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Jurisdiction of the Amsterdam Court of Appeal in the Converium Settlement Case

by Martin George on December 4, 2010

[Guest post written by Thijs Bosters LL.M., a PhD Researcher (Private International Law and Collective redress) at Tilburg University.]

After the *Morrison v. NAB* decision of last June, the question was raised how and where an f-cubed case should be filed in the future. It has been proposed that, for example, the Canadian class action or the Dutch collective settlement procedure could serve as alternatives in cross-border securities mass disputes. What makes the Dutch collective settlement procedure such an interesting alternative is that a settlement can be declared binding by the Amsterdam Court of Appeal on all persons to which it applies according to its terms. In this way, all plaintiffs can be covered and a mass dispute can be resolved through a single action (for more information on the Collective Settlement Act (*Wet collectieve afwikkeling massaschade*), see the The Global Class Actions Exchange report of Stanford Law School). With the 2009 Shell collective settlement, the Dutch Act proved that it can be instrumental in the resolution of cross-border securities mass disputes. The *Shell* case, however, was only a partially f-cubed case, as quite many of the investors involved were Dutch.

Converium

On 12 November 2010, the Amsterdam Court of Appeal assumed preliminary jurisdiction in the "full f-cubed" *Converium* case (the Dutch text can be found here). This case revolves around the Swiss reinsurance company Converium Holding AG (currently known as SCOR Holding AG). In late 2001, Zürich Financial Services Ltd, of which Converium was a full subsidiary, sold its shares through an initial public offering. The shares were listed on the SWX Swiss Exchange in Switzerland and as American Depositary Shares (ADSs) on the New York Stock Exchange. Between 7 January 2002 and 2 September 2004, Converium made several announcements which led people to believe that Converium had deliberately underestimated the insurance risks when floating its reinsurance unit. The existing reserve deficiency forced Converium to announce that it would take a charge of between $ 400 and $ 500 million to increase its reserve. This, combined with the downgrade of the company's credit rating by Standard & Poor's in response to the reserve increase, caused a massive drop of the share value.

In October 2004, the first of several securities class action complaints was filed against Converium, ZFS, and certain of Converium's officers and directors. Eventually, the filed class actions were consolidated before the United States District Court for the Southern District of New York. This court, however, excluded from the class action all non-U.S. persons who had purchased Converium shares on any non-U.S. exchange, leaving them empty-handed. Because of the positive way the Shell case was being resolved in the Netherlands, Converium and ZFS agreed that a settlement would be sought for these non-U.S. purchasers through the Dutch collective settlement system.

Converium, ZFS, the special Converium Securities Compensation Foundation (which represents the group of individual purchasers that were excluded from the U.S. class), and the

Dutch Investors Association agreed on a settlement on 8 July 2010. These parties subsequently filed an application with the Amsterdam Court of Appeal to declare the settlement binding. Because there were only approximately 200 known Dutch individual purchasers (out of a total of 12,000), who formed the most important link to use the Dutch system, the Court first wanted to decide whether this link was enough to assume jurisdiction over the case.

Jurisdiction Amsterdam Court of Appeal

The Court first examined whether it could assume jurisdiction to effectuate the settlement and subsequently whether it was also competent to bind all the purchasers named in the settlement. This would prevent plaintiffs from filing a claim for damages in the future.

As the settlement only takes effect if it is made binding, it is not possible to directly use Article 5(1) Brussels I/Lugano to determine which court has jurisdiction because the place of performance, the main requirement of this provision, is unknown. However, in *Effer v. Kantner*, the court also based its jurisdiction on Article 5(1) Brussels I/Lugano in a dispute concerning a contract which had not been concluded yet, so the place of performance was unknown as well. Because the Converium settlement is aimed at a certain performance that will take place in the Netherlands, namely, payment of damages by the Dutch special compensation foundation, the Dutch Court of Appeal can assume jurisdiction.

To prevent parallel and irreconcilable litigation, the Amsterdam Court of Appeal based its jurisdiction to declare the settlement binding on Article 6(1) Brussels I/Lugano. The Court stated that the claims of the various purchasers are so closely connected that it is expedient to hear and decide on them together. As the Court already had jurisdiction over the Dutch purchasers, Article 6(1) Brussels I/Lugano makes it possible to assume jurisdiction in the combined case.

Although the majority of the purchasers are domiciled in one of the Brussels I Regulation/Lugano Convention member states, there are also purchasers that are not. In these cases, the Dutch Code of Civil Procedure decides whether a Dutch court has jurisdiction. According to this Code, a court can assume jurisdiction over cases in which one or more purchasers are domiciled in the Netherlands. In the *Converium* case, the Compensation Foundation and the Investors Association are domiciled in the Netherlands. Moreover, because the settlement will be executed in the Netherlands, there is a sufficient connection with the Dutch jurisdiction for the Amsterdam Court of Appeal to also assume jurisdiction for those cases which involve non-Brussels I/Lugano purchasers.

Based on the above-mentioned provisions, the Amsterdam Court of Appeal may assume jurisdiction in the *Converium* case. Article 6 ECHR and the principle of *audi alteram partem*, however, prevent the Court from making a final decision on its competence. As not all the purchasers have been summoned yet, the Court will be forced to stay the proceedings (Article 26(2) Brussels I/Lugano) till they have been given proper notice. Until then, the ruling will be provisional. During the fairness hearing, which still has to be scheduled but will probably take place in the second half of 2011, the purchasers may still advance a different view on the jurisdiction issue.