The Netherlands: A New Securities Settlements Hub?

By Peter Kamminga

Non-U.S. investors who want to settle claims related to securities fraud have a new forum for obtaining approval of their settlements: the Court of Amsterdam.

In November 2010, a class of European and other non-U.S. investors settled claims in two securities class action suits for a total of 58.4M USD combined. The plaintiffs (all non-U.S. residents) were shareholders of Converium/SCOR who purchased Converium Holding AG common stock on the Swiss Stock Exchange (SWX) and other stock exchanges located outside the United States between January 7, 2002, and September 2, 2004. The shareholders sought damages from Zurich Financial Services, Ltd., for providing misleading financial advice related to the loss of value in Converium stock during the period of 2002 to 2004.

On January 17, 2012, a little over a year after both parties signed a settlement agreement, the Amsterdam Court of Appeals gave final approval to the settlement, confirming its earlier provisional judgment on jurisdiction. The news got quite some coverage among insurers and securities class action lawyers worldwide, especially in the U.S.

For the Dutch, this did not come as a complete surprise, as the court approved a similar settlement agreement related to Shell Oil in April 2007. This case is different because, unlike in the case of Shell (a half-Dutch company), the Dutch interests in Converium were almost nonexistent. None of the potentially liable parties was domiciled in the Netherlands, and only a small number of the shareholders were.

What does this mean? And will this lead to a settlement boom in the Netherlands? This approval may have a significant impact: It shows that the Dutch Collective Settlement Act of 2005 (WCAM) is available to parties not based in the Netherlands, and WCAM is considered binding even when the wrongdoing occurred elsewhere in the world. The Netherlands is the only European jurisdiction offering the option to declare a settlement binding on an "opt-out" basis. By providing non-U.S. investors a forum where they may settle claims about shares purchased at non-U.S. exchanges, the Amsterdam Court is an interesting option as a pragmatic and investor-friendly forum.

Some experts say this could lead to two settlement circuits: one in the U.S., where a jury may award high damages to plaintiffs, and a second in the Netherlands, where a judge may approve (declare binding) a settlement agreement for the whole class. It seems efficient and could result in multinationals trying to settle their cases in Amsterdam instead of the U.S.

The decision of the U.S. Supreme Court in Morrison v. National Australia Bank in 2010 underscores the ruling of the Amsterdam Court. In Morrison, the Supreme Court restricted the rights of investors within the U.S. and around the world to bring claims under U.S. federal securities laws for shares not purchased on a U.S. exchange. This

makes U.S. courts a less desirable option for certain investors.

One issue that could make multinationals hesitant about litigating in the Netherlands is the question of the preclusive effect of the settlements being declared binding: Can the parties be confident that the WCAM settlement will be binding everywhere outside of the Netherlands? Those considering settling matters in the Netherlands must ensure that interested parties outside of the Netherlands know that the choice of forum clause binds them to the WCAM settlement. The finality of judgment is important to ensure that those that did not opt-out of the settlement cannot pursue further individual proceedings.

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