International Class Actions: Will the Centre of Gravity Shift from the US towards Europe?

Implications of the *Morrison* and *Converium* decisions

**BY WOUTER J.L. DE CLERCK (AMSTERDAM), JEFFREY D. ROTENBERG (NEW YORK) AND JEAN-PIERRE DOUGLAS-HENRY (LONDON), DLA PIPER**

1. **INTRODUCTION**

On 17 January of this year the Court of Appeals in Amsterdam, the Netherlands concluded class-settlement proceedings in the *Converium* securities litigation. In its decision, the court made explicit reference to the 2010 United States (US) Supreme Court judgment in *Morrison v. National Australia Bank* insofar as that decision curbed the precedent of US courts exercising a considerable reach beyond the American territory in matters of securities litigation. It is interesting to consider these decisions – which have sparked debate in their respective jurisdictions – from a trans-Atlantic perspective, more specifically taking into account views from the United States, the Netherlands and the United Kingdom. This article highlights that the decisions of the Dutch courts in the Converium case confirm the Netherlands as the pre-eminent European centre for the settlement of international collective claims outside of the US. The US Supreme Court judgment in *Morrison* curtailed the class of potential claimants in US mass securities litigation and left many investors without a dispute resolution forum. The Converium class settlement decisions signal a willingness in the Netherlands to pick up where the US courts left off, with implications for the European Union (EU).

2. **PRESUMPTION AGAINST EXTRATERRITORIALITY IN THE UNITED STATES**

In its decision in *Morrison*, the Supreme Court made it clear that the United States would not become a global forum for private securities fraud cases imported from overseas exchanges, irrespective of the involvement of United States actors or United States trading activity. Rejecting the existing ‘conducts’ and ‘effects’ tests for assessing foreign claims, the Supreme Court limited the reach of section 10(b) of the US Securities Exchange Act (1934) and US Securities and Exchange Commission (SEC) Rule 10b-5 to only ‘transactions in securities listed on domestic exchanges and domestic transactions in other securities’ – the so-called transactional test. *Morrison* involved what has become known as a ‘foreign-cubed’ or ‘f-cubed’ set of facts – non-US investors who purchased shares of a non-US company on exchanges outside of the United States and who then brought suit in US courts. The Supreme Court’s bright-line rule against the extraterritorial application of section 10(b), however, has been interpreted far more broadly in light of the Supreme Court’s determination that the ‘focus’ of the Exchange Act of 1934 is not on the locus of the allegedly deceptive conduct, but rather on whether the...
violative conduct occurred in connection with either the purchase or sale of a security listed on a US exchange or in the United States. The nexus of the allegedly fraudulent conduct to the United States is insufficient; rather, the transaction in the underlying securities must have occurred in the United States.

Read in this way, Morrison not only bars f-cubed plaintiffs from United States courts, but their f-squared brethren as well – US investors who purchased foreign securities on foreign exchanges. Creative plaintiff arguments targeting Morrison’s ‘domestic transaction’ language recasting the old ‘conducts’ and ‘effects’ tests thus far have been widely rejected by the courts. In this vein, for example, the United States District Court for the Southern District of New York recently rejected claims predicated on the theory that investors who purchased their shares of foreign stock from within the United States survive Morrison, regardless of whether the stock was purchased on a domestic or a foreign exchange. This is based on the grounds that US-based purchases of common shares of a foreign company from a foreign exchange satisfies Morrison’s transactional test because this constitutes a ‘purchase […] of any other security in the United States.’ Instead, as in Morrison, the Court placed its focus on the ‘primacy of the domestic exchange’ to the Exchange Act, over the fact that purchasers were American and that they were harmed in the United States. The UBS decision is consistent with post-Morrison rulings barring claims by US investors where the relevant securities are not traded on US exchanges. Applying Morrison in dismissing a claim based on interest arising from swap agreements in which ‘the issuer of the reference security […] and the perpetrator of the alleged fraud […] are located in Germany’, the Court interpreted a ‘domestic transaction in other securities’ as ‘purchases and sales of securities explicitly solicited by the issuer in the US’. This was to avoid foreign issuers from becoming subject to section 10(b) liability simply by virtue of US investors taking derivative positions in their securities.

The Converium settlement in the United States class action, which preceded Morrison, covered all investors who purchased Converium ADRs on the domestic, New York Stock Exchange, as well as any other United States purchasers of Converium shares on the foreign SWX Swiss Exchange. The latter Converium investors purchasing on the foreign exchanges would, under Morrison, not be entitled to relief under section 10(b) and SEC Rule 10b-5 as f-squared plaintiffs (and would have been dismissed from the litigation in advance of any class settlement). This renders the availability of alternative, foreign fora for potential collective relief all the more attractive to US plaintiffs and their counsel – a dynamic which has manifested itself already in two cases – one of which is the Converium litigation – and potentially another one, as will be discussed below.

3. ‘CLASS ACTIONS’ IN THE NETHERLANDS

Before one can properly consider the effects of the Converium decisions, it is important to take into account some of the particular characteristics of the legal measures in place in the Netherlands. There are two distinctive models for the redress of mass claims. In 1994, the collective action was introduced with the inclusion of sections 3:305a and 3:305b in the Dutch Civil Code (DCC). Although not applicable in the Converium litigation, it is of interest to mention this, by now, fairly established measure for mass claim redress in the Netherlands. On the basis of section 3:305a DCC a foundation (stichting) or an association (vereniging) (with full legal capacity) may initiate proceedings for the purpose of protection of the parallel interests of a defined ‘class’ of claimants, which interests the foundation or the association represents according to its articles of association and its operating in the public domain. Most notably, the court cannot grant an order for damages in this type of proceedings. The foundation or association may, however, request the court to establish by declaratory judgment the liability of the defendant(s) on a class-wide basis. Such a declaratory judgment can serve as a platform for claimants to claim damages in individual proceedings. Through the introduction of the collective action the Dutch legislator’s aims to avoid mass litigation on issues which can be dealt with collectively and to secure access to the courts for individual litigants, who may not be in a position to fund extensive proceedings (in several instances) on the merits of a claim.

As of 2005, the Collective Settlements of Mass Claims Act1 (Collective Settlements Act) facilitates the so-called collective settlement proceedings such as the Converium litigation. The Netherlands is apparently the only jurisdiction in the EU which offers proceedings for the purpose of declaring a collective settlement binding on all class members on an opt-out basis. A foundation or an association (with full legal capacity), that would be entitled to bring (and may have brought) a collective action pursuant to section 3:305a DCC, is exclusively positioned to effectuate redress of a mass claim. The foundation or association must – among other requirements – be sufficiently representative of the group of claimants involved. Pursuant to section 7:907-7:910 DCC, the foundation or association may, together and in mutual consent with a party or parties whom the foundation or association has settled with, petition the court to have the (respective) settlement agreement(s) declared binding on members of one or more classes of claimants. Note that the Collective Settlements Act does not provide any authority to bring claims on behalf of a class – these are strictly (collective) settlement proceedings. An important feature of the legislation is the procedure for notifying class members of the court’s validation of the settlement. For after

---

9 Act of 6 April 1994. Amendments were proposed in December 2011 which would encompass both s. 3:305a and the Collective Settlements Act.
10 Note that the rules of the Dutch Bar Association prohibit the use of ‘no-cure-no-pay’ billing schemes.
12 The statutory requirements are the same or – according to the parliamentary history – to be interpreted similarly as with the collective action of s. 3:305a DCC.
this notification, a claimant who qualifies for one of the classes which are within the scope of the settlement agreement must, within a minimum period of three months, give notice of his or her wish to opt out or his right to release will be exclusively governed by the terms of the settlement.13 The party or parties who are liable for payment of the release may also opt out, but only if this has been agreed upon in the settlement agreement, exclusively on the ground that the scope of the settlement is too limited (for reason of (too many opt-outs from claimants) and within six months from the date of validation of the settlement agreement.

4. CONVERIUM JUDGMENTS

4.1. Facts

In the first of two judgments in Converium, the Court of Appeals is concise in its setting-out of the facts of the matter. The Court’s summary of the facts is – in any case – solely based on the facts set out by the petitioning parties, Scor Holding (Switzerland) AG (previously Converium Holding AG) (Converium) and Zurich Financial Services Ltd (ZFS), both (re-)insurance companies domiciled in Switzerland and Stichting Converium Securities Compensation Foundation (Stichting)14 and Vereniging VER NCVB (VEB), both domiciled in the Netherlands. In short, ZFS held all shares in Converium (then Zurich Re) until 11 December 2001, when through an Initial Public Offering (IPO) the shares were listed on the SWX Swiss Exchange in Switzerland and, in the form of American Depositary Shares, on the NYSE in the United States. From the beginning of 2002 through to September 2004, Converium was forced to disclose on several occasions that they had underestimated liability risks (chiefly in the North-American market) and as such had made inaccurate statements with respect to their reserves and future obligations. Share prices fell, especially from July 2004 (by almost 70%)15 and investors brought securities class actions in the United States against Converium and ZFS. Several suits ensued, which were joined in a consolidated class action before the United States District Court for the Southern District of New York. The cases were ultimately settled with the court’s approval by the judgment of December 2008, making the settlement binding on all members of the class, as certified by the court in two preceding judgments. In those two judgments, the court had ruled (still pre-Morrison16) that it did not have jurisdiction to hear claims from f-cubed investors, i.e. non-American investors who had bought Converium shares on foreign exchanges, thereby limiting the class to f-squared investors, i.e. American investors or investors who had bought Converium shares on the NYSE. The f-cubed Converium investors then sought jurisdiction in the Netherlands.

4.2. (International) Jurisdiction

Converium is the third concluded collective settlement litigation (of six in total, since the coming into force of the Collective Settlements Act) which affects a significant number of claimants residing outside the Netherlands, one of these three being the well-documented Shell decision of May 2009.17 That case did, however, involve, unlike Converium, a Dutch company and shares that were traded on Euronext Amsterdam. Therefore, the Converium judgments appear to push (further) the boundaries of the previously unforeseen international scope of the Collective Settlements Act.

Also, the line of reasoning chosen by the Amsterdam Court of Appeals in Shell and Converium with respect to its international jurisdiction under the Brussels I regime deserves further scrutiny. As is evident from the text of the judgment, the Court of Appeals feels the need to accommodate investors who fell outside the class as defined by the Southern District Court of New York, insofar as these investors have reached settlement with Converium and ZFS, and are looking to secure their release by having the settlement declared binding. The Court of Appeals speaks several times of ‘complementing’ settlements, which will lead to compensation of all investors who bought Converium shares in a particular period and to whom, according to the terms of settlement, compensation is owed. Interestingly, the Court of Appeals explicitly mentions and seeks comfort in the Morrison judgment, which followed the District’s Court decision in Converium to exclude f-cubed investors from the class, when it constructs its theory of complementing settlements. As is shown above, there is a correlation, but a more nuanced one. If Morrison had preceded Converium, arguably, the Amsterdam Court of Appeals would have had more claimants (also f-squared ones) to deal with.18

13 Which terms may specify that to a particular group of claimants no payment is owed even though they fall within the class. This makes a valid notification for the purpose of an opt-out the more important. See also below in para. 4.
14 Which was set up by ZFS, Converium and one of the lead plaintiffs in the US litigation.
16 See above: para. 2.
18 At least by the Dutch legislator: supra para. 3.
19 Supra para. 2.
It is in this mood, that the Court of Appeals (provisionally\(^20\)) decides it has jurisdiction to hear a petition to declare binding a settlement for the benefit of investors who mainly reside outside the Netherlands – of an estimated 12,000 investors, 8,500 are domiciled in Switzerland and around 2,700 are domiciled in EU countries of which around 1,500 are in the UK and around two hundred (2%) in the Netherlands – and have bought shares from a Swiss company on exchanges outside the Netherlands. It is safe to say it concerned a matter with limited connection to the Netherlands.

When constructing its (international) jurisdiction, for as far as non-Dutch investors are concerned, the court roughly discerns between (i) investors from countries who are EU members, which are therefore regulated by the Brussels I regime,\(^{21}\) and investors from countries who are not EU members, but who are party to the (amended) Lugano convention\(^{22}\) and (ii) investors who do not reside in any of these countries. For the second (ii) group, the Court of Appeals can establish jurisdiction on the basis of a general, statutory jurisdiction that Dutch courts have to hear petition proceedings when one or more of the petitioning parties are domiciled in the Netherlands.\(^{23}\) In addition, and within the boundaries of this particular statutory jurisdiction, the Court of Appeals points out that the matter is related to the jurisdictional sphere of the Netherlands, since one of the petitioning parties, the Stichting is domiciled in the Netherlands and will execute payment under the settlement in the Netherlands, once it is declared binding. Although this statutory jurisdiction, which only applies to petition proceedings, can be considered as far-reaching in itself, it is the jurisdictional approach of the Court of Appeals to the first group of claimants which has turned heads.

The Court of Appeals assumes jurisdiction with regard to investors from the first (i) group on the basis of two separate grounds, one of which it had also applied in the Shell case. The latter being the principle that if one defendant is domiciled within the court’s jurisdiction, it can assume jurisdiction with regard to other defendants if redress in separate proceedings could lead to contradictory outcomes on, essentially, the same matter.\(^{24}\) The Court of Appeals then goes on to decide that, since an estimated two hundred investors are domiciled in the Netherlands, it can assume jurisdiction with respect to investors from EU countries and non-EU countries which are party to the (amended) Lugano convention. Without losing oneself in the technicalities of the Dutch petition proceedings – it is remarkable how the Court of Appeals bridges the gap between the concept of ‘defendant’ under the Brussels I regime and the Lugano convention on the one hand and investors in Converium shares on the other hand, who are not, at least not all,\(^{25}\) party to the petition proceedings nor are they, even if they are a party to the proceedings, defending themselves against a claim.\(^{26}\) Furthermore, the chance of contradictory outcomes seems inherent to collective settlement proceedings, since claimants always have an opportunity to opt out, start proceedings on their own and, potentially, obtain an award different to the release they would have had on the basis of a collective settlement.

The second ground for jurisdiction is applied by the Court of Appeals on the basis of the principle in the Brussels I Regulation and the Lugano convention that in the case of performance-under-contract, the court in the country where the performance must be made can (also) assume jurisdiction. The Court of Appeals then goes on to specify that the respective obligations for release of individual investors, which will only come into being once the settlement has been declared binding, are also part of the petition proceedings now brought before it. And, since the Stichting is responsible for executing payment to individual investors through a bank account in the Netherlands and this foundation is domiciled in the Netherlands, the Court of Appeals assumes jurisdiction. There has been criticism for the Court’s approach to the concept of performance-under-contract in relation to jurisdiction and, more specifically, the rather loose manner in which relevant case law of the European Court of Justice has been applied.\(^{27}\) For the purpose of this article, it is sufficient to point out that the Court of Appeals does seem to stretch the boundaries when it assumes jurisdiction on the basis of obligations for release of individual investors who are not (yet) part of the proceedings and which obligations will only come into being once the proceedings have been concluded with an all-binding settlement.

4.3. Second Judgment and ‘Fairness Test’

In its second judgment of 17 January 2012, the Court of Appeals confirms its decision on jurisdiction, also because none of the parties (including the opposing parties) contested it.\(^{28}\) Note that even if the...
opposing parties had (unsuccessfully) contested jurisdiction, leave for appeal to the Dutch Supreme Court is only available to the petitioning parties.\textsuperscript{29} Therefore, even though at the time of writing of this article the appeal deadline has not yet lapsed, the decision on jurisdiction appears to be final. Something the opposing parties did contest was the fairness of the release in the collective settlement, also because the release for the smaller group of Converium investors in the US was significantly larger in monetary terms. The issue of fairness involves a statutory test to be applied by the Court of Appeals before it can declare the collective settlement binding. The Court of Appeals dismisses any objections as to the fairness of the release with reference to (i) expert evidence, which covers the various legal and factual circumstances which make it very difficult for claimants, who fall outside the class defined by the District Court for the Southern District of New York, to obtain release through contentious proceedings outside the US and (ii) the lack of any known litigation on Converium outside the US. For the purpose of this article, it is of interest to add that to the extent ‘independent’ litigation can be initiated outside the US with the potential to generate significant findings of liability that will naturally drive the calculus for litigation can be initiated outside the US with the potential to generate significant findings of liability that will naturally drive the calculus for companies seeking global settlements. Furthermore, the notion that a release can (also) be considered as fair since claimants who want to pursue their chances in individual proceedings may opt out, seems flawed for several reasons, a practical one being that there is an inherent risk that claimants with an unknown domicile will only learn of the collective settlement after the period for opting out has lapsed.

5. WIDER IMPACT IN THE EUROPEAN UNION

The decision of the Amsterdam Court of Appeals to declare the settlement binding is, in principle, enforceable in all EU Member States under Brussels I and/ or the Lugano Convention as appropriate, although this has not yet been tested. Interestingly, the Dutch legislator not only did not envision an international scope for the Collective Settlements Act, but it also explicitly doubted, in the explanatory memorandum of the Act, the enforceability of a judgment which would validate a collective settlement for claimants (also) domiciled outside the Netherlands for the reason of a lack of sufficient representation of foreign claimants. At present, the latter does not seem to be the main difficulty, since there is a practice of national bodies for the protection of investor interests (such as the Dutch VEB) endorsing global settlement initiatives. If European enforceability is indeed feasible, then this will introduce an EU-wide settlement procedure for class actions ahead of the initiatives in this area by the European Commission, and despite some Member States, like the UK, having decided for the time being not to expand their collective redress jurisdiction. A public consultation was launched by the European Commission in February 2011 entitled ‘Towards a

Coherent European Approach to Collective Redress’. The European Parliament adopted a resolution on 2 February 2012 in response to this and seemed to welcome a possible EU instrument on collective redress. The European Commission’s work programme for 2012 includes an initiative to ensure that the European approach to collective redress is coherent and consistent, but it is not yet clear whether this will take the form of legislative or non-legislative action. The Dutch government has engaged with the European Commission on the issue, expressing its preference for best practices and harmonization of national models for collective redress, rather than the replacing of these national models with EU-legislation. Prominently, the Dutch government has suggested that (particular) national jurisdictions may offer collective redress for claimants from all EU Member States, while stressing the importance of EU-wide enforceability and clarity on what national law is applicable.\textsuperscript{30}

6. CONCLUSION

The overall effect of the Morrison and Converium decisions can be summarized as follows:

- US courts have limited US securities class actions to transactions in securities listed on US exchanges and US-based transactions in other securities;
- All investors falling outside this class will need to find an alternative forum for resolution of a collective claim (or they will need to bring individual actions);
- If a Dutch foundation representing the interests of these investors can reach a collective settlement with a potentially liable entity, the Amsterdam Court of Appeals can declare the settlement binding on a class-wide basis;
- The Dutch system is open to investors who are not domiciled in the Netherlands if the foundation performs the settlement agreement in the Netherlands and payment is made from the Netherlands; and
- The decision of the Amsterdam Court of Appeals is, in theory, capable of being recognized and enforced throughout the EU despite some Member States opting not to embrace collective redress under national law.

It is evident from the text of the judgment that the Amsterdam Court of Appeals made its decision to fill a gap in the resolution of international class actions, following the decision in Morrison. The Court specifically referred to ‘complementing’ settlements, which would lead to compensation for all investors who bought Converium shares in a particular period and to whom compensation was owed. The Dutch system provides a class settlement option for investors who are excluded from a US class action and it appears to work in conjunction with US proceedings where liability against the entity has been established.

\textsuperscript{29} S. 1018-1 DCCP.

However, the Dutch Collective Settlements Act does require a settlement to have been reached and the Court assumed jurisdiction in Converium solely for the purposes of approving a collective settlement and declaring it binding. The first US style class action that is not presenting a pre-packaged settlement has, however, apparently already commenced. A foundation has been formed by the shareholders of Fortis, the Dutch-Belgian bank which was nationalized in the wake of the 2008 banking crisis. Stichting Investor Claims Against Fortis (SICAF) is, according to its website, currently pursuing a claim in the Dutch courts (after, apparently, a securities class action in the United States was unsuccessful) under section 3:305a DCC (collective action) to obtain a class-wide declaratory judgment that Fortis violated duties owed to investors. If SICAF succeeds,31 one cannot rule out the possibility that subsequently a settlement will be negotiated (and potentially declared binding) under the Collective Settlements Act to deal with the quantum aspects of the claim.

31 In particular, it is going to be interesting to see whether SICAF meets all the statutory requirements. The Dutch legislator has repeatedly (and again in the parliamentary consultations of last year on the amendment of s. 3:305a) stressed that collective actions are not accessible for foundations set up for commercial purposes only (‘entrepreneurial lawyering’). Also, the requirement of sufficient representation may be relevant – SICAF currently only solicits for investors who purchased more than 100,000 shares (in the relevant period).