

Trans-national litigation: Dutch developments

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Mode of treatment

- Group actions and collective settlements under Dutch law
- International jurisdiction of the Dutch courts: Shell case/Vedior/Converium
- Recognition and enforcement of US class action settlement approvals: the Ahold case

Group actions under Dutch law

Who can file?

- Foundation or association
- Acting for the interests of other persons
- In accordance with the objects as described in the articles of association
- generic investors' or consumers' organization or special purpose vehicle
- No individual lead plaintiff acting for the class
- Foundation/organization brings claim in its own name
- No court supervision over appointment of lead counsel
- No certification

No collective claims for money damages!

Instead:

claim for a declaratory judgment that defendant acted wrongfully against group members

Scope of the judgment

- Only binding between the plaintiffs' organization and the defendant
- Thus: individual group members can still sue
- Settlement requires active adherence by individual group members (opt-in)

Collective Settlements of Mass Claims Act 2005 (WCAM)

“I think it is fascinating to learn how in such a short time WCAM has captured the attention of lawyers/parties as a mechanism for resolving mass injuries on a world-wide scale.”

Prof. Deborah Hensler/Stanford-Washington (25/2/2010)

Origin WCAM: insurance industry driven

- Dutch DES hormone case
- Inspired by US practice of class settlement

Objectives of WCAM

- Providing general statutory framework for...
- ...court approval of collective settlement agreement for mass claims, resulting in...
- ...the agreement being binding on all class members...
- ...unless opt-out option is exercised

WCAM in action I

5 cases decided and declared binding:

- Product liability (DES-hormone, June 2006)
- Financial services (Dexia Bank Nederland re securities leasing, January 2007)
- Securities (Shell Reserves Recategorisation, 2007)
- Securities (Vedior, 2008)
- Life insurance (Vie d'Or, 2008)
- Securities (Converium-): interim ruling on jurisdiction 12 November 2010

WCAM in action II

- DES (2006): 34,000 (+) € 38 million
- Dexia (2007): 300,000 € 1 billion
- Vie d'Or (2009): 11,000 € 45 million
- Shell (2009): 500,000 \$ 352.6 million
- Vedior (2009): 2,000 € 4.25 million
- Converium 12,000 \$ 58.4 million

Approval procedure

- Joint request
- Exclusive national jurisdiction Amsterdam Court of Appeal
- Case management conference
- 1st notification
- Individual group members and other organizations can file objections
- Oral hearing
- Court order on approval
- 2nd notification (opt out 3 months)

Effects of court approval

Group members become:

- Parties to the settlement agreement
- Entitled to receive payment of compensation amount

International jurisdiction of the Dutch courts

- Shell settlement: a Dutch and UK defendant; worldwide class; most shareholders in the UK and the Netherlands;
- Vedior: a Dutch defendant; worldwide class (including US shareholders)
- Converium: French-Swiss defendants, most shareholders outside the Netherlands
- Evaluation of the Dutch Ministry of Justice on ipr-aspects of the WCAM

Recognition and enforcement of US judgments

If no treaty (USA!): recognition only if:

- foreign court has employed “an internationally recognised” jurisdictional basis;
- test whether recognition of the foreign judgment would offend Dutch public policy

No case law until 23 June 2010: Amsterdam District Court (Ahold case)

The Ahold case: US Background I

- Royal Ahold announcement 24 Febr. 2003 re US Foodservices Inc. (alleged complex fraud): downward restatement of the profits
- Ahold shares and ADR's plummeted more than 60%
- Several putative class actions (C.A.) against Ahold, its former CFO, accountant Deloitte
- C.A. eventually consolidated District Court of Maryland

The Ahold case: US Background II

- 2004/2007: class action against Deloitte dismissed in first instance and on appeal
- 2005: VEB starts inquiry proceedings before Enterprise Chamber A'dam Court of Appeal into Ahold policy
- 2006: global class certified for settlement purposes only
 - USD 1.1 billion
 - Deloitte not a party to the settlement
 - Bar Order and a Judgment Reduction Credit
 - Choice of Forum clause (US Court)

The Ahold case: Dutch proceedings I

- February 2008/District Court of A'dam
- Foundation SOBI (research and advice)-Foundation AHDeloitteClaim (SPV)- (Dutch) natural persons and legal entities that didn't opt out US/global class

v.

- Deloitte and the AH CFO

The Ahold case: Dutch proceedings II

- Defence: Plaintiffs bound by US settlement =
 - AH CFO: Choice of Forum clause: Amsterdam has no jurisdiction
 - Deloitte: Judgment Reduction Credit applicable (some plaintiffs did receive money from the fund)

The Ahold case: Dutch proceedings III

- Test case: joint request for ruling on recognition and enforcement of US judgments in general
- US approval of class settlement will be recognised in the Netherlands and CFO and Deloitte may invoke the Judgment Reduction Credit clause

Reasoning A'dam District Court

- Jurisdiction US court based on forum delicti
- No infringement of Dutch public policy
 - Class action settlement proceedings in US similar to those under the Dutch WCAM
 - Interests were adequately safeguarded
 - Right to object
 - Opt out
 - Sufficient time to opt out (even though < 3 months)
 - Adequate notification: personal letter and 65 announcements in Dutch newspapers
 - The differences between the US and the Dutch proceedings are not such that Dutch public policy is at stake

But note!

- The recognition by A'dam District Court is itself not recognisable in Europe under the Brussels I Regulation or the Lugano Convention. Other European courts are not bound by it.
- Appeal?
- Room for exception if:
 - a class member proves that in his case the safeguards were not upheld;
 - recognition would be unacceptable in view of the standards of reasonableness and fairness

Ruling on Jurisdiction

- Class members are not bound by the Choice of Forum clause
- Nor are co-defendants not a party to the SA
- Choice of Forum clause should be *explicitly* accepted
 - Acceptance might follow from filing a Claim Form

Comment

- A'dam District Court agreed to rule “in general” on recognition and enforcement;
- What if requested ruling concerned a US judgment in a class action for damages or an SA approval after certification of such a class action?
- Ruling on Choice of Forum clause opens the door to different interpretations of the SA