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The Converium decision: promoting the Netherlands as a centre for class settlements

On 17 January 2012, the Amsterdam Court of Appeal in the Converium case confirmed its earlier provisional decision in which it declared the international collective settlement reached between non-US securities holders and two Swiss issuers binding. The interesting aspect of this decision is the Court's finding that it had jurisdiction even though the potentially liable parties were neither domiciled in the Netherlands nor had shares listed on the Amsterdam Stock Exchange, and the vast majority of the shareholders were also based outside the Netherlands.

This ruling will further promote the position of the Netherlands as a centre for the international collective settlement of mass claims and as a forum for non-US securities holders. As such, the Dutch system of class settlements - in conjunction with the US class settlement system - makes the Amsterdam Court of Appeal an attractive venue for parties wishing to reach a global settlement.

Key issues

The Dutch alternative to US class settlements

Until recently, the United States has been the jurisdiction of choice for non-US claimants bringing class action proceedings against US and non-US companies. However, in its decision *Morrison v National Australia Bank* of 24 June 2010, the US Supreme Court restricted the ability of non-US claimants to initiate securities class actions in the United States. For further information on the Morrison case, please click here. For these non-US claimants, the Netherlands is fast becoming a realistic alternative forum.

Under legislation enacted in 2005 on the collective settlement of mass claims (*Wet collectieve afwikkeling massaschades*, the "WCAM"), a foundation or association established under Dutch law that represents (for example) the interests of shareholders who potentially have a claim against an issuer (or for that matter an underwriter) can negotiate a settlement with the issuer and, together with the issuer, submit the settlement agreement to the Amsterdam Court of Appeal (the "Court") for approval. It is not necessary that litigation is first

brought by the shareholders against the issuer. Individual shareholders can appear as defendants in the proceedings in which the settlement is to be declared binding, in order to raise objections. Before approving the settlement, the Court will review whether the shareholders are sufficiently represented by the foundation or association. Several interest groups can jointly represent a class of shareholders. Once the Court approves the settlement, it is binding on all shareholders within the class represented by the foundation or association, except for those who expressly opt-out. This opt-out system is unique in Europe. If a shareholder opts-out, it retains the right to initiate individual proceedings; a shareholder who does not opt-out is bound by the settlement.

In an earlier case involving two Shell entitities, the Court held that it also had jurisdiction to declare the settlement binding on shareholders who were not domiciled in the Netherlands. However, the Shell case had strong links to the Netherlands. In the Converium case, there was hardly any connection to the Netherlands. Nonetheless in this case the Court also has assumed jurisdiction, thereby further opening up the Dutch class settlement system to non-Dutch issuers and shareholders.

Converium: facts of the case

This case concerns two Swiss reinsurance companies: Scor Holding AG (formerly known as Converium Holding AG, "Converium") and Zurich Financial Services Ltd ("ZFS"). Until 11 December 2001, Converium was a subsidiary of ZFS. On that date, ZFS sold all its shares in Converium through an IPO; Converium's shares were listed on the SWX Swiss Stock Exchange, and American Depositary receipts were listed on the New York Stock Exchange. Between 2002 and 2004, Converium announced several times that it was increasing its loss reserves. As a result, Converium's shares declined in value, prompting investors of both companies to bring securities class actions in the United States against Converium and ZFS. A settlement was reached with a certified group of claimants and approved by the US court. However, non-US claimants who purchased Converium shares on a non-US stock exchange were excluded from this certified class by the US court (the “Non-US Claimants”).

The Non-US Claimants, represented by two Dutch interest groups, the VEB (Association of Securities Holders) and the Stichting Converium Securities Compensation Foundation, subsequently reached a settlement agreement with Converium and ZFS. They then requested the Court to declare the settlement binding pursuant to the WCAM. The group of Non-US Claimants consisted of approximately 12,000 persons and companies of which only 200 were Dutch. The majority of the claimants were Swiss residents and companies or UK residents and companies. The remainder of the claimants originate from countries inside or outside the EU.

Provisional ruling on jurisdiction

After receiving the request to approve the settlement binding, it was agreed that the Court should first decide on its jurisdiction in a provisional ruling. The Court ruled – partly using the same line of reasoning as previously in the Shell decision – that it had jurisdiction in respect of all the Non-US Claimants. Firstly, as in the Shell decision, the court based its jurisdiction on the fact that at least some of the shareholders were based in the Netherlands. Secondly, and partly to address criticism that the first argument may be too weak to support jurisdiction in respect of all represented shareholders, the Court put forward an additional basis for its jurisdiction, being that the representative interest groups that were filing the application were Dutch and that the settlement agreement would be performed in the Netherlands as the Dutch Stichting Converium Securities Compensation Foundation would distribute the payments required by the settlement agreement to all Non-US Claimants from its Dutch bank account. This implies that as long as a Dutch interest group is involved in pursuing and performing the settlement agreement and payment is made from the Netherlands, no other connection with the Netherlands is required for the Court to have jurisdiction to declare a settlement agreement binding.

Declaring the settlement binding

All interested parties were notified of the provisional ruling and given the opportunity to object. Several parties made use of this opportunity to question the settlement terms, but none of them raised any objections to the provisional ruling on jurisdiction, which ruling the Court therefore confirmed.

The objections to the settlement terms, including that the settlement amount was unreasonable because the US class settlement amount was higher, were rejected. The Court granted the Non-US Claimants three months to opt-out.

The decision of the Court to declare the settlement binding should in principle be recognised in all EU Member States under the Brussels I Regulation and in Switzerland, Norway and Iceland under the Lugano Convention. This is yet to be tested however.

The day after: implications of the Converium decision

The effect of the Converium decision is that the Dutch class settlement system is arguably available even though none of the potential claimants or potentially liable parties is domiciled in the Netherlands. Jurisdiction can be created by the simple step of setting up a Dutch foundation or association that will enter into the settlement on behalf of the potential claimants. The Court was fully aware that it was creating an alternative (or additional) venue for international class settlements. In its provisional ruling, the Court specifically referred to the limitations on the availability of the US courts as a result of, amongst other, Morrison v National Australia Bank.

With the Converium decision, the Court has confirmed that the Netherlands is fast becoming an important centre for international collective settlement of mass claims. The Netherlands is an attractive forum for non-US securities holders who have been excluded from US class settlements. But any institution confronted with the risk of claims by or on behalf of multiple claimants can also benefit. In line with the Shell and Converium class settlements, the Dutch system of class settlements – in conjunction with the US class action system – can be an attractive instrument for such parties to reach a global settlement with potential claimants irrespective of where legal proceedings are commenced. These parties may thus find a relatively quick and efficient solution to reach a collective settlement of mass claims.

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