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Dutch Court Approves Collective Settlement of Fortis Shareholders' Claims

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The Amsterdam Court of Appeal has approved a €1.3 billion collective settlement of claims asserted on behalf of shareholders of the former Fortis (now Ageas). The July 13, 2018 decision again shows that the Dutch Act on Collective Settlement of Mass Claims (the "WCAM") can be used to resolve transnational disputes regardless of whether those claims could be litigated adversarially on a classwide basis in the Netherlands or elsewhere.

Background

The proposed settlement arose from shareholder litigation filed against Fortis in Belgium, the Netherlands, and elsewhere following the 2007/2008 financial collapse. In the past, global securities problems of this type had often been resolved in U.S. courts under the federal securities laws. However, in 2010, the U.S. Supreme Court held in *Morrison v. National Australia Bank* that the federal securities laws apply only to misstatements or omissions made in connection with the purchase or sale of (*i*) securities listed on a U.S. exchange or (*ii*) any other securities in U.S. transactions. Thus, persons who had purchased securities of Fortis (a Belgian/Dutch issuer) in non-U.S. transactions could not pursue their claims under the U.S. securities laws.

In 2005, the Netherlands enacted the WCAM, which authorizes classwide settlement of claims on an opt-out basis – unlike most other non-U.S. procedural rules, which, if they allow classwide resolutions at all, generally do so only on an opt-in basis. The settling parties enter into a settlement agreement and file a petition asking the Amsterdam Court of Appeal (which has exclusive jurisdiction over WCAM proceedings) to approve the proposed settlement and declare it binding on the class members, who are viewed as defendants in the petition proceeding. The signer(s) of the settlement on behalf of the class members must be one or more foundations (potentially including an ad-hoc or special-purpose vehicle created to enter into the settlement), rather than one of the allegedly injured class members.

The WCAM procedure is somewhat analogous to what U.S. lawyers know as a settlement class action, but with at least two key differences: (*i*) the WCAM cannot be used to *litigate* claims on a classwide basis, but only to *settle* them, and (*ii*) class members do not need to decide whether to opt out until *after* objections have been filed and the court has approved settlement.

The WCAM assumed a truly international scope in two global securities settlements: one involving Royal Dutch Shell (an Anglo/Dutch company) in 2009, and another involving the former Converium Holding AG and its parent (both Swiss companies) in 2012. Both settlements involved significant numbers of non-Dutch shareholders. In the *Converium* case, for example, only about 3% of the shares at issue were owned by Dutch residents. But the Amsterdam Court of Appeal (in different panels of three judges) approved both settlements and upheld jurisdiction over the global classes.

The Amsterdam Court of Appeal has invoked several bases to assert jurisdiction over transnational classes:

- For Dutch class members, jurisdiction exists under article 4 of the European Union's Brussels I Regulation, which provides that domiciliaries of a Member State can be sued in the courts of that state.
- For domiciliaries of other EU countries, two jurisdictional bases exist:
    - Brussels I Regulation article 8(1) says that, in multi-defendant cases, domiciliaries of a Member State can be sued in a state where at least one defendant is domiciled if "[t]he claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of

irreconcilable judgments resulting from separate proceedings." This provision means that, as long as any class members (who are viewed as defendants here) are Dutch, the non-Dutch EU class members may also be sued in the Netherlands because all class members are subject to the same declaratory proceeding to bind them to the settlement and to limit the alleged wrongdoer's liability.

    - Brussels I Regulation article 7(1)(a) says that, for matters relating to a contract, a domiciliary of a Member State may be sued in another Member State if that other state is the place where the contract will be performed. A WCAM contract can be and usually is structured to be performed in the Netherlands.

- For domiciliaries of Lugano Convention countries, the Lugano Convention has provisions similar to those of the Brussels I Regulation.
- For domiciliaries of other countries, article 6 of the Brussels I Regulation says that the Member State's law (*i.e.*, Dutch law) applies. Article 107 of the Dutch Code of Civil Procedure allows jurisdiction over codefendants if sufficient connectivity exists between or among the claims – so article 107 is similar to article 8(1) of the Brussels I Regulation.
    - Jurisdiction also exists over non-EU/EVEX class members for two other reasons: one or more petitioners (such as the foundation that is a party to the settlement) are domiciled in the Netherlands, and the matter is sufficiently connected to the Dutch legal order.

The Ageas Settlement

The Ageas settlement was proposed on behalf of persons who had purchased or held Fortis shares between February 2007 and October 2008. The settlement divided the class of eligible shareholders into Active Claimants and Non-Active Claimants. In the original proposal, Active Claimants – who had initiated (or had joined organizations that had initiated) timely proceedings against Ageas – were to receive a larger portion of the settlement amount than would Non-Active Claimants, who had not taken those steps.

The Amsterdam Court of Appeal disapproved of this allocation in a June 2017 decision. One of the judges on the panel (Judge Van Achterberg) had also sat on the panels that had ruled on the Shell and Converium settlements. The court did not reject differential treatment among class members based on *substantive* differences in their claims, but it held that differences in compensation could not depend solely on whether a class member was active or inactive in pursuing litigation. However, the court did not object to incentive awards for lead or active claimants as long as those awards are related to the claimants' reasonable costs and expenses.

Determining the reasonableness of those costs, however, can be difficult. In Europe, unlike in the United States, multi-party or collective actions often are not financially viable unless allegedly injured persons step forward and register their claims (*i.e.*, opt in) – a process that requires significant administrative investments. The court wanted to be informed about the costs and expenses incurred by the representative organizations and their success fees in order to determine whether the group members' interests were being adequately protected.

A complicating factor was that the representative organizations propounding the Fortis settlement on behalf of the class had different governance structures and business models. The group included (*i*) ad-hoc foundations established solely to effectuate the proposed settlement (FortisEffect, SICAF), (*ii*) a pre-existing investor association that cross-finances its cases, not all of which are damages actions (the Dutch investor association known as VEB), and (*iii*) a commercial organization (Deminor). The ad-hoc foundations and Deminor apparently are externally financed by commercial litigation funders. VEB received some negative press coverage for negotiating a success fee of €25 million – an amount not directly related to its activities in this particular case – while portraying itself as a non-profit entity. VEB has been pivotal in the WCAM global settlements to date and has suggested to the Amsterdam court that no such settlement would be possible without VEB's blessing.

The parties then amended the settlement to try to address the court's concerns. Ageas increased the settlement amount by €100 million (from €1.204 billion to €1.3 billion), and the parties agreed to give Active and Non-Active Claimants the same base amounts of compensation, with Active Claimants being entitled to additional compensation of 25% to cover their costs. However, the parties did not amend the representative organizations' fees.

On February 5, 2018, the Court of Appeal issued a second interim ruling, ordering the representative organizations to improve their submissions about their business models. The court held further hearings in March to discuss those additional submissions and the legal position of the shareholders.

The Court's Final Decision

The court approved the proposed Fortis settlement on July 13, 2018, with one exception: the settlement agreement was not declared binding as to VEB itself. According to its articles of association, VEB is supposed to represent *all* Dutch shareholders, not just its own members (who pay membership fees), and certainly not just its members who purchased Fortis shares. The court saw a conflict in VEB's negotiating an additional 25% only for its own members while purporting to represent all investors, including "non-active" ones. The court did not believe that its decision should promote membership in VEB.

Some highlights of the court's ruling include the following:

- In the past, parties to WCAM settlements had been able to keep fee discussions private by addressing fees in separate documents. The Court of Appeal has now warned that fees must always be part of the court's review of a proposed WCAM settlement, regardless of whether the parties have expressly included fee provisions in the settlement documents.
- The court was satisfied in this particular case with the level of information (or lack thereof) provided by some of the representative organizations concerning the identity of the external funders and the terms of the financing agreements, but the court warned that, in future cases, it might require fuller disclosure of that information.
- Until now, the general view had been that only non-profit organizations (ad hoc or pre-existing) could act as petitioners for the class in a WCAM proceeding. But we

now know that this assumption might not always be true. Deminor, one of the petitioners, is a commercial organization. However, the court was not faced with a situation where the *only* petitioner acting for the class was a commercial entity. The other petitioners for the class included two ad-hoc non-profit foundations and VEB. The safer practice might be to include at least one non-profit organization as a petitioner.

- Until now, people had wondered whether a global securities settlement could be concluded under the WCAM without VEB's blessing and participation. The court's critical comments about VEB could reduce VEB's role in future WCAM settlements – although the court did approve VEB's €25 million fee.
- The settlement provides a recovery not only to investors who purchased Fortis shares during the relevant period, but also to those who held shares during that time – although the holders will receive a lower percentage of recovery than will the purchasers. The court appeared to be skeptical about the speculative nature of holders' claims, but was willing to approve the allocation of settlement funds to holders inasmuch as the percentage of recovery was low. This decision marks the first time the court has addressed holders' claims, although the ruling was not issued in an adversarial proceeding and thus does not mean that the court would sustain such claims in future litigation.

Class members will now be given notice of the settlement and a chance to opt out of it.

Implications

The Amsterdam court's decision confirms that the WCAM remains a viable way to settle – on a transnational, opt-out basis – potential securities and other claims that might not be litigable or resolvable on a classwide basis in many countries. The WCAM has received much scrutiny from commentators over the past decade, but the Dutch legislature and the Amsterdam Court of Appeal have continued to uphold its use.

The potential availability of a Dutch forum has become more important as the United States has retreated from serving as an international dispute-resolution jurisdiction. We will see whether other litigants turn to the WCAM in coming years to resolve transnational problems that cannot be settled or litigated in U.S. courts.

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