider lists;

b amendments to the regime for the approval and reporting of transactions committed by persons discharging managerial responsibilities;[15] and

c introduction of stringent procedures to follow when conducting market soundings.[16]

To ensure compliance with the new requirements under MAR, issuers are advised to update several of their internal policies, guidelines and procedures.[17]

As will be elaborated on below (see Section III), the SFSA may impose administrative sanctions under a variety of rules, including under MAR in cases of, for example, market abuse, and the NSE may sanction breaches of its listing and takeover rules.

A listed issuer is under a continuous disclosure obligation to disclose inside information in accordance with Article 17 of MAR (delayed disclosure is only permitted in certain circumstances). In addition, there are a number of disclosure rules relating to public takeovers (e.g., rules governing prospectuses). There is also a general requirement that all disclosed information shall be fair, clear and not misleading. Common administrative actions include supervision and enforcement of the disclosure rules.

13 The number is rising each year, see www.fi.se/sv/publicerat/statistik/marknadsmissbruk.

14 Although in no need of Swedish legislation, the Swedish parliament has revised a number of statutes in the field of securities law and enacted the Act Complementing the EU's Market Abuse Regulation (2016:1306) to ensure consistency with MAR.

15 A person discharging managerial responsibilities means a person within an issuer, an emission allowance market participant or another entity referred to in MAR Article 19(10), who is: (1) a member of the administrative, management or supervisory body of that entity; or (2) a senior executive who is not a member of the bodies referred to in point (1), who has regular access to inside information relating directly or indirectly to that entity and power to take managerial decisions affecting the future developments and business prospects of that entity (MAR Article 3.1.25.).

16 Market soundings are interactions between a seller of financial instruments and one or more potential investors, prior to the announcement of a transaction, to gauge the interest of potential investors in a possible transaction and its pricing, size and structuring. Market soundings could involve an initial or secondary offer of relevant securities, and are distinct from ordinary trading (MAR Article 11).

17 It also bears mentioning that the changes listed above only reflect a minor selection of the new requirements imposed on issuers under MAR.

II PRIVATE ENFORCEMENT

The majority of enforcement actions in Sweden are public enforcement actions. Private securities litigation is unusual. This is probably partly because of the fact that Swedish law, in general, lacks statutory rules regulating civil liability in relation to improper securities activities, and partly because Sweden does not have a cultural tradition of tort litigation. A third reason might be that the majority of the investors acquire financial instruments through financial intermediaries. Therefore, the most natural claim for damages would be against an agent or a financial adviser.

There are explicit civil liability provisions for founders, board members, managing directors, auditors, general examiners and special examiners in a company that has prepared and issued a prospectus. According to the Swedish Companies Act, each of these bodies shall compensate anyone who suffers a loss caused by a breach of the provisions in Chapter 2 of the Financial Instruments Trading Act (1991) or the Commission Regulation (EC) No. 809/2004 of 29 April 2004 implementing Directive 2003/71/EC regarding information contained in prospectuses.[18] The same applies where damage is caused to a shareholder or other person because of a breach of the applicable annual accounts legislation. Apart from this, Swedish law does not contain any specific provisions as regards which parties can be held liable for false or misleading information, whether in a prospectus or otherwise. Private litigation is rare, and case law on the matter is very scarce.[19] The main rule under Swedish law is that, in the absence of a contractual relation or explicit statutory provisions, liability requires that the damage has been caused by a criminal offence.[20] The exceptions from the main rule are to be developed by case law, and the Swedish Supreme Court has on several occasions made exceptions to this rule.[21] It remains to be seen what exceptions (if any) can be made in relation to false or misleading information in the field of securities law.

The special provisions set forth in the Swedish Companies Act on the liability towards shareholders and other investors for breaches of the applicable annual accounts legislation were subject to a landmark judgment in 2014 (the *BDO* case). The case concerns an auditor's (BDO's) liability for false and misleading information contained in an annual report. However, it has been argued, on good grounds, that the ruling contains important statements of general application, and thus being of importance for, for example, the scope of board members' liability under the Swedish Companies Act.[22] In its judgment, the Supreme Court introduced a new requisite of 'justifiable reliance' in relation to the false or misleading information that an investor must demonstrate in order to obtain damages. Only reliance of a certain strength and relevance qualifies and reaches this high threshold. The Supreme Court explained that a business decision should be deemed to be based on a justifiable reliance on

18 Chapter 29, Section 1, Paragraph 2.

19 It remains uncertain whether the issuer itself can be held liable to pay damages for false or misleading statements made by its representatives under Swedish law. According to the predominant view, the answer is negative; see C Af Sanberg et al., *Law of Exchange* (2011), p. 237 et seq.

20 The acquisition of shares made in connection with an issue is not considered as a 'purchase' as this notion is otherwise understood in the law of obligations under Swedish law. Therefore, the rules regarding, for example, sale of goods are not considered applicable to such acquisitions.

21 See NJA 1987 Section 692, NJA 2001 Section 878 and NJA 2005 Section 608.

22 See further D Sveen and J Anderson, *The protection for investors following the BDO-case*, Juridisk Tidskrift No. 12017/18 p. 233 et seq. As noted above, the board, the CEO and the auditor share a joint and several liability for breaches of the applicable annual accounts legislation.

information in a certain annual report if the decision 'concerns a business relation with the company or a transaction in respect of shares or other instruments issued by the company'. In other words, it appears that investors who purchase shares on the secondary market will most likely fail to establish justifiable reliance. The group of investors entitled to compensation thus seems to have been significantly narrowed, and the judgment has been criticised for weakening investor protection.[23]

i Forms of action

A person suffering damage because of improper securities activities cannot turn to the SFSA for damages. The only alternative to claim damages is to file a claim against the damaging party with the civil courts. In cases of insider trading or market abuse, an aggrieved party may also intervene in a criminal proceeding and seek damages in the trial.[24] Under Swedish law, whoever causes damage to another person by way of a criminal act is liable to that person for damages.

Although civil liability for losses resulting from false or misleading statements or any other improper security activity can exist under Swedish law, such claims are, as mentioned, rare.[25]

ii Procedure

General

The Code of Judicial Procedure (CJP) governs all aspects of the conduct of civil court claims, and, thus, also private securities claims.

Judicial proceedings commence by the claimant submitting a written application for summons (statement of claim) to the district court, which must comply with certain requirements provided by the CJP. More specifically, the summons application shall include:

a a distinct relief sought;
b a detailed account of the circumstances invoked as the basis for the claim;
c primary statement of the evidence relied upon; and
d the circumstances rendering the court competent, unless this is apparent from what is otherwise stated.[26]

23 Ibid.

24 This requires that a party is considered as the 'aggrieved party' as this concept is defined in the field of criminal law. The criminal definition of the concept aggrieved party is set forth in Chapter 20 Section 8, Paragraph 4 of the CJP, according to which the aggrieved person is the person against whom the offence was committed or who was affronted or harmed by it. It is unclear whether a person suffering damage because of insider trading or market abuse falls within the scope of this definition. No relevant case law seems to exist.

25 Although not always relating to securities, it might be mentioned that litigation against negligent auditors has increased in Sweden in recent years. One example is the much publicised judgment in the *Prosolvia* case (Case No. T 4207-10). In that case, civil liability proceedings were initiated by the bankruptcy estate of Prosolvia against PwC. The Court of Appeal found that PwC had failed to perform its audit in accordance with the relevant law and audit standards and that PwC therefore was liable to pay 2.1 billion krona in damages for negligent auditing. Another example is the *BDO* case mentioned above.

26 Chapter 42 Section 2 of the CJP. The competent court for civil cases in general is the court of the place where the respondent resides (Chapter 10 Section 1 of the CJP) (see also Section IV).

Upon receipt of the statement of claim, the court issues a summons requiring the respondent to respond to the claim within the time limit set by the court.[27] The answer shall state to what extent the claimant's claims are admitted or contested, including therefore the respondent's position as to the basis of the claims and also the basis for the defence. The claimant is typically ordered to submit a reply to the statement of defence. There is no limit to the number of submissions that each party may submit, unless the court decides otherwise.

A key feature of litigation in Sweden as regards evidence is the concept of 'free evaluation of evidence', which means that there is no admissible or non-admissible evidence. Instead, it is up to the court to consider and evaluate all evidence provided by the parties and to assign appropriate weight to each evidence. Only in exceptional circumstances, if the court finds certain evidence to be clearly superfluous, may the court dismiss evidence. There is no pretrial discovery in Swedish litigation. However, parties (and third parties) can be ordered by the court to produce documents upon the request of a party. Pursuant to Chapter 38, Section 2 of the CJP, anybody holding a written document that can be assumed to be of importance as evidence may be ordered to produce it.[28] A prerequisite for the court to order a party (or third party) to produce documents is that the party seeking production must be able to sufficiently identify the documents to be produced and explain why the documents can be assumed to be of importance as evidence in the specific case. The level of precision is hard to define generally. To the extent that a document cannot be specified exactly, it may be sufficient that the requesting party identifies a certain defined category of documents, provided that what the party intends to prove with the documents is clearly specified.[29]

Normally the court requests the parties to appear at a pretrial hearing, the purpose of which is to clarify the parties' claims and positions, and which parts of the claim are admitted or denied by the respondent.[30] It is normally sufficient that parties are represented by counsel at the pretrial hearing, but many judges encourage the parties also to have competent party representatives attending the pretrial hearing. The court is also under a duty to investigate whether there are possibilities for an out-of-court settlement during the pretrial hearing.[31]

The practice of the courts is also to schedule, in consultation with the parties, the dates for the main hearing at the pretrial hearing. The main hearing begins with the claimant stating the relief sought and the respondent stating whether the claimant's claims are contested or admitted. Thereafter, the parties, each in turn, shall present their cases and any written evidence.[32] After that, any witnesses or experts are examined. Lastly, the parties present their closing arguments.

Litigation costs (for example, the cost for legal counsel) are assessed by the court at the end of the trial. The general rule is that the costs follow the events (i.e., the losing party reimburses the prevailing party for its costs).[33] However, only costs that the court deems have

27 Depending on the size and complexity of the claim, the time limit may vary from two to five weeks. If the respondent fails to submit a statement of defence within the applicable time limit, the claimant is able to apply to the court for a default judgment (Chapter 44 of the CJP).

28 Naturally, there are exemptions to the rule relating to, for example, certain mandatory rules on confidentiality.

29 Swedish Supreme Court cases NJA 1998 p. 590 and 2012 p. 289.

30 Chapter 42 Section 6 of the CJP.

31 Ibid.

32 Chapter 43 Section 7.

33 Chapter 18 Section 1 of the CJP.

been reasonably incurred to safeguard the prevailing party's interest must be reimbursed. This means that if the losing party contests the winning party's claim for costs, the court will determine whether the prevailing party's costs are reasonable.

Rules governing lawyers' fees are set forth in the Code of Professional Conduct issued by the Swedish Bar Association, according to which all fees charged by a lawyer[34] must be reasonable having regard to what has been agreed with the client, the extent of the mandate, its nature, complexity and importance, as well as the lawyer's expertise, the result of the work and other such circumstances.[35] Contingency fees are generally considered to be unethical and, therefore, prohibited.[36] That being said, there is no restriction against setting the fees in relation to the outcome and degree of success as long as the fees do not compose a percentage or stake of the damages or other monetary relief.

Furthermore, there is no general restriction against third-party litigation funding, although such arrangements are unusual in Sweden.

The judgment of a district court in a civil action can be appealed to the court of appeal. Leave to appeal is required for the court of appeal to review the district court's judgment. Leave to appeal may be granted if it is of importance for the guidance of the application of law that the court of appeal tries the case or if there is reason to believe that the court of appeal would come to a different conclusion from that of the district court.[37] Accordingly, leave to appeal may be granted on issues of facts. The threshold for leave to appeal to the court of appeal is relatively low. However, leave to appeal to the Supreme Court is much more restricted and is granted basically only in those cases where it is important to establish a judgment that may provide guidance for the Swedish district courts and courts of appeal. In other words, the court of appeal is in practice the final instance for most cases.

iii Group litigation

The Group Proceedings Act (2002:559) (GPA) provides the possibility of binding together a plurality of claims against the same respondent into one group action (or class act), if the following criteria are met:

a the action falls within the scope of the competence of general courts under the CJP;

b the action is based on circumstances that are common or similar to the claims of the members or the group;

c a group proceeding does not appear to be inappropriate having regard to the claims of the group members;

d most of the claims to which the action relates cannot be equally and adequately pursued through personal actions by the individual members of the group;

e the group is appropriately defined, taking into consideration its size, scope and other factors;[38] and

f the claimant can appropriately represent the members of the group, having regard to its interest in the substantive matter, its financial capacity to bring a group action, and the general circumstances of the case.

34 Sw. Advokat.

35 Section 4.1.1 and 4.1.2 of the Code.

36 Section 4.2.1 of the Code.

37 Chapter 49 Section 14 of the CJP.

38 There are no limits, neither maximum nor minimum, as regards the number of possible class members.

Claims for damages resulting from improper securities activities fulfil the first criteria and are, as such, permitted under the GPA.

The GPA has not yet been used to a great extent, and as far as we know it has never been used in connection with any securities litigation.

iv Settlements

Civil actions litigated in district courts may be settled at any time, within or outside the proceedings, by way of a settlement agreement. It also bears mentioning that the claimant may, at any time, withdraw its claim. However, if the claimant withdraws its claim after the respondent has submitted its reply, the case shall nonetheless be adjudicated upon if the respondent so requests.

If the parties agree on a settlement of the dispute, they are free to decide whether the settlement shall be confirmed by the court by way of a consent judgment. If confirmed, the settlement (i.e., the judgment) will become enforceable and have *res iudicata* effect. The court does not assess the fairness or reasonableness of the conditions of the settlement, but it may refuse to confirm a settlement that violates public policy, or that is too difficult to enforce (e.g., if the settlement includes too many uncertain elements and subjective conditions). If not confirmed, the settlement agreement will be subject to the general principles of Swedish contract law.

v Damages and remedies

Punitive or exemplary damages are not available under Swedish law. Damages are awarded only for financial losses actually sustained. The object of damages is, at least as a starting point, to restore the aggravated party's financial situation as if the damaging event had never occurred. Therefore, courts will compare the aggrieved party's actual financial situation with the hypothetical financial situation in the absence of the damaging event (the 'differential' method).

The claimant bears the burden of proof in relation to the losses suffered and the causal link between the loss and the breach. The loss must also not be too remote (i.e., proximity must be demonstrated). The claimant further needs to demonstrate that it is possible to calculate the alleged loss with reasonable certainty. If proof regarding the quantum of the loss cannot be adduced (or can only be adduced with difficulty), the court may estimate the loss at a reasonable amount. This may also be done where the production of the relevant evidence can be expected to entail costs or inconveniences out of reasonable proportion to the extent of the loss, and the amount of the claimed damages is minor.[39] It should be noted that this rule of alleviation of evidentiary burden relates to the quantum only and not to the presence of an actual loss.

39 Chapter 35, Section 5 of the CJP.

III PUBLIC ENFORCEMENT

i Forms of action

Public enforcement actions may be divided into two main categories: (1) administrative and quasi-administrative proceedings, conducted by the SFSA and the relevant exchange respectively; and (2) criminal proceedings conducted by the SNECA before the criminal courts.

Administrative actions

The SFSA may commence administrative proceedings to determine whether a breach of securities laws has occurred, and it is entitled to impose sanctions that can be appealed before administrative courts. The range of supervisory and investigatory powers available to the SFSA has increased as a result of the Market Abuse Regulation.

The supervisory and investigatory powers of the SFSA include the power to:

a request information from market participants and disclosure of relevant documents;
b summon and question any person who might possess relevant information;
c carry out on-site inspections;
d suspend trading of the financial instrument concerned;
e require the temporary cessation of any practice that the SFSA considers contrary to the Market Abuse Regulation;
f refer matters for criminal investigation;
g impose a temporary prohibition on the exercise of professional activity; and
h take all necessary measures to ensure that the public is correctly informed, *inter alia*, by correcting false or misleading disclosed information, including by requiring an issuer or other person who has published or disseminated false or misleading information to publish a corrective statement.

Furthermore, in relation to insider trading and market manipulation, the SFSA may impose pecuniary sanctions against both natural and legal persons.[40]

Quasi-administrative actions

As a result of the legislator having delegated a degree of authority and standards-setting to the self-regulation system, the ongoing supervision of issuers is mainly exercised by the relevant stock exchange. As noted above, the listing and takeover rules of the NSE indirectly implement EU legislation in the field of securities law and the stock exchange is also responsible for monitoring compliance with its rules. The SFSA seeks to ensure that the stock exchanges enforce their rules correctly in relation to the issuers.

In the event of a failure by the issuer to comply with the stock exchange's rules, the exchange may, if the violation is serious, decide to delist the issuer's traded financial

40 The maximum sanction for market manipulation for natural persons has previously been raised from €100,000 to €5 million and for legal entities from €10 million to €15 million or from 10 per cent of the total annual turnover to 15 per cent.

instruments, or, if delisting is considered unsuitable, impose a fine corresponding to not more than 15 times the annual fee paid by the issuer to the exchange.[41] Where the non-compliance is of a less serious nature or is excusable, the exchange may issue a reprimand.

The NSE has a Disciplinary Committee to adjudicate and sanction breaches of the listing rules. In the event of a suspected violation, the exchange initially issues a written request for an explanation from the issuer concerning the matter at hand. The issuer shall upon request by the exchange supply the exchange with the information it requires to determine whether there has been a breach. Detailed provisions about the Disciplinary Committee are set forth in the SMA and in regulations issued by the SFSA.

Criminal actions

According to MAR, stock exchanges, multilateral trading facilities and persons professionally executing transactions are obligated to report any observed trade orders or transactions that can be assumed to be related to insider trading, market manipulation or unlawful disclosure of insider information, or attempts at such conduct. In accordance with the Market Abuse Act, the SFSA submits these matters to prosecutors at the SNECA, who start a criminal investigation. The SFSA itself may not initiate criminal proceedings.

Prosecutors are obliged, under the CJP, to conduct a criminal investigation when informed that a crime might have been committed. During the investigation, the prosecutor may, among other things, examine witnesses, gather documentary evidence and under certain circumstances use wiretapping and other means of coercion. Normally the SFSA and SNECA collaborate closely and exchange information. Suspects have no obligation to cooperate with either the court or the prosecutor or to produce evidence.

Legal persons cannot be held liable for criminal offences. Criminal liability is instead attributed to directors or representatives of the entity issuing the security. The sanctions that the court may impose vary depending upon the type of criminal offence, and some offences (e.g., serious insider trading and serious market manipulation) can be punishable with up to six years of imprisonment. Less serious instances of such criminal offences could be punishable with a fine. If convicted, the defendant has the right to appeal before the court of appeal.

If administrative sanctions have been imposed on a defendant by the SFSA, prosecutors are precluded from imposing further (criminal) sanctions on the defendant (provided that the matter concerns the same market abuse infringement).[42] However, if the SFSA has not imposed administrative sanctions, the prosecutor is under a duty, alongside the prosecution, to file a motion for administrative sanctions.[43] This might appear contradictory given the prohibition of *ne bis in idem*, but given that the criminal burden of proof is harder to satisfy than the administrative burden of proof, the idea is that the court shall adjudicate upon the administrative action only if the prosecutor fails to sufficiently substantiate the criminal offence.[44]

41 The annual fee is based on the average market capitalisation for the previous year (December to November). The minimum fee is 205,000 krona and the maximum fee 3,105,000 krona.

42 Chapter 3, Section 7 of the Market Abuse Act (this means that the administrative sanctions are considered to fall within the scope of the *ne bis in idem* principle).

43 Chapter 4, Section 1 of the Market Abuse Act.

44 Chapter 4, Section 1 Paragraph 2 of the Market Abuse Act.

ii Settlements

Settlement of administrative actions undertaken by the SFSA is not possible under Swedish law. Nor are settlements available in criminal proceedings, and there is no equivalent of plea-bargain agreements.

IV CROSS-BORDER ISSUES

i Jurisdictional issues

Jurisdiction under EU regulation No. 1215/2012

Jurisdictional issues are governed by the Brussels I *bis* Regulation, provided that the respondent is domiciled in an EU Member State.[45] A respondent not domiciled in a Member State is in general subject to national rules of jurisdiction.[46] However, there are a few exceptions. For example, national rules of jurisdiction do not apply regardless of whether the respondent is domiciled in a Member State or not if a matter falls within the scope of Article 17 of the Regulation (consumer contracts).

The general rule of jurisdiction under the Regulation is that the courts of the Member State in which the respondent is domiciled will have jurisdiction to hear the dispute, regardless of the respondent's nationality (Article 4). An action may also be brought against a respondent in the courts of a Member State other than the Member State in which the respondent is domiciled in the cases mentioned in Articles 7 to 23 (rules of special jurisdiction).[47] It must be stressed that it is only possible to depart from the general rule in the specific cases expressly provided for in the Regulation.

Special rules of jurisdiction apply in matters relating to, for example, contracts[48] (Article 7.1.a), tort[49] (Article 7.2) and consumer contracts (Articles 17–18).[50] In the very controversial judgment *Kolassa v. Barclays Bank*, the Court of Justice of the European Union (CJEU) for the first time decided which, if any, of these special jurisdictional grounds are applicable for claims against an issuer of securities based on an allegedly false or misleading prospectus.[51]

In the case at hand, Mr Kolassa, domiciled in Austria, acquired certain financial instruments issued by Barclays UK. Barclays did not sell the instruments directly to Mr Kolassa. Rather, the acquisition was made through the local investment firm direktlange.at. It later turned out that the instruments had lost their value. As an investor having suffered loss, Mr Kolassa brought an action before the Handelsgericht Wien seeking the payment of approximately €73,705 in damages on the basis of the contractual, pre-contractual, tortious or delictual liability of Barclays Bank. According to Mr Kolassa, the prospectus issued by Barclays contained errors, and he submitted that he would not have made the investment had Barclays disclosed all relevant information as required by law.

45 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

46 Article 6.

47 There are also exclusive jurisdiction provisions (art. 24) and provisions governing prorogation agreements (Articles 25–26).

48 In which case the courts for the place of performance of the obligation in question have jurisdiction.

49 In which case the courts for the place where the harmful event occurred or may occur have jurisdiction.

50 In which case the courts for the place where the consumer is domiciled have jurisdiction.

51 *Harald Kolassa v. Barclays Bank plc.*, C-375/13; ECLI:EU:C:2015:37.

The CJEU first looked at contractual grounds of jurisdiction, namely for consumer contract claims under Article 17, and for contractual matters under Article 7.1.a. The CJEU decided that neither of these provisions could be applied since no contract between the parties was entered into in the case at hand.[52] It is not entirely clear whether or not a contract would be deemed to have existed if Mr Kolassa had instead acquired the instruments directly from Barclays.

After discarding the contract rules, the CJEU focused on Article 7.2 and found that the claim was delictual in nature. According to Article 7.2, the courts for the place where the harmful event occurred or may occur have jurisdiction alongside the court where the respondent is domiciled. According to settled case law, the expression 'place where the harmful event occurred or may occur' covers both the place where the damage occurred and the place of the event giving rise to it, meaning that the respondent may be sued, at the option of the applicant, in the courts for either of those places. As regards the place of the event giving rise to the damage, the CJEU ruled that this place was where Barclays had its seat (the United Kingdom), given that all relevant decisions concerning the arrangement for the investment proposed by Barclays and the content of the relevant prospectus had been taken there. As regards the localisation of damage, the CJEU ruled that the courts at the place of the domicile of Mr Kolassa had jurisdiction, 'in particular when the loss itself occurred directly in the investor's bank account and if that bank account is held with a bank established within the jurisdiction of these courts'. It is unclear whether the reference to the bank account refers to the securities account or the account from which the securities were paid.

The *Kolassa* case leaves many questions unanswered and the issue of jurisdiction for claims against an issuer of securities based on an allegedly false or misleading prospectus remains uncertain. It will not be possible to make a clear determination of the competent court in prospectus liability suits until the CJEU has had a chance to clarify the scope and closer meaning of its ruling in *Kolassa*.

Jurisdiction under national rules

If the respondent is not domiciled in an EU Member State, and provided that the matter does not fall within the scope of Article 17 of the regulation (consumer contracts), Swedish national rules on jurisdiction will apply. These are set out in Chapter 10 of the CJP.[53]

Where the respondent has residence outside Sweden, the main rule provides that the district court in the place where the respondent is sojourning has jurisdiction.[54] Other courts of Sweden have jurisdiction alongside the court where the respondent is sojourning in the following cases:

52 Paragraphs 35 and 41 of the judgment. It may be noted that settled case law gives different interpretations to the notions of contract in the context of Articles 17 and 7.1.a of the Regulation. Article 7.1.a does not require a contract to have been concluded. Identifying a contractual obligation is nevertheless essential if that provision is to apply, for jurisdiction under that provision is established on the basis of the place of performance of the contractual obligation in question. Thus, the application of the rule of special jurisdiction provided for matters relating to a contract in Article 7.1.a presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based. The court however concluded that such a legal obligation freely consented to by Barclays Bank with respect to Mr Kolassa was lacking (paragraph 40).

53 It should be noted that these rules determine the internal jurisdiction but they are considered applicable *ex analogia* in international disputes.

54 Chapter 10 Section 1, Paragraph 5.

a Section 3 allows jurisdiction for the district court in the place where the respondent's property is located.[55]

b In matters relating to contracts, Section 4 allows jurisdiction for the district court in the place where the contract was entered into.[56]

c In matters relating to tort, Section 8 allows jurisdiction for the district court in the place where the tortuous act occurred or had its impact.

d In matters relating to consumer contracts, Section 8a allows jurisdiction for the district court in the place where the consumer resides if the claim amounts to less than approximately 22,000 krona. The general jurisdiction rules are applicable in consumer disputes exceeding the mentioned amount.

e Section 6 allows jurisdiction for the courts in the place where a business establishment is located, provided that the dispute arises directly out of the business activity carried out at the establishment. Unrelated claims are therefore not sufficient for jurisdiction.

Conflict of law issues

The governing law of contracts will be determined in accordance with the Rome I Regulation.[57] The basic principle is that the parties are free to choose the governing law of their contract.[58] To the extent that the law applicable to the contract has not been chosen by the parties, the law governing the contract shall be determined in accordance with Article 4.1 of the Regulation, which contains different choice-of-law rules for different types of contract. Where the contract may not be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it is to be governed by the law of the country where the party required to effect the characteristic performance of the contract has his or her habitual residence (Article 4.2).[59] However, where it is clear from all

55 The property must have some asset value. Furthermore, it follows from the Supreme Court case NJA 1981 p. 386 that a Swedish court may not exercise jurisdiction over a foreigner that has property intended for his or her personal use during a temporary stay in Sweden.

56 The provision requires that the contract must have been entered when the respondent or his or her legal representative was in Sweden. It is thus not sufficient that a preparatory negotiation has taken place within Sweden. Moreover, in NJA 1940 p. 354, the Supreme Court stated that a contract concluded by telephone between a Swedish and a foreign company is not sufficient for jurisdiction.

57 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

58 The freedom of contract is subject to certain exceptions; for example, in relation to overriding mandatory provisions (Article 9 Rome I Regulation).

59 There is a special choice-of-law rule for certain types of financial contracts set forth in Article 4.1(h). Pursuant to that article, a contract concluded within a multilateral system that brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law. The exact scope of this Article is to some extent unclear, but our understanding is that it encompasses contracts relating to financial instruments that have been concluded within a regulated market or a multilateral trading facility by financial entities that have special permission to trade in such organised financial markets. Thus, contracts concluded between such financial entities and their clients are not included in this category.

the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in Articles 4.1 or 4.2, the law of that other country shall apply (Article 4.3).[60]

The governing law of matters relating to tort will be determined in accordance with the Rome II Regulation.[61] The basic rule is that the law applicable to a tort claim is the law of the country in which the damage occurs (*lex loci damin*), irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.[62]

The *Kolassa* ruling may have ramifications on the determination of the applicable law according to Rome I and Rome II, especially as regards what is to be understood by the notions 'contract' and 'tort', given the principle of parallel interpretation between the Brussels and the Rome Regulations.[63]

Criminal jurisdiction

A Swedish court may exercise jurisdiction over crimes committed outside Sweden according to Swedish law where the crime has been committed:

a by a Swedish citizen or an alien domiciled in Sweden;

b by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in Sweden or who is a Danish, Finnish, Icelandic, or Norwegian citizen and is present in Sweden; or

c by any other alien, who is present in Sweden, and the crime under Swedish law can result in imprisonment for more than six months.[64]

There are also a few other rules that allows Swedish courts to exercise jurisdiction over crimes committed outside Sweden according to Swedish law (e.g., if the least severe punishment prescribed for the crime in Swedish law is imprisonment for four years or more).[65]

60 Where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract shall be governed by the law of the country with which it is most closely connected (Article 4.4).

61 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

62 Article 4.1. Articles 5 through 12 provide special rules for particular types of torts (none of which are of relevance in the field of securities litigation).

63 See Rome I and Rome II Regulations, recital 7.

64 Chapter 2, Section 1 Paragraph 1 of the Swedish Penal Code. If, under Swedish law, the punishment for the act cannot be more severe than a fine, a further requirement is that act is subject to criminal responsibility both under the law of the place where it was committed and under Swedish law (Paragraph 2).

65 Special rules of jurisdiction are set forth in, for example, Chapter 2, Section 3 of the Swedish Penal Code. There are also special rules pertaining to international crimes (Section 6). Also, Section 7 explicitly gives effect to any limitations resulting from generally recognised fundamental principles of public international law or from special provisions in agreements with foreign powers.

V YEAR IN REVIEW

As of January 2018, new rules for the securities market went into effect in the EU through the MiFID II Directive and the MiFIR Regulation. European financial regulators claim that the new rules will strengthen investor protection through the introduction of improved requirements on, for example, the responsibility of management bodies, inducements, information and reporting to clients and product governance.[66]

In addition, the Swedish Corporate Governance Board has recently published revised Takeover Rules, which came into force on 1 April 2018.[67] The key changes include new procedural rules regarding regulatory approvals and a new provision permitting an offeror that has failed to obtain a required regulatory approval within the maximum acceptance period to return with a new offer within four weeks of receipt of the approval, notwithstanding the general rule that a new offer may not be submitted within 12 months of the previous offer.

VI OUTLOOK AND CONCLUSIONS

In our opinion, investor protection has to a certain extent been neglected in Sweden as civil liability for making false or misleading statements in prospectuses so far has proven ineffective as regards private securities litigation. In 2013, the Swedish government proposed that the rules regarding civil liability for prospectuses shall be amended to include, *inter alia*, express liability for the company itself and the advisers participating in the preparation of the prospectus.[68] The proposal has not yet led to any law reforms.

66 Key publications and guidelines can be found at the European Securities and Markets Authority's (ESMA) website, https://www.esma.europa.eu/policy-rules/mifid-ii-and-mifir.

67 http://www.corporategovernanceboard.se/takeover-rules/takeover-rules-regulated-markets.

68 Ds 2013:16.

Appendix 1

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