Converium Decision by Dutch Court Promotes European Venue for Binding Settlement of Mass Claims

The Amsterdam Court of Appeal's recent decision in *Converium Holdings AG* may signal the emergence of Dutch courts as a forum in which parties can settle cross-border mass claims, subject only to opt outs. In November 2010, that court held that it could declare binding a proposed settlement in a case in which 12,000 investors, only 200 of whom were from the Netherlands, alleged securities fraud on the part of Converium, a Swiss reinsurer with no securities listed on Netherlands-based exchanges. *Scor Holdings AG (f/k/a Converium Holdings AG)*, Gerechtshof Amsterdam [HoF] [Amsterdam Court of Appeal], Amsterdam, 12 Nov. 2010 NJ—(Neth.) The decision notably expanded the jurisdiction the same court had exercised a year before in approving a settlement between Royal Dutch Shell and a class of non-U.S. investors who alleged that Shell had misstated its proven reserves. *Shell Petroleum N.V./Dexia Bank Nederland N.V.*, Gerechtshof Amsterdam [HoF] [Amsterdam Court of Appeal], Amsterdam, 29 May 2009 NJ 506 (Neth.) (hereinafter "*Shell Petroleum*").

The significance is that the Netherlands is the only European country that, like the United States, provides for the binding settlement of mass claims. Although *Converium* will be provisional pending a fairness hearing later this year, it will likely become final, thus making the settlement binding, at a minimum, in all EU member states, as well as Switzerland, Iceland, and Norway, under the Brussels I Regulation and the Lugano Convention.

The Amsterdam Court of Appeal appears to be acting consciously to create a forum for cross-border mass claims; it referenced limitations imposed, for example, by the U.S. Supreme Court in *Morrison v. National Australia Bank Ltd.*, __U.S.__, 130 S. Ct. 2869 (2010), restricting the extra-U.S. application of Section 10(b) of the Securities Exchange Act. *Id.* at 2884 (holding that Section 10b-5 applies "[o]nly [to] transactions in securities listed on domestic exchanges, and domestic transactions in other securities"). Aggrieved shareholders already appear to have recognized *Converium's* significance: A foundation representing a global consortium of shareholders filed a securities fraud class action on January 10, 2011, in the Utrecht Civil Court against Fortis—once the largest financial institution in Belgium and the Netherlands that collapsed in spectacular fashion following its ill-fated acquisition of ABN Amro. Moreover, in the Fortis case, shareholders are not presenting a proposed settlement, but rather are raising claims for adjudication.

Overview of Dutch Class Action System

Unique to European legal systems, Dutch law provides rudimentary elements of a class action system. The two most important provisions are the Dutch Act on the Collective Settlement of Mass Claims (Wet collectieve awkikkeling massaschade or "WCAM") and Article 3-305a of the Dutch Civil Code, authorizing parties to bring collective actions.

WCAM, passed in 2005, allows parties to petition Dutch courts to declare a mass settlement binding on a class or classes of persons whose members suffered similar injury. See BW (Civil Code) Art. 9:907. Under WCAM, parties to a prior-negotiated settlement may petition the Amsterdam Court of Appeal—a court akin to a U.S. federal circuit court—to declare the agreement binding on a class whose members suffered similar damages. Parties to the settlement must include both those that inflicted the harm and will pay compensation and a foundation organized under Dutch law to represent the interests of the class and administer the settlement. *Id.* The court may reject a proposed settlement if the interests of the persons on behalf of whom the settlement was concluded are not adequately safeguarded or if the foundation is not adequately representative of the class. See *id.* at Art. 9:707(3).

Although WCAM authorizes the settlement of mass claims, it provides no authority to bring claims on behalf of a class. Parties seeking to bring a collective action in Dutch courts must do so under Article 3:305a of the Civil Code. Like WCAM, Article 3:305a allows a foundation organized for the express purpose of representing the legal interests of a class to bring claims on its behalf. Article 3:305a does not, however, provide for the award of compensatory damages. As a result, collective actions are generally styled as declaratory judgment actions to determine certain facts and issues of liability on a class-wide basis. Once liability is established, the foundation generally moves to settle claims on a class-wide basis under WCAM.

Transnational Securities Fraud Class Actions in Dutch Courts: Shell Petroleum to Converium

Dutch courts first waded into the field of transnational securities fraud class actions in *Shell Petroleum*, when the Amsterdam Court of Appeal issued a landmark decision declaring binding a $352 million settlement between Royal Dutch Shell (and its affiliates) and non-U.S. shareholders. To recover for losses incurred as a result of Shell's misstatement of its oil reserves, Shell's non-U.S. shareholders attempted to join a U.S. class action filed in January 2006. *In re Royal Dutch Shell Transp. Sec. Litig.* 522 F. Supp. 2d 712 (D.N.J. 2007). However, even under the more forgiving conduct and effects jurisdictional test then

applied by U.S. federal courts, the non-U.S. shareholders faced an uphill battle even to obtain a hearing in a U.S. court. As foreign shareholders suing a foreign corporation whose stock they purchased on a foreign exchange, their claims had little, if any, connection to the U.S.

The existence of jurisdiction was never determined by a U.S. court. Instead, frustrated in their efforts to negotiate a global settlement, Shell's attorneys approached the class of non-U.S. shareholders and separately negotiated a $352 million settlement. See Robert J. Giuffra, Jr., *Dutch Case Has Implications for Global Class Actions*, Harv. Forum on Corp. Governance, June 6, 2009, available at http://blogs.law.harvard.edu/corpgov/2009/06/21/dutch-decision-has-implications-for-global-class-actions/.

To enforce that settlement, the parties turned to WCAM. The non-U.S. shareholders joined a foundation organized under Dutch law and petitioned the Amsterdam Court of Appeal to use its authority under WCAM to declare the settlement binding. Five other applicants joined the petition: Shell Petroleum N.V.; Shell Transport and Trading, a Shell subsidiary incorporated in the U.K.; two Dutch foundations representing the interests of pension funds; and the Dutch Investors' Association, a private association that acts on behalf of Dutch shareholders generally but did not represent individual investors.

The central question considered jurisdiction because the proposed settlement was the first attempt to apply WCAM to a significant number of claimants domiciled outside the Netherlands. *See* Helene Van Lith, *The Dutch Collective Settlements Act and Private International Law*, at 19-22 (2010). Because Shell is Dutch, the court was primarily concerned with whether it could exercise WCAM jurisdiction over the non-U.S. shareholders—many of which were domiciled outside the Netherlands. As to shareholders domiciled in the Netherlands, elsewhere in the EU, Norway, Switzerland, and Iceland, the court declared itself competent to declare the settlement binding under the Brussels Regime—the set of rules governing which European courts have jurisdiction in civil or commercial legal disputes. See *Shell Petroleum*, ¶¶ 5.18, 5.26-5.27. The assertion of jurisdiction over shareholders residing elsewhere posed a more difficult question, but the court based jurisdiction over them on the fact that five of the six applicants seeking to have the settlement declared binding were domiciled in the Netherlands. *Id.*, ¶ 5.16. Having found jurisdiction, the Amsterdam Court of Appeal then declared the Shell settlement binding on all class members that failed to opt-out in a timely fashion. *Id.*, ¶ 9.

Although *Shell Petroleum* drew attention, observers were uncertain how far Dutch courts would extend their reach over the settlement of mass claims. *Shell Petroleum*, after all, involved Shell, a Dutch company with shares traded on Euronext Amsterdam, and a class of investors predominately domiciled in the Netherlands.

Converium was significant because the parties and claims had far less connection to the Netherlands. The allegations of securities fraud arose after Converium, a Swiss reinsurer with shares listed on the Swiss Exchange and the NYSE, restated its available loss reserves, causing a drop in stock price. Shareholders filed a class action on behalf of all investors in the Southern District of New York. *In re SCOR Holding (Switz.) AG Sec. Litig.*, 537 F. Supp. 2d 556, 569 (S.D.N.Y. 2008). The court, however, certified only a limited class of Converium shareholders owing to concerns over subject matter jurisdiction and dismissed the claims of any non-U.S. shareholder that had purchased claims on the Swiss Exchange.

As in *Shell Petroleum*, the *Converium* parties turned to WCAM. They formed a foundation to represent the interests of non-U.S. Converium shareholders in settlement negotiations and to present the settlement to the Dutch court for approval alongside Converium's parent, SCOR Holdings AG. Notwithstanding that none of the potentially liable parties and few of the shareholders (200 of 12,000) were domiciled in the Netherlands, the court ruled that it had jurisdiction to declare the settlement binding. *Converium*, ¶ 3. The court's action implied strongly that *Shell Petroleum* had not set an outer limit to the court's jurisdiction. Its decision also demonstrated awareness that it was making available a forum where none might otherwise be available. It referenced the Supreme Court's decision in *Morrison*, noting that to refrain from exercising jurisdiction would leave non-U.S. shareholders that had purchased Converium shares on the Swiss Exchange without a court in which to bring their claims. *Id.*, ¶¶ 2.6-2.7.

The court began its analysis by ruling that because the settlement agreement would be performed in the Netherlands (*i.e.*, the settlement would be paid there), provisions of the Brussels Regime conferring jurisdiction to enforce contracts in the place of performance provided the initial grant of jurisdiction. *Id.*, ¶ 2.8 The Brussels Regime also allowed the court to declare the settlement binding between shareholders domiciled in the Netherlands, elsewhere in the EU, Norway, Switzerland, and Iceland. *Id.*, ¶ 2.12. To assert jurisdiction over shareholders residing elsewhere, the court relied exclusively on the fact that, as required by WCAM, a foundation organized under Dutch law represented the class of non-U.S. shareholders and would

administer the settlement. *Id.* In the court's view, the foundation's connection to the Netherlands, along with the fact that the settlement would be executed in the Netherlands, sufficed to authorize the exercise of jurisdiction. *Id.*, ¶ 3.

Converium thus dramatically expanded the potential reach of the Amsterdam Court of Appeal to settle mass claims. After *Converium*, the presence of a foundation organized under Dutch law to represent shareholders seems to be the only prerequisite to the exercise of jurisdiction to declare a binding settlement. Although *Converium* does not make the point explicitly, its logic suggests that Dutch courts may exercise jurisdiction over transnational mass claims whenever WCAM itself is satisfied—*i.e.*, so long as the interests of the persons on behalf of whom the settlement was concluded are adequately safeguarded and the foundation's membership is adequately representative of the class of injured persons. See BR (Civil Code) Art. 9:707(3).

Current State of Play

Converium's expansion of Dutch jurisdiction should prompt shareholders and foreign securities issuers alike to take note that Dutch courts may be filling the void created by *Morrison*. As noted above, aggrieved Fortis shareholders have already sought to build on Converium and capitalize on the continued opening of Dutch courts to cross-border class actions. Tellingly, Morrison incorporates all the claims brought by the global class of investors in a suit previously dismissed in the U.S. federal courts. See *Copeland v. Fortis*, 685 F. Supp. 2d 498 (S.D.N.Y. 2010). To press their claims in the Dutch courts, the Fortis shareholders have joined a foundation, officially known as the Stichting Investor Claims Against Fortis ("SICAF"), to pursue an action under Article 3-305a to obtain a class-wide declaratory judgment that Fortis violated duties owed to investors. *See* http://investorclaimsagainstfortis.com.

SICAF's lawsuit seeks to approximate a U.S.-style class action and is the first of its kind in that it is not presenting a pre-packaged settlement. Instead, it is an Art. 3:305a collective action claim unaccompanied by a request under WCAM for approval of a settlement. If it is successful at the declaratory judgment stage, SICAF will have bound its members to participate in any settlement negotiated under WCAM. Given the expansive breadth of Dutch jurisdiction under *Converium*, SICAF's suit may portend a wave of shareholder-plaintiffs turning to Dutch courts to press cross-border mass claims, including ones that are barred in the U.S.