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The Dutch Act on Collective Settlement of Mass Claims (WCAM) Goes Global Again: A Forum Outside the United States to Resolve Mass Claims Disputes Internationally

On March 14, 2016, Ageas (formerly, Fortis Bank) and several foundations representing the Fortis shareholders announced a EUR 1.204 billion settlement of shareholder claims and they are now seeking to declare the settlement legally binding on all shareholders under the 2005 Dutch Act on Collective Settlement of Mass Claims (the WCAM).[1] Recently, the settlement was brought before the Amsterdam Court of Appeal to be declared legally binding upon all shareholders. The case currently pending before the Amsterdam Court of Appeal will further demonstrate whether the Netherlands is a feasible forum for class wide resolution of transnational disputes and can provide a feasible alternative to cases that can no longer be resolved in the United States, or practically anywhere else in the world.

The Ageas settlement marks a milestone in the shareholder litigation initiated against Fortis in Belgium, the Netherlands, and other countries in the aftermath of the 2007-2008 financial collapse.[2] Since the 2010 U.S. Supreme Court decision in *Morrison v. National Australia Bank*[3], it has become much more difficult to resolve such global securities actions under federal securities laws in the United States. As a result, non-American purchasers of securities in Fortis, a Belgian company, in non-American transactions may not be able to pursue their claims in the United States. These investors may

[1] *See* "Ageas, Deminor, Stichting FortisEffect, SICAF en VEB bereiken akkoord voor schikking van alle burgerlijke zaken over Fortisverleden" (Ageas, Deminor, Stichting FortisEffect, SICAF and VEB reach settlement on all civil cases concerning the past related to Fortis), available at: http://www.ageas.com/nl/persbericht/ageas-deminor-stichting-fortiseffect-sicaf-en-veb-bereiken-akkoord-voor-schikking-van (last visited on March 17, 2016).

[2] *Ibid*.

[3] 561 U.S. 247 (2010).

increasingly look for alternatives, with one such possibility being WCAM.

The 2005 WCAM addresses mass tort claims and was first used in a medical product liability case concerning the DES synthetic estrogen hormone and alleged connected birth defects.[4] WCAM has been applied to a series of cases, and more and more international cases. In short, WCAM provides for a settlement of class members' claims on an opt-out basis, whereas most other non-American collective redress mechanisms, such as the English Group Litigation Order, are opt-in mechanisms.[5] The parties to the settlement file a petition to the Amsterdam Court of Appeal that has exclusive jurisdiction to approve the settlement and declare it legally binding on the group members.

Because the Dutch legislature explicitly focused on US class actions while enacting WCAM in 2005, it shares certain features of US class actions, such as the opt-out mechanism, and several conditions concerning the 'certification' of the classes that must be satisfied. However, with WCAM, the Amsterdam Court of Appeal merely marginally judges the settlements to be fit to be declared legally binding. Further, there are key differences between the Dutch WCAM and US settlement class actions. First, the parties can only settle their claims under the WCAM; the Act cannot be used to litigate. Second, the party that represents the interest of the class members must be a foundation; it cannot be a private individual plaintiff. Third, the represented persons can still opt out after objections have been filed and after the court has approved the settlement.

WCAM was used for international settlements in two global securities settlements, one in 2009 concerning Royal Dutch Shell[6], an English corporation with headquarters in the Netherlands and listed in the United States, the United Kingdom, and the Netherlands, and the other in 2012 concerning former Converium Holding AG and its parent, Swiss companies. Both settlements concerned a large number of non-Dutch shareholders. In fact, in the *Converium* cases[7] only a small percentage of the class members were Dutch nationals. A key issue in those international settlements under WCAM concerned private international law. The EU Brussels I-bis Regulation[8] provides adjudicative jurisdiction to the Dutch courts as soon as the "defendant"[9] is incorporated in the Netherlands and the rendered judgments under WCAM should be recognized by other Member States' courts thereafter.

A Dutch foundation can be incorporated easily on an ad hoc basis to represent foreign claimants. The Amsterdam Court of Appeal assumes jurisdiction relatively easily as demonstrated in the *Converium* case: the court upheld jurisdiction as to non-EU/EVEX class members because the Dutch foundation was a party to the settlement. Moreover, it is not required that each petitioner be representative for all persons involved. Besides, the Amsterdam court of appeal explicitly held that (i) the Netherlands is the only national legal system in the EU that authorizes opt-out collective settlements, (ii) it would be very difficult for the non-U.S. shareholders who were excluded from the U.S. settlement to get compensation outside the United States, and it was improbable that they would get compensation in the United States, and (iii) the non-US shareholders could opt out and start individual proceedings if they did not want to be legally bound by the WCAM

[4] Amsterdam Court of Appeal 1 June 2006, NJ 2006, 461 (*DES*). Other subsequent cases include: Amsterdam Court of Appeal 25 January 2007, JOR 2007, 71 (*Dexia*); Amsterdam Court of Appeal 29 April 2009, JOR 2009, 196 (*Vie d'Or*), and Amsterdam Court of Appeal 15 July 2009, JIN 2009, 620 (*Vedior*).

[5] See Rachael Mulheron, The Class Action in Common Law Legal Systems: A Comparative Perspective, (diss. Oxford), Oxford: Hart Publishing, 2004.

[6] *See* Amsterdam Court of Appeal 29 May 2009, *JOR* 2009, 197 (*Shell*).

[7] *See* Amsterdam Court of Appeal 17 January 2012, *JOR* 2012, 51 (*Converium*) rending its interim decision of 2 November 2010, *JOR* 2011, 46 (*Converium*).

[8] *See* Article 4 Brussels I bis Regulation. For domiciliaries is other EU Member States, jurisdiction can be based on either Article 8(1) in multi-defendant cases: domiciliaries of a EU Member State can be sued in another Member State where at least one defendant is domiciled and if the claims are so closely connected that good administration of justice requires the claims should be resolved by the other Member State; and other legal provisions to base jurisdiction could be Article 7(1)(a) Brussels Ibis Regulation. For domiciliaries of country party to the Lugano Convention, e.g., Switzerland, similar provision to the Brussels Ibis Regulation apply. For domiciliaries in other countries, Article 6 Brussels Ibis Regulation and Article 107 Dutch Code of Civil Procedure allows jurisdiction over co-defendants in case of sufficient connectivity between claims.

[9] For the purposes of the WCAM, the class members represented by the foundation are regarded as defendants in the petition proceeding.

settlement. And finally, the WCAM cases are to be recognized and enforced across the EU.[10] GT will continue to monitor the *Ageas* WCAM procedure closely and provide updates as appropriate.

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[10] Based on the Brussels I bis regulation, the WCAM cases are court judgments that should be recognized and enforced in the EU. There is a very limited exception to this principle, *i.e.*, where a judgment would violate public order. However, the German Professor Halfmeier in: A. Halfmeier, Recognition of a WCAM settlement in Germany, NIPR 2012, p. 176 states the WCAM declarations are to be treated as "judgments" in the sense of the Brussels I [bis] Regulation and are thus objects of recognition in all EU Member States; and he argued that the opt out system inherent in the WCAM procedure does not violate the German public order, but is compatible with the fair trial principles under the German Constitution as well as under the European [Human] Rights Convention. He considers the WCAM therefore an attractive model for the future reform of collective proceedings on the European level.