Legal Alert

DE BRAUW BLACKSTONE WESTBROEK

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Converium: Dutch court declares an international collective settlement binding

On 17 January 2012, the Amsterdam Court of Appeal declared an international collective settlement binding in a case where none of the potentially liable parties and only a limited number of the potential claimants were domiciled in the Netherlands. This decision confirms the Court of Appeal's earlier provisional decision to assume international jurisdiction. The decision will in principle have to be recognised in all European Members States, Switzerland, Iceland and Norway. The Netherlands is the only European country where a collective settlement can be declared binding on an entire class on an “opt out” basis. This makes the Netherlands an attractive venue for settling international mass claims, irrespective of whether any litigation has taken place in the Netherlands. This option has become more important since the U.S. Supreme Court's decisions in Morisson v. National Australia Bank and Hoffman-La Roche v. Empagran.

See for more general information on the Dutch Act on the Collective Settlement of Mass Claims (*Wet collectieve afwikkeling massaschade*; the "WCAM"): Ruud Hermans and Jan de Bie Leuveling Tjeenk, International Class Action Settlements in the Netherlands since Converium, in The International Comparative Legal Guide to: Class & Group Actions 2012.

Background of the case

Converium Holding AG (“Converium”) is a Swiss reinsurance company (currently known as SCOR Holding AG). Converium was a wholly owned subsidiary of Zürich Financial Services Ltd (“ZFS”) until 2001, when ZFS sold all its Converium shares through an IPO. Converium shares were listed on the SWX Swiss Exchange and Converium ADSs were listed on the New York Stock Exchange. Converium’s share price declined after the company announced increases in its loss reserves in the period from 2002 through 2004. These announcements led to securities class actions in the United States against Converium and ZFS on behalf of a worldwide putative class. The United States District Court for the Southern District of New York (the “U.S. Court”) certified a class consisting of all U.S. persons who had purchased Converium securities on any exchange, as well as all persons - regardless of their residence - who had purchased Converium securities on a U.S. exchange (the "U.S. Purchasers"). The U.S. Court excluded from the class all non-U.S. persons who had purchased Converium securities on any non-U.S. exchange (the “Non-U.S. Purchasers”). The U.S. class action was settled and these settlements (the "U.S. Settlements") were approved by the U.S. Court. Both Converium and ZFS then settled the potential claims of all Non-U.S. Purchasers with a Dutch foundation representing the Non-U.S. Purchasers (the "Non-U.S. Settlements"). The Non-U.S.

Purchasers were predominantly domiciled in Switzerland and the U.K. Only a few were domiciled in the Netherlands. De Brauw acted as legal counsel to ZFS in its successful application to the Amsterdam Court of Appeal to declare this settlement binding.

Decision

The Amsterdam Court of Appeal (the "Court") confirmed its provisional decision on jurisdiction which followed substantially the same line of reasoning as its Shell decision. But the Converium settlement is less connected to the Netherlands than the Shell settlement. In Converium, none of the potentially liable parties and only a limited number of the interested persons were domiciled in the Netherlands. The Court emphasised the significance of a Dutch foundation representing the interested persons and having to distribute the settlement relief under the settlement agreement. This suggests that even without any interested persons domiciled in the Netherlands the Court could have jurisdiction to declare the settlement binding. In its earlier provisional decision, the Court explicitly referred to the limitations for the U.S. courts to do the same in securities and anti-trust cases as a result of the U.S. Supreme Court's decisions in Morrison v. National Australia Bank and Hoffman-La Roche v. Empagran.

In Converium, a number of defendants argued that the amount of settlement relief for the Non-U.S. Purchasers under the Non-U.S. Settlement concluded by Converium was unreasonable, because the amount of settlement relief for the U.S. Purchasers under the U.S. Settlements was relatively higher. The Court dismissed this objection on the ground that the legal position of the Non-U.S. Purchasers differed substantially from the legal position of the U.S. Purchasers, because the Non-U.S. Purchasers had been excluded from the class by the U.S. Court and no litigation by Non-U.S. Purchasers had been initiated outside of the U.S.

The same defendants also argued that the amount of settlement relief was unreasonable, because the fees for U.S. plaintiffs' lead counsel, to be deducted from the settlement relief, were too high. The Court dismissed this objection on the ground that the work in connection with the settlement had been carried out for a substantial part within the U.S. jurisdiction by U.S. law firms and that what is considered customary and reasonable in the U.S. may be taken into account in applying the reasonableness test under Dutch law.

The Court also ruled that the representativity test had been met because the Dutch foundation representing the interested persons had various participants and supporters, including shareholder associations and institutional shareholders, domiciled in Switzerland and the U.K., where most known Non-U.S. Purchasers were domiciled.

Implications

The Netherlands is the only European jurisdiction offering a procedure to declare a collective settlement binding on all class members on an "opt out" basis. Using the Shell decision as a precedent, the Converium decision confirms that the Amsterdam Court not only has jurisdiction to declare an international collective settlement binding on all class members, irrespective of their domicile, but also has the appetite to facilitate such settlements even if the parties to the settlement and the class members only have a limited connection to the Netherlands.

All EU Member States, Switzerland, Iceland and Norway will in principle have to recognize the Converium decision. However, no case law on this issue exists at this point. Whether other countries will also recognize it, will depend on local law.

The Converium decision confirms that the Netherlands is Europe's most attractive venue for facilitating international settlements. It is irrelevant in this context whether the settlement forms the outcome of class action litigation, and if it does, in which country the litigation took place.

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