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Dutch Decision Makes Inroads Toward Collective Binding Settlements in Europe

By Beata Gocyk-Farber and Lauren McMillen

A recent Dutch decision approving a binding collective settlement of securities fraud claims presents a potential roadmap for the administration of future class settlements on behalf of "foreign-cubed" plaintiffs who have difficulty establishing jurisdiction within the US courts.

On May 29, 2009, the Court of Appeal of Amsterdam approved a landmark $381 million agreement between Dutch company Royal Dutch Shell ("Shell") and its non-US investors in settlement of those investors' securities fraud claims arising from allegations that Shell had overstated its oil and gas reserves.

The Shell Case and the Jurisdictional Limitations Facing "Foreign-Cubed" Plaintiffs

The Shell case was first filed in the US on behalf of both US-based investors and "foreign-cubed" investors — foreign shareholders, suing a foreign corporation, regarding stock purchased on a foreign exchange. As noted in our previous articles, "foreign-cubed" investors face substantial obstacles in establishing jurisdiction within the US courts. The First Quarter 2009 issue of the *Advocate European Supplement* discussed a recent decision by the United States Court of Appeals for the Second Circuit — *Morrison v. National Australia Bank Ltd.,* 547 F.3d 167 (2nd Cir. 2008) — dismissing a sub-class of "foreign-cubed" plaintiffs on the grounds that those particular plaintiffs were not within the jurisdiction of the US federal courts.

A unified federal standard to be applied to the jurisdictional nexus of "foreign-cubed" plaintiffs may be forthcoming. In March 2009, the "foreign-cubed" plaintiffs dismissed from the *Morrison* action filed a petition for *certiorari* with the United States Supreme Court. On June 1, 2009, the Supreme Court entered an order inviting the US Office of the Solicitor General to express the government's views on whether the antifraud provisions of the US securities laws extend to transnational frauds and investors.

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If plaintiffs' petition for *certiorari* is granted, the Supreme Court's decision in this action could have a significant impact on the future for non-US-based litigants and defendants in securities fraud actions. If access to the US courts' jurisdiction is eased for "foreign-cubed" investors,

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Eye on the Issues

LEGISLATIVE/REGULATORY AND JUDICIAL UPDATES AND DEVELOPMENTS OF INTEREST TO EUROPEAN INVESTORS

By Takeo Kellar

UN Issues Report on Funds' Fiduciary Obligation to Invest Responsibly

In July 2009, the United Nations Environment Programme Finance Initiative's ("UNEP FI") Asset Management Working Group followed up on its influential 2005 "Freshfields Report" with a new report entitled "Fiduciary Responsibility: Legal and Practical Aspects of Integrating Environmental, Social and Governance Issues Into Institutional Investment." This report provides a "legal roadmap for fiduciaries looking for concrete steps to operationalise their commitment to responsible investment." Significantly, the report states that there is a "very real risk" that investment advisors "will be sued for negligence" if they fail "to raise and take into account ESG considerations." Several large European pension funds have since formalized the duty to invest responsibly. For example, on April 3, 2009, the Norwegian Ministry of Finance on behalf of the Norwegian Government issued a press release stating that "[t]he Government wants the Government Pension Fund — Global to take an even stronger stance in its role as a responsible investor" and that "the Ministry of Finance is signing up to the UN Principles for Responsible Investment (PRI) and is going to participate directly in other international initiatives, so as to be involved in putting on the agenda how the concerns of environmental and social responsibilities and good corporate governance can be safeguarded by financial investors." *Report available at http://www.unepfi.org/fileadmin/documents/fiduciaryII.pdf*

Pension Funds Lodge Opposition to Proposed EU Hedge Fund Rules

In April, the European Union unveiled proposals to introduce new restrictions on hedge funds, private equity funds and real estate products to address concerns following the financial crisis. The draft legislation demands that those funds register and disclose certain information to regulators and also restricts the ability of non-EU managers to sell funds in Europe. Because the affected funds are largely domiciled off-shore or run by US entities, the draft legislation has provoked criticism from the British government, US Treasury officials, as well as lobbyists for the funds such as the Alternative Investment Management Association (AIMA). Recently, British pension funds have begun to voice concern over the proposed legislation as well. Kathryn Graham, a director at Hermes Pension Fund Management, which acts as direct advisers to trustees of the more than 30 billion pound BT Pension Scheme, said it was time for the industry to speak up: "There are unintended consequences from the structure of the directive which would lead us to have substantially smaller choice in terms of the investments we're able to make, but also, I would imagine, a significantly increased cost to the investments we are able to make," she told Reuters. Similarly, Joanne Segars, Chief Executive of the National Association of Pension Funds, told Reuters that "The directive, if passed in its current form, will reduce investment choice and mean that the return pension schemes can get for any level of risk will be reduced," and that "[e]ven a small reduction in return will have an impact on the affordability of defined benefit pension schemes." Many observers predict changes before the draft rules become law. *Reuters, August 4, 2009; European Commission draft Directive on Alternative Investment Fund Managers (April 30, 2009)*

11th Circuit Rules Securities Class Action Settlement Covers Foreign Plaintiffs

The United States Court of Appeals for the Eleventh Circuit recently ruled that it had jurisdiction over claims brought by foreign purchasers in a securities class action against CP Ships Ltd. Allen Germain, a Canadian plaintiff in the case, challenged the jurisdiction of the Court to approve a settlement of $1.3 million. CP Ships is a container shipping company, organized under Canadian laws and operating in several countries. Although officially headquartered in England during the class period, relevant operations and personnel central to the alleged fraud (i.e., the accounting department and executive officers) were located in Florida. Roughly eighty percent of CP Ships' shares are traded on the Toronto Stock Exchange ("TSX") and twenty percent are traded on the New York Stock Exchange. Germain argued that the settlement could jeopardize claims he and other Canadian plaintiffs had brought in related actions in the Canadian courts, alleging that they had been harmed by purchasing CP Ships' stock on the TSX and that the settlement was inadequate. The Eleventh Circuit rejected those arguments, finding that the district court's decision was in line with several similar cases in which U.S. courts had exercised jurisdiction over the claims of foreign purchasers. The Court held that the complaint alleged "ample facts sufficient to establish subject matter jurisdiction under the 'conduct test' over unnamed foreign class members who purchased on the TSX," because CP Ships' allegedly fraudulent conduct took place in the United States. The Court also ruled that any class member wishing to pursue the Canadian actions had been adequately notified that they could opt out of the settlement, and that the settlement was fair. *In re CP Ships Ltd. Securities Litigation, No. 08-166334, 2009 WL 2462367 (11th Cir. Aug. 13, 2009)*

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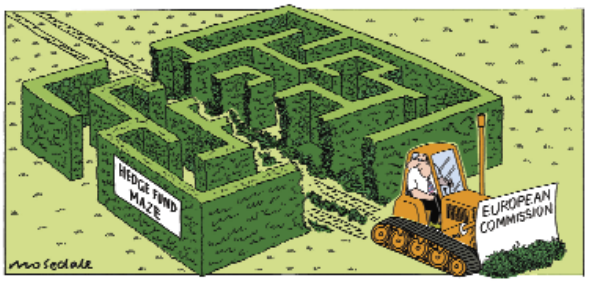
there will be little incentive to seek justice elsewhere. But, to the extent that establishing jurisdiction in the US for certain "foreign-cubed" investors remains a significant obstacle, the Dutch court's approval of the *Shell* settlement further confirms that the settlement of US class actions under the Dutch Act on Collective Settlement of Mass Claims (the "Dutch Act") may provide a viable option for "foreign cubed investors" to recoup their losses.

The Dutch Act Provides for the Binding Settlement of Class Action Claims in Europe

On July 27, 2005, the Netherlands enacted the Dutch Act, making the Netherlands the first, and thus far the only, European country with legislation enabling a binding collective settlement of mass disputes. Under the Dutch Act, parties that have agreed to settle a mass damage claim may jointly request the Amsterdam Court of Appeal to declare the settlement binding on a group of similarly situated claimants described in the settlement agreement. The settlement agreement must be between one or more liable entities and a foundation or association representing the interests of the claimants. The Dutch Act is the first European legislation with the power to bind putative class members who do not choose to affirmatively opt out of the settlement. As of the end of July 2009, the Dutch Act has produced five court-approved collective settlements in a variety of disputes, ranging from products liability to securities fraud.



In 2007, faced with the uncertainty of jurisdiction for the "foreign-cubed" investors in the US *Shell* action, Shell and the "foreign-cubed" investors announced a settlement that was contingent upon the Court of Appeal of Amsterdam's approval under the Dutch Act.

The Dutch Court's Approval of the *Shell* Settlement and its Impact On Future Foreign Class Settlements

The recent *Shell* opinion, along with the four other approved settlements by the Court of Appeal of Amsterdam, confirms that the Dutch Act gives investors a way to achieve a binding settlement in Europe in cases where there is no jurisdictional nexus to the US. It is still unknown, however, whether the Dutch court will also apply the global settlement power of the Dutch Act to settle claims brought against other European companies not located in the Netherlands by a group of pan-European investors.

In the *Shell* opinion, jurisdiction was granted because one of the two Shell corporate entities, as well as the co-applicant Stichting Shell Reserves Compensation Foundation (created to represent non-US Shell investors) and the Dutch Investors' Association were residents of the Netherlands. Although there is nothing in the *Shell* opinion that limits the Dutch Act's jurisdiction to Dutch companies and Dutch investors, it is unclear whether plaintiffs litigating against non-Dutch companies can seek global settlements pursuant to this legislation.

The Court of Appeal could be asked to decide whether European companies outside of the Netherlands may settle claims using the authority of the Dutch Act in the near future in connection with a settlement on behalf of "foreign cubed" investors in *In re SCOR Securities Litigation* (formerly *Converium Securities Litigation*). In 2007, after nearly four years of litigation, plaintiffs reached agreements in principle with the Swiss company Converium to settle the claims of all non-US residents who purchased Converium common stock on the SWX Swiss Exchange during the period January 7, 2002 through and including September 2, 2004 for a total amount of USD $58.4 million (hereafter, the "Converium Settlement"). This settlement is in addition to a separate settlement reached in the US class action on behalf of US residents who purchased Converium common stock on the SWX Swiss Exchange.

The Converium Settlement was reached, in principle, in the framework of the US class action. However, because the US court excluded all "foreign-cubed" investors (who purchased Converium common stock on non-U.S. exchanges) from the class based on jurisdictional grounds, the Converium Settlement will be submitted for approval under the Dutch Act before the Court of Appeal of Amsterdam by a Dutch foundation representing the interests of non-US resident purchasers of Converium common stock. A decision on the Converium settlement could shed additional light on the applicability of the Dutch Act to settle cases involving non-Dutch defendants and primarily non-Dutch plaintiffs.

The use of the Dutch Act to settle the disputes of "foreign-cubed" plaintiffs whose claims are not within the jurisdiction of the US courts is a helpful tool going forward. Although the US courts remain the most attractive venue for the litigation of investors' claims for a variety of reasons, including the availability of contingent fee arrangements, the presumption of reliance for securities trading in efficient markets and the availability of jury trials, in the event that non-US-based claims are bifurcated from those of US-based investors, plaintiffs worldwide may still seek one unified binding settlement to be administered jointly under the laws of the US and the Dutch Act.

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