Securities Litigation

In 13 jurisdictions worldwide

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GETTING THE DEAL THROUGH

Ireland

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1 Describe the nature and extent of securities litigation in your jurisdiction.

Securities claims in Ireland can be brought either on the basis of common law principles in contract or tort or on the basis of specific statutory provisions as outlined below. Although securities claims have traditionally been less common in Ireland than in jurisdictions such as the United States, there have been an increasing number of such claims in Ireland over recent years. These include a proliferation of *Madoff*-related claims, together with a host of claims arising out of the global financial crises or related issues. In addition, there is an increasing propensity for securities litigation to be undertaken for strategic reasons in the context of corporate disputes.

2 What are the types of securities claim available to investors?

In Ireland, in addition to claims in contract or tort, investors have a specific right to sue for loss or damage arising from untrue statements in prospectuses of publicly traded securities under section 41 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (IFCMPA 2005). Section 33 of that Act also provides for civil liability for breaches of Irish market abuse law, relating to insider trading and market manipulation, in relation to securities traded on the Main Securities Market of the Irish Stock Exchange (ISE). A similar cause of action is provided for under section 109 of the Companies Act 1990 for market abuse in relation to the ISE's other two markets: the Exploration Securities Market and the Global Exchange Market.

There are also a number of other securities claims open to investors under Irish law. Many of these claims are general common law contractual or tortious causes of action, such as:

- breach of contract;
- misrepresentation;
- negligence;
- negligent misrepresentation;
- negligent misstatement; and
- fraud.

Claims may be addressed concurrently in contract or tort. In addition, certain statutory provisions will impose civil liability in certain circumstances, for example, section 297A of the Companies Act 1963 imposes civil liability on directors and officers of a company for fraudulent trading and for reckless trading, on the winding up or examinership of the company.

Shareholders will also have civil claims against directors and independent persons for misconduct in the preparation or implementation of a merger, or for untrue statements in the draft terms of merger, the explanatory report, the independent person's report or the accounting statement under Regulation 22 of the European Communities (Mergers and Divisions of Companies) Regulations 1987. Similar civil liability arises in relation to the division of companies under Regulation 41. As the merger and division of Irish public limited companies is a rare occurrence, these regulations are not often invoked.

3 How do claims arising out of securities offerings differ from those based on secondary-market purchases of securities?

The whole range of claims outlined in question 2 would be available to an investor in an initial offering of publicly traded securities. However, an investor in secondary market purchases may be restricted from making contractual claims against the company in which securities have been issued and may lack standing for other claims, due to the lack of a contractual relationship between the investor and the initial offeror.

An offeror of securities to which a prospectus relates, including an offeror in a secondary market, is one of the categories of persons who are subject to statutory civil liability for misstatements in, and omissions from, a prospectus, if the securities are acquired on the faith of the prospectus and loss or damage has been suffered by the acquirer.

4 Are there differences in the claims available for publicly traded securities and for privately issued securities?

One of the main differences between publicly and privately traded securities, and therefore a difference between the claims that arise, is the requirement for the publication of a prospectus. If there is no offer of securities to the public, and no application for admission to trading of securities on an EU regulated market, then there is no obligation to publish a prospectus. Therefore, claims arising from a privately issued security may be limited to the common law causes of action and statutory fraudulent and reckless trading causes of action listed in question 2.

A publicly traded security could give rise to the additional statutory causes of action under the IFCMPA 2005, as mentioned in question 2.

5 What are the elements of the main types of securities claim?

Statutory Causes of Action

Section 41 – IFCMPA 2005: Civil liability for untrue statements and omissions in prospectuses

A plaintiff investor must establish that he or she purchased securities on the faith of the prospectus and suffered loss or damage because there was an untrue statement in the prospectus, or because there was an omission of information required by EU prospectus law from the prospectus.

Section 33 – Civil liability for certain breaches of Irish market abuse law

A plaintiff investor must establish that:

- the defendant contravened a provision of Irish market abuse law relating to insider information;
- the plaintiff sustained loss; and
- that loss was due to the difference between the price at which the securities were acquired or disposed of and the price at which they would have been likely to have been acquired or disposed of, if relevant information had been generally available.

Further, a plaintiff investor will also have a claim to be compensated for acquiring or disposing of securities as a result of market manipulation where they establish that there was breach of Irish market abuse law. They do not need to establish loss in such circumstances.

Contract claims

Breach of contract

The plaintiff must establish that there has been a breach of a contractual term.

Misrepresentation

A plaintiff investor must establish that there was a misrepresentation of fact that was relied upon by the plaintiff and that induced the plaintiff to enter into the contract.

Tort claims

Negligence

In order to establish negligence, the plaintiff investor must establish that:

- a duty of care was owed to the plaintiff by the defendant;
- a breach of that duty of care occurred;
- the breach of care caused actual loss or damage to the plaintiff; and
- the loss or damage was a reasonably foreseeable result of the defendant's conduct.

Negligent misrepresentation

In order to establish negligent misrepresentation (a variant of the general negligence principles), the plaintiff investor must establish that the defendant:

- failed to exercise due care in making the representation;
- the representation induced the plaintiff to, for example, enter into the particular agreement; and
- the plaintiff suffered damage because of the inaccurate representation.

Negligent misstatement

In order to establish negligent misstatement (another variant of the general negligence principles), the plaintiff investor must establish that:

- there was a special relationship between the plaintiff and the defendant (eg, in *Securities Trust Ltd v Hugh Moore & Alexander Ltd* such a relationship was held to exist between shareholders and the company);
- there was reliance on the misstatement;
- the reliance caused damage or loss to the plaintiff; and
- the reliance was foreseeable and reasonable.

Fraud (deceit)

In order to establish fraud, the plaintiff investor must establish that the defendant knowingly, recklessly, or carelessly made an untrue representation of fact with the intent to induce reliance, which brought about actual reliance by the plaintiff and which caused damage to the plaintiff due to his or her reliance.

6 What is the standard for determining whether the offering documents or other statements by defendants are actionable?

The standard for civil liability for section 41 of the IFCMPA 2005 is simply that there either be an untrue statement in, or an omission of information required under EU prospectus law from, the prospectus. The standard in relation to market abuse under section 33 of the IFCMPA 2005 is also simply that market abuse occurred.

The general standard for tortious claims revolving around fraudulent and negligent misrepresentations and negligent misstatements is that there was a material untruth that induced reliance. However, an omission might be actionable if it can be interpreted as an active misrepresentation or where the omission distorts the meaning of a truthful representation given. Similarly, the standard for misrepresentation in contractual claims is one of material misrepresentation, which is subsequently relied upon. Omission will constitute misrepresentation where once truthful, but now false, statements are not corrected by the defendant.

7 What is the standard for determining whether a defendant has a culpable state of mind?

In relation to the statutory civil claims under the IFCMPA 2005, a plaintiff investor does not need to establish the defendant's state of mind; it suffices that the elements of the liability be established. However, liability under the IFCMPA 2005 will not arise in relation to untrue statements or omissions where the defendant had reasonable grounds for believing the statements were true and believed the statements to be true at the time. It should be noted that this is a defence to be proved by the defendant, rather than something the plaintiff needs to establish. See also question 12.

In order to succeed in any of the negligence tortious claims surrounding representations, the plaintiff would need to demonstrate that the defendant had failed to exercise due care as to the statement's truthfulness. To succeed in a fraud claim, it would be necessary to show that the defendant had actual knowledge of the statement's untruth or was reckless in relation to the same, but mere negligence would not be enough.

For a breach of contract claim, the defendant's state of mind would not necessarily be relevant.

8 Is proof of reliance required, and are there any presumptions of reliance available to assist plaintiffs?

Reliance is required to sustain a civil claim in relation to misstatements in a prospectus under section 41 of the IFCMPA 2005. The plaintiff must show that it acquired the securities 'on the faith' of the prospectus. However, reliance need not be established for claims in relation to insider trading or market manipulation claims under section 33 of the IFCMPA 2005.

Reliance is a key element in establishing a tortious misrepresentation or misstatements and a misrepresentation at contract law.

9 Is proof of causation required? How is causation established?

The statutory, contractual and tortious claims discussed above all require a factual causal link between the untruth, the market abuse, or the misconduct and the loss or damage suffered by the defendant. The negligence tort claims (general negligence, negligent misrepresentation and negligent misstatement) will also require the legal causation element of reasonable foreseeability. In essence this means that if the defendant made an intentional or careless misrepresentation and that misrepresentation was relied upon causing loss or damage to the plaintiff, civil liability would nevertheless only attach if the defendant could have reasonably foreseen the occurrence of the loss or damage that was suffered by the plaintiff. Such reasonable foreseeability is not a requirement of the statutory civil claims.

10 What elements present special issues in the securities litigation context?

The lack of class actions in Ireland could give rise to special issues in the context of a huge number of investors pursuing a securities claim. See question 20 for more details.

11 What is the relevant limitation period? When does it begin to run? Can it be extended or shortened?

Securities claims in contract or tort must be brought within six years of the date on which the cause of action 'accrues'. In *Gallagher v ACC Bank* [2012] IESC 35, the loss suffered by the plaintiff in investing in a bond that was unsuitable for him was judged to have accrued once the plaintiff made the investment (as opposed to some later point at which losses on the bond actually occurred).

If the claim relates to fraud, the limitation period will not start to run until the plaintiff discovered, or ought to have discovered, the fraud. Special circumstances also surround plaintiffs judged to be under a disability.

There is a two-year limitation period for the statutory cause of action relating to insider trading and market manipulation in section 33 of the IFCMPA 2005. Interestingly, section 41 of the IFCMPA 2005 does not provide a limitation period for claims relating to untrue statements and omissions in prospectuses. However, the courts have an inherent jurisdiction to strike out a claim for delay and, therefore, it would be unwise to unduly delay once an investor became aware, or should have become aware, that a cause of action had accrued.

12 What defences present special issues in the securities litigation context?

In relation to untruths and omissions in prospectuses, section 42 of the IFCMPA 2005 provides a defence where a person can prove they had reasonable grounds for believing, and did believe that the relevant statement was true, or that a matter omitted from the prospectus was properly omitted. It also provides for other defences where directors withdraw their consent to being directors and prove that the prospectus was issued without their consent; or where a prospectus was issued without their knowledge or consent and they notified the public of the same; or on becoming aware of the untrue statement or omission, they withdraw their consent and notify the public of the reason for the same before the securities are purchased. Similar defences apply to experts whose statements are used in a prospectus.

The IFCMPA 2005 does not provide for defences against civil claims where market abuse regulations are contravened. Such claims do, however, have a limitation period, as outlined in question 11.

13 What remedies are available? What is the measure of damages?

An investor will be entitled to compensation for the loss or damage suffered in relation to the statutory breaches under the IFCMPA 2005.

The normal categories of damages will be available to investors in relation to the tort claims. These categories include:

- compensatory damages – the main objective of these types of damages is to compensate the victim for the damage or loss arising as a result of the wrongful act of the defendant;
- aggravated damages – these damages are awarded where the conduct of the defendant has aggravated the wrong done to the plaintiff;
- nominal damages or contemptuous damages – these damages recognise that a right protected under tort law has been infringed but little real injury has resulted; and
- punitive or exemplary damages – these are available in exceptional cases in order to make an example of the defendant's wrongdoing. Such awards are less common (and typically smaller) in Ireland than, say, the United States.

Contractual claims for rescission can also theoretically be awarded in a misrepresentation claim. In a breach of contract claim, damages aim to put the plaintiff in the position he or she would have been in had the contract been performed. The latter can include loss of profit that could have been made had the contract been performed.

Part VII of the Companies Act 1990 provides for the restriction and disqualification of directors in certain instances. In particular, section 160(2) sets out that, where a person has been guilty, while a promoter or officer of a company, of any fraud or breach of duty in relation to the company or its members, he or she can be subject to a disqualification order. The period of disqualification is largely at the discretion of the court.

14 What is required to plead the claim adequately and proceed past the initial pleading?

In order to plead any of the claims previously discussed adequately and to proceed past the pleadings stage, the pleadings should set out the material facts upon which the plaintiff relies, and there should be sufficient facts alleged in order to demonstrate a reasonable cause of action and that the claim is not frivolous or vexatious.

The relevant claims in securities litigation are not subject to any heightened requirements to proceed to trial, with the exception of a fraud or misrepresentation claim. Such claims need to be particularised in detail to show the nature of the allegation and how it is alleged to have occurred.

15 What are the procedural mechanisms available to defendants to defeat, dispose of or narrow claims at an early stage of proceedings? What requirements must be satisfied to obtain each form of pre-trial resolution?

Several procedural mechanisms and actions can be taken in an attempt to defeat, dispose of or narrow claims at the early stages of proceedings. These include:

Notice of particulars

The plaintiff's statement of claim will usually state his or her claim in general terms. In such cases, the defendants can serve a notice for particulars of the plaintiff's claim in order to narrow the claim.

Security for costs

A defendant can bring an application for security of costs if the plaintiff is a natural person who lives outside the EU or if the plaintiff is a company, regardless of where it is resident. The defendant has to set out that they have a prima facie defence. For more details, see question 26.

Adding third parties

Third parties can be joined by the defendant where they believe that party may be liable for all or part of the loss or damage suffered by the plaintiff. Such an application must be brought as soon as is practicable.

Application to dismiss for failure to disclose a reasonable cause of action

A defendant can bring an application to dismiss where the plaintiff's pleadings fail to disclose a reasonable cause of action, or where the pleadings are judged to be frivolous or vexatious.

Lodgements and Calderbank letters

The defendant can lodge into court an offer of money to the plaintiff in full and final settlement of the plaintiff's claim. If the plaintiff fails or refuses to accept the lodgement and fails to obtain an award in excess of the sum lodged at the full hearing of the action, the plaintiff will be penalised as to the costs. The plaintiff will have to bear his or her own costs from the date of lodgement onwards and also discharge the defendant's costs from that date onwards.

Alternatively to a lodgement, the defendant can make a written offer to the plaintiff on a without-prejudice basis, except for costs (a 'Calderbank letter'). If that offer is rejected and it turns out to have been a reasonable offer given the court's subsequent ruling, the plaintiff will suffer financial consequences in relation to costs.

Application to dismiss for want of prosecution

Where the plaintiff has commenced proceedings but subsequently fails to abide by the timing deadlines set by the Rules of the Superior Courts, the defendant can apply to have the proceedings dismissed. However, such an application is unlikely to succeed unless egregious delay or prejudice to the defendant's case arising from the delay can be demonstrated.

16 Are the principles of secondary, vicarious or 'controlling person' liability recognised in your jurisdiction?

The Irish courts recognise the concept of vicarious liability. Vicarious liability arises when a wrong by a person in the course of his or her employment is treated as being done by that person's employer, whether or not it was done with the employer's knowledge or approval.

On the other hand, some torts may be considered to be done by the company itself, and not the individual employee who carried out the act. Such acts can be said to be done under the direction of the board of directors or the shareholders in a general meeting and, in such a situation, the court will look at the actions of those who control the company. However, it has been noted by the Irish courts that those individuals with the 'directing mind and will' may not necessarily be those who had general control and management.

17 What are the special issues in your jurisdiction with respect to securities claims against directors?

The general rule is that directors' duties are owed to the company itself, and not to the shareholders, creditors or employees of the company. However, there have been recent developments in the Irish courts which have extended directors' duties to creditors where the company is insolvent or in the process of insolvency and, by statute, to employees and members. The courts have not yet, however, gone so far as to expand this to shareholders' interests in the value of their shareholdings.

In addition to the usual remedies available to a plaintiff if he or she succeeds in an action under tort or contract, Part VII of the Company's Act 1990 provides for the restriction and disqualification of directors in certain instances.

Section 41 of the IFCMPA 2005, as discussed above, provides for causes of action for untrue statements in, and omissions from, prospectuses, against, the company, the promoters, the directors and persons who have 'authorised the issue of' the prospectus, among others. There are, however, a number of statutory defences against these provisions, as outlined in question 12.

Section 43 of the same Act is also relevant for directors in the structured finance context, as it limits liability to certain parties, excluding directors from liability. This section only applies to non-equity securities. See question 28 for further information.

Section 44 of the same Act provides that, where a public offering of securities has been made and the prospectus contains the name of a director of the issuer or the name of an expert who has purportedly made a statement in the prospectus, and that person has not consented to being a director or an expert, or has withdrawn, in writing, his or her consent before the issue of the prospectus, the directors of the issuer shall be liable to indemnify that person against all damages, costs and expenses to which he or she may be made liable as a result of of his or her name having been in the prospectus, or as a result of the inclusion of a statement purporting to be made by him or her, or in defending him or herself against any action or legal proceeding brought against him or her in respect thereof. This section will not apply to any directors without whose knowledge or consent the prospectus was issued.

18 What are the special issues in your jurisdiction with respect to securities claims against underwriters?

Section 38 of the IFCMPA 2005, in particular subsections 5–7, are relevant here. An underwriter is not deemed to be a promoter or a person who has authorised the issue of the prospectus and, therefore, will not fall under section 41 or 43. The Act does state, however, that an underwriter will be considered to be a 'purchaser' where a person intends to make an offer of securities to the public, and another person (the 'purchaser') agrees to purchase those securities with the intention of their immediate resale to give effect to that intention of the offeror, at a profit or subject to payment by the offeror to the purchaser of a commission, and binds him or herself to purchase, or procure the purchase of, any of the securities not so resold.

There is also the potential for liability under Irish common law to arise for underwriters by virtue of being involved in the preparation of a prospectus containing a misrepresentation, or a negligent or fraudulent misstatement.

Separately, section 48 of the IFCMPA 2005 prescribes statutory criminal liability for untrue statements in, and omissions from, a prospectus, which can apply to any person 'who authorised the issue of' the prospectus. Further, section 38(5), as explained above, does not apply in the criminal liability context; consequently, if it could be shown to the satisfaction of an Irish court that an underwriter had 'authorised the issue' of the prospectus, criminal liability could be established under section 48, unless a defence based on 'due diligence' could be successfully pleaded.

19 What are the special issues in your jurisdiction with respect to securities claims against auditors?

An auditor's contract is usually with the company. The auditor's duties are to the shareholders as a body, rather than individually. Third parties (such as shareholders and creditors) generally have no claim in contract against the auditors. However, a third party may claim that circumstances exist that give him or her a duty of care in tort. The third party must prove that:

- a duty of care arose;
- the loss was reasonably foreseeable;
- there was a sufficient degree of proximity between the auditor and the third party; and
- it was reasonable for the third party to rely on the accounts.

Section 45 of the IFCMPA 2005 notes that a prospectus containing a statement from an expert (auditors would be considered experts in this context) shall not be issued unless the expert has given his or her consent in writing for the inclusion of the statement and this consent has not been withdrawn. It should also be stated in the prospectus that the expert has given such consent. If a prospectus is issued in contravention of this requirement, the issuer and any other person who was knowingly a party to the issue shall be guilty of an offence and liable to a fine.

Section 44 of the IFCMPA 2005 would also be relevant to auditors (see question 17).

Section 200 of the Companies Act 1963 states that a provision (in the articles of association or in any contract with a company or otherwise) shall be void if it exempts any officer of the company or the auditor from, or indemnifies him or her against, any liability which, by virtue of any rule of law, would otherwise attach to him or her in respect of any negligence, default, breach of duty or breach of trust of which he or she may be guilty in relation to the company.

Separately, Ireland is subject to both the financial reporting standards of the applicable financial reporting framework and the accounting requirements under the Company Law Acts. The main financial reporting frameworks in use in Ireland are the International Financial Reporting Standards (as endorsed by the EU), and the Irish and UK Generally Accepted Accounting Principles, promulgated for use in Ireland by Chartered Accountants Ireland. If an auditor fails to meet the required financial reporting standards, the governing body for accountants or auditors can commence an investigation, which could potentially create a cause of action in fraud or professional negligence, or both.

20 In what circumstances does your jurisdiction allow collective proceedings?

Ireland does not have a formal class action procedure. There is, however, a procedure known as a 'representative action' allowing one action to be brought to resolve issues on behalf of different parties with the same interest. However, each claimant must agree to participate before they will be bound by the outcome. There are limitations on this procedure, including the reliefs available. While declaratory relief and injunctive relief might arise from the resolution of common issues, separate claims may still be needed to resolve individual damages claims and to deal with issues that are claimant specific.

There have been a significant number of multi-party claims in Ireland in recent years, including financial services litigation, such as the *Madoff*-related litigation or a large group of mis-selling claims against an Irish bank, ACC.

21 In collective proceedings, are claims opt-in or opt-out?

The Irish procedure is an opt-in procedure. It is not possible to bring an action on behalf of parties without their express mandate.

22 Can damages be determined on a class-wide basis, or must damages be assessed individually?

Each plaintiff needs to prove his or her particular entitlement to damages and this cannot be done collectively.

23 What is the involvement of the court in collective proceedings?

For a group to bring a representative action it must be defined by the same interest requirement and it will require authorisation from each individual member that the named party can act in a representative capacity. There is no specialist judge for representative actions. A representative action will usually be taken in the High Court or the Commercial Court.

There are no express or automatic case management procedures in the High Court. However, parties can apply for entry to the Commercial Court and will then be able to apply for case management. The courts are increasingly willing to facilitate such requests, particularly in complex or multi-party litigation. Strict deadlines are imposed when proceedings are case-managed in the Commercial Court.

24 What role do regulators, professional bodies, and other third parties play in collective proceedings?

As Ireland does not have a formal class action procedure, regulators, professional bodies and other third parties would play the same role in collective proceedings that they would play in normal legal proceedings.

In reality, it is unlikely that regulators or professional bodies would want to get involved in private actions, and they would be more likely to take a separate regulatory enforcement action.

However, regulators, professional bodies and other third parties could be asked to provide non-party discovery, and this could be quite a significant task for the body if a large number of plaintiffs are involved.

Separately, the Financial Services Ombudsman would be an important way of seeking redress for individual and corporate investors (subject to certain restrictions). The Financial Services Ombudsman is a statutory officer who deals independently with complaints from consumers about their individual dealings with all financial services providers that have not been resolved by the providers. The Ombudsman is, therefore, the arbiter of unresolved disputes and is impartial. The general rule is that you are not entitled to make a complaint to the Ombudsman if the conduct complained about is or has been the subject of legal proceedings. Additionally, if the matter has been decided by the Ombudsman, the courts will generally not allow the decision to be litigated ab initio. However, you do have a statutory right to appeal the decision of the Ombudsman to the High Court.

25 What options are available for plaintiffs to obtain funding for their claims?

Contingency or conditional fee arrangements are not permitted in Ireland, although 'after the event' insurance is permitted. The traditional common law rules on maintenance and champerty prevent third-party funding in cases where they have no legitimate concern without just cause or excuse.

A recent Commercial Court decision, *Thema International Fund PLC v HSBC Institutional Trust Services (Ireland) Limited and others* [2011] IEHC 357, confirmed that maintenance and champerty still subsist in Irish law. It is unlawful for a party without a legitimate interest to fund the litigation of another, or to fund litigation in return for a share of the proceeds. A creditor or shareholder might have such a legitimate interest, although third-party funders would not.

This decision also shows that the Irish courts have jurisdiction to award costs orders against third-party funders if the claim is ultimately unsuccessful.

Update and trends

The Companies Act 2014 was enacted in late 2014 and is expected to commence in mid-2015. It will repeal and replace the statutory causes of action mentioned in question 2. In particular, Part 23 of the Bill will deal with public offers of securities and market abuse. As things stand, all of the aforementioned causes of action will be recreated, with the exception of those created by section 109 of the Companies Act 1990, which will be repealed but not replaced. It is thought that these causes of action will be recreated by statutory instrument. Disqualification of directors for breaches of duty will be dealt with under Part 14 of the Act.

Recent case law suggests that third-party funding is permissible in certain circumstances. In the *Thema International* case discussed above, the High Court confirmed that, in certain circumstances, namely when a third party has a legitimate interest in the outcome of the litigation, third-party funding will be permissible. This will have an effect on future securities litigation as now, for example, creditors or shareholders of an insolvent company may provide funding for litigation as they would be considered to have a legitimate interest in the litigation and such funding would obviously indirectly benefit them.

More generally in relation to litigation, Ireland has recently introduced legislation to establish a new Court of Appeal, in order to deal with the backlog of cases being referred to the Supreme Court compared with other, similar common law jurisdictions. It was felt that the long delay in getting a case heard before the Supreme Court was an impediment to giving litigants fair access to justice. The Court of Appeal will hear appeals from the High Court and will allow the Supreme Court to focus on cases of importance.

It appears that class actions and the lack of formal class actions procedures in Ireland are likely to become issues in the next few years. Class actions are discussed in questions 20 to 24. While Irish courts have developed mechanisms to deal with group litigation and common issues by representative actions or on a test-case basis, it seems likely that the courts will have to consider formalising the procedure in the future. A new EU Directive on antitrust damages actions was signed into law on 26 November 2014 – member states will have two years to implement it in their national legal systems. This Directive aims to make it easier for victims of illegal cartels and other violations of European law to recover damages before national courts throughout the European Union. Simultaneously, the European Commission also published a Recommendation on collective redress, inviting member states to introduce, by July 2015, collective actions, including actions for damages, in line with the principles set out in the Recommendation.

26 Who is liable to pay costs in securities litigation? How are they calculated? Are there other procedural issues relevant to costs?

In Ireland the general rule in civil litigation is that costs follow the event ie, the losing party is liable to pay the costs of the successsful party. Parties to an action will include a claim for their costs in the relevant court documents (eg, in the statement of claim for the plaintiff).

Generally, parties will try to agree costs between themselves. The court can, however, order that costs be taxed by the Office of the Taxing Master in default of agreement and the courts always retain a discretion to amend the level of costs if they feel it is appropriate. In addition, an arbitrator or a party to the action can request that the costs be taxed.

The submission of a lodgement (or in the case of state or semi-state bodies, a tender) has the potential to reduce a successful plaintiff's claim for costs (see question 15).

The court also has authority to order a plaintiff to provide security for costs, upon application by the defendant. The High Court will calculate the sum and it will generally be one-third of the likely costs.

In an application for security for costs against a natural person, the defendant must show that it has a prima facie defence against the claim advanced against it and, generally, that the individual resides outside of the EU. The courts are very hesitant to prevent a plaintiff having recourse to litigation and, if a plaintiff can show that his or her case has a reasonable degree of merit, then the fact that they do not have sufficient funds will usually not prevent them from taking these proceedings.

In order to be successful in an application for security for costs against a company, Irish or otherwise, the defendant must show that he or she has a prima facie defence and that the plaintiff will not be able to meet the defendant's costs if the defendant succeeds at trial.

27 Are there special issues in your jurisdiction with respect to interests in investment funds? What claims are available to investors in a fund against the fund and its directors, and against an investment manager or adviser?

Conditions can be imposed on regulated funds by the Central Bank of Ireland, which is designated under statute as the competent authority with responsibility for the authorisation and supervision of investment funds.

The main investment funds in Ireland are UCITS, which are open-ended funds that can be established as unit trusts, common contractual funds, variable or fixed capital companies. Other investment funds that do not require authorisation under the UCITS Directive are alternative investment funds.

Investment funds may be listed on the ISE (eg, hedge funds, exchange traded funds, private equity funds, multi-manager funds, property funds, venture capital funds, emerging market funds, derivative funds and fund of funds). Funds domiciled in Ireland and abroad can be listed on the ISE. In order to have a fund admitted to the ISE it is necessary to appoint a sponsor who will submit the listing particulars for review by the ISE (this process is done in conjunction with the authorisation process by the Central Bank).

The general claims outlined in question 2 would also be applicable in this context.

28 Are there special issues in your country in the structured finance context?

Structured finance is used by a cross-section of the international financial services industry in Ireland. Structured finance vehicles are more commonly known in Ireland as special purpose vehicles (SPVs). The aircraft-leasing sector, for example, uses SPVs to finance and hold certain types of assets, as does the investment fund sector. The insurance sector also uses SPVs to issue insurance-related debt securities. In 2011, Ireland extended the category of assets that may be held by SPVs to include commodities and plants and machinery, such as aircraft and other chattels.

SPVs are set up in Ireland under section 110 of the Irish Taxes Consolidation Act, 1997. SPVs must acquire, hold or manage qualifying financial assets (including bonds, loan receivables, derivatives and carbon offsets) of at least €10 million, be resident in Ireland and carry on no activities other than holding or managing such financial assets. An SPV must notify the Irish Revenue Commissioners of its existence, but no special rulings or authorisations are required in Ireland in order for an SPV to achieve its tax neutral status.

SPV asset types include asset-backed securities, catastrophe bonds, collateralised debt obligations, collateralised loan obligations, commercial mortgage-backed securitisations, asset-backed commercial paper, distressed debt, loan participation notes, medium-term notes, repackaging, residential mortgage-backed securitisations, US life settlements and other structured finance transactions.

The ISE has extensive experience in the listing of specialist debt securities, including SPVs. Securities issued by an Irish SPV may, once the prospectus has been approved by the Irish Central Bank, be accepted throughout the EU for public offers and admission to trading on regulated markets under the EU Prospectus Directive.

The claims and remedies available to structured finance trustees, investors and financial guarantee insurers are the same as those outlined in questions 2 and 13.

Section 41 of the IFCMPA 2005, as discussed above, would apply here providing for statutory civil liability for misstatements in, and omissions from, the prospectus.

Section 43 of the same Act would also be applicable here. This section applies solely to non-equity securities (ie, debt), and limits the scope of the parties from whom a purchaser can seek compensation for misstatements in the prospectus, as discussed above. The purchaser can only seek compensation from the offeror of the securities, the person who sought admission of the securities to the regulated market or the guarantor (and, in that case, only in circumstances where the misstatement was made or the information was omitted from the prospectus that relates to the guarantor or

the guarantee given by the guarantor). No other parties will be liable for compensation.

29 What are the requirements for foreign residents or for holders of securities purchased in other jurisdictions to bring a successful claim in your jurisdiction?

Traditionally, a claim with an international element was governed by the rules of private international law and, therefore, the common law rules under Irish law would apply.

For EU residents, the Brussels I Regulation (Council Regulation 44/2001) states that jurisdiction is to be exercised by the EU country in which the defendant is domiciled, regardless of nationality. Domicile is determined in accordance with the domestic law of the EU country where the matter is brought before the court. In the case of legal persons or firms, domicile is determined by the country where they have their statutory seat, central administration or principal place of business. In the case of trusts, domicile is defined by the court that is considering the case, which applies its own rules of private international law.

The Lugano Convention is a parallel Convention to the Brussels I Regulation, which applies between EU states and European Free Trade Association (EFTA) states.

For non-EU or non-EFTA residents, the Irish courts will apply the common law rules to determine if the Irish courts have sufficient jurisdiction to hear the proceedings.

30 What are the requirements for investors to bring a successful claim in your jurisdiction against foreign defendants or issuers of securities traded on a foreign exchange?

Parties to an investment can provide explicitly in the contract which country or court has jurisdiction should a dispute arise. Further, the parties can agree and provide for in the contract that service of any summons in any such proceeding may be effected at any place within or outside the jurisdiction on any party or person on behalf of any party or in any manner specified or indicated in such contract.

If the contract between the parties does not include a jurisdiction clause, the plaintiff must present a good and arguable case (eg, that the contract was made or the tort was committed in this jurisdiction), in order to obtain the leave of the court to serve the proceedings on a defendant outside the state and proceed with the litigation.

31 How do courts in your jurisdiction deal with multiple securities claims in different jurisdictions?

The Rome I Convention (Regulation (EC) No. 593/2008) provides that, if the parties cannot come to an agreement as to jurisdiction, the country in which the contract is most closely performed will have jurisdiction.

Where a non-EU claim is involved, article 6 of the Hague Convention provides that, if parties agree that a court of a contracting state to the Convention has jurisdiction, then the foreign court where proceedings have also been brought shall suspend or dismiss the proceedings. However, the Convention has not yet entered into force. It was signed (but not ratified) by the European Union (on behalf of all its member states except Denmark) and the United States, while Mexico acceded to it.

Therefore, until the Convention is ratified, common law rules will apply between Ireland and countries not subject to the Rome I Convention. The Irish courts can accept jurisdiction irrespective of the parties' express choice of a foreign jurisdiction if Ireland is the most appropriate forum for the action, having the most real and substantial connection to it (ie, the contract was performed in Ireland and the Irish court has jurisdiction to hear the dispute).

32 What are the requirements in your jurisdiction to enforce foreign-court judgments relating to securities transactions?

Where the foreign-court judgment originates from within the EU, the Brussels I Regulation will apply. An ex parte application grounded on affidavit must be submitted to the Master of the High Court, along with a certificate from the foreign court that granted the judgment certifying that the judgment is enforceable.

The Lugano Convention is a parallel convention to the Brussels I Regulation, which applies between EU states and EFTA states.

For non-EU and non-EFTA originating judgments, the Irish courts rely on the Irish common law rules of enforcement, which permit the enforcement of foreign judgments within certain limits. The court will recognise the foreign judgment if it is satisfied that the papers are in order and that the judgment is one that ought to be recognised and enforced in Ireland. However, there are a number of prerequisites to be met under Irish common law in order for a court to recognise and enforce a foreign judgment. These rules are restrictive in nature and may act as a considerable impediment to having one's foreign judgment recognised by an Irish court.

33 What alternatives to litigation are available in your jurisdiction to redress losses on securities transactions? What are the advantages and disadvantages of arbitration as compared with litigation in your jurisdiction in securities disputes?

Alternatives to litigation would include:

- Mediation – a voluntary, non-binding, private dispute resolution process facilitated by a neutral person (the mediator), which enables the parties to reach a negotiated settlement. A core principle of mediation is that the parties 'control' the outcome, rather than it being imposed upon them. Unless required by contract, parties attend mediation voluntarily. Either party can terminate the mediation at any time.
- Conciliation – very similar to mediation but, whereas mediation is almost always viewed as a facilitative process, conciliation is seen as evaluative on the basis that, if the parties fail to reach agreement, the conciliator will put forward his or her own proposals for the settlement of the dispute in the form of a recommendation.
- Arbitration – a dispute resolution procedure whereby two parties in dispute agree to be bound by a decision of an independent third party (the arbitrator). The role of an arbitrator is similar to that of a judge, but the procedure can be less formal. An arbitrator is usually an expert in his or her own right. Arbitration is private and often informal.

Usually, all of the above alternatives would proceed on a 'without prejudice' basis so that, if unsuccessful, they would not prejudice any parties' rights to then take proceedings forward through the Irish courts.

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