



THE NETHERLANDS AS GATEWAY FOR INTERNATIONAL CLASS ACTIONS

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1. INTRODUCTION

The Netherlands is expected to play an important role not just within Europe, but also worldwide in international financial mass claims. In the class action against Swiss insurance company Converium, it seems as if the Amsterdam Court of Appeal has thrown the doors open to 'foreign' mass damage cases. Despite the fact that the large and international group of duped investors numbered only a few Dutch investors, the Court of Appeal felt it had jurisdiction to hear the dispute.¹ The Amsterdam Court of Appeal subsequently applied the rules of the Class Action (Financial Settlement) Act (WCAM) and declared the settlement reached to be universally binding.² This has made the Netherlands an attractive country for European and US shareholders to settle mass damage claims.

2. DUTCH SYSTEM FOR FINANCIAL SETTLEMENT OF MASS DAMAGE

The Netherlands has two sets of regulations, which, on paper, are separate from each other, to facilitate the financial settlement of mass damage. On the one hand there is the 'class action' which is provided for in Article 3:305a of the Dutch Civil Code. This is appropriate if a special interest organisation represents, both according to its articles and actually, the individual, similar interests of victims. The possibility of filing a class action against a party that has allegedly caused damage is subject to an important restriction however: the claim cannot be aimed at securing collective damages to be paid in money.³ Partly for this reason, the law provides for the possibility that a settlement agreement can be declared universally binding on grounds of the Class Action

(Financial Settlement) Act (WCAM). Since 2005, this law allows for the possibility of having a (settlement) agreement on the settlement of mass damages concluded between one or more special interest organisations and the party or parties that caused the damage to be declared universally binding for the entire group of victims by the Amsterdam Court of Appeal. Individual victims can withdraw from the settlement by opting out.

Although the class action and the WCAM are separate procedures, they are not entirely separate from each other. Since claiming collective damages is prohibited in the Dutch class action and the majority of class actions are initiated in order to obtain financial compensation, the class action is often used as a stepping stone for a WCAM procedure held before the Amsterdam

Court of Appeal at a later date. This course of affairs is often called the 'two-phase class action'. The class action (phase 1) is a preliminary step for a subsequent action to obtain damage compensation (phase 2).

3. THE CONVERIUM CASE

The decision in the Converium case⁴ was prompted by a dispute concerning the 2001 flotation of Converium, a company that was previously a 100% subsidiary of Zurich Financial Services Ltd. (hereafter: ZFS). The shares in Converium were listed on the Swiss stock market and the derived American Depository Shares on the NYSE. Between 2002 and 2004, Converium reportedly made misleading announcements, which resulted in a fall in share prices.

Because of the suspected violation of securities law, Securities Fraud Class Actions were filed in a number American courts against the companies involved and their directors, which cases were later consolidated before the United States District Court for the Southern District of New York (District Court). This resulted in two settlements for the US investors. However, the District Court declared itself incompetent to hear the claims of investors who bought shares in Converium on the Swiss stock market or another securities market outside the US and who were resident or based outside the US at the time of the purchase.⁵ The settlement agreements that Converium and ZFS asked the Amsterdam Court of Appeal to declare universally binding therefore pertain to the compensation for shareholders who were excluded from the US settlements. For these investors, Dutch lobby organisations reached another two collective settlements with Converium and ZFS. These are worldwide settlements involving an estimated 12,000 shareholders. Just 2% of this group holds Dutch nationality.

On 9 July 2010 Converium, ZFS, the Stichting Converium Compensation Foundation (the Foundation) – which had been specifically set up for this purpose, and VEB (Association of Stockholders) filed a petition with the Amsterdam Court of Appeal pursuant to Article 7:907 of the Civil Code. The petition aimed to have the two

agreements (settlements) for the compensation of damage suffered by non-US shareholders declared universally binding. On 12 November 2010 the Court of Appeal passed an interim order on its jurisdiction with the provisional finding that the Court of Appeal was competent to hear the request that this 'international collective settlement' be declared binding. The Court of Appeal considered relevant here the fact that neither Europe nor the United States provides an

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other forum for non-US shareholders to have their settlement declared binding. In its final decision of 17 January 2012, the Court of Appeal upheld its preliminary jurisdiction ruling without providing further reasoning.

With this, its sixth WCAM final decision, the Court of Appeal underscored that it applies the WCAM and is willing, when assessing a settlement, to take into account its possible international character. The Court of Appeal thus definitively put the Dutch WCAM route on the international legal map.

4. F-CUBED CLAIMS: REASONS FOR THE NETHERLANDS AS GATEWAY FOR INTERNATIONAL MASS DAMAGE CLAIMS

F-cubed claims are suits brought by foreign investors who have purchased shares of a foreign company on a foreign exchange and who then try to have their losses compensated via US courts (foreign-cubed cases). The US Supreme Court explicitly gave its view on this in the decision in *Morrison versus National Australia Bank*.⁶ In this case, the US Supreme Court declared the court incompetent with regard to damage claims from non-US investors in non-US companies on non-US stock markets.

The fact that the Amsterdam Court of Appeal precisely did not take the same line in the Converium case and considered itself competent to hear international disputes shows that the Dutch mass damage regulations provide an important opportunity for complex, multijurisdiction class actions. There are two sides to this. First of all, a class action and the ensuing settlement can be seen in the Netherlands as an opportunity to have financial class actions of (non-US) shareholders taken care of worldwide in combination with a US class action/settlement. This is particularly the case if there are obstacles to a class action in the United States. A class action in the Netherlands can also play an important strategic role if the shares of a company are (entirely) listed on a European stock market. A US judge will usually not handle these damages claims, even if there are US investors involved. A class action in the Netherlands can enable the company and/or the director being sued to settle out of court with the (European and American) investors and arrive at a collective settlement of the damages claims. The developments above make the WCAM an interesting instrument for US shareholders. Not only because US investors are seeking ways to have their non-U.S. losses compensated⁷, but also ways to enter the European market.⁸

¹ Amsterdam Court of Appeal, 12 November 2010, LJN BO3908 (Converium I).

² Amsterdam Court of Appeal, 17 January 2012, LJN BV 1026 (Converium II).

³ In relation to this, see for instance *Parliamentary Papers II* 1991/92, 22486, no. 3.

⁴ Amsterdam Court of Appeal, 17 January 2012, LJN BV 1026 (Converium II).

⁵ The US Supreme Court had limited the extraterritoriality of the federal securities legislation earlier in the case *Morrison versus National Australia Bank*, 561 US, (2010).

⁶ *Morrison v. National Australia Bank Ltd.*, 547 F.3d 167 (2d Cir. 2008).

⁷ See D. Bario, Dutch Treat? With Door to U.S. Courts Closed by *Morrison*, Securities Class Action Lawyers Sue Fortis in Holland, Am. Law. Litig. Daily (10 January 2011), <http://www.law.com/jsp/tal/digestTAL.jsp?id=1202477589137&Dutch_Treat_With_Doors_to_US_Courts_Closed_by_Morrison_Securities_Class_Action_Lawyers_Sue_Fortis_in_Holland>.

⁸ M. Palmisciano, "The Dutch option: the effects of domestic restriction and foreign acceptance of class litigation on American plaintiffs," *Boston College Law Review* 2012, p. 1847.



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