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## Amsterdam, the Place to Settle

The unique possibility to declare collective settlements in class action cases binding upon all aggrieved parties only exists in the Netherlands. This possibility is based on the Dutch Collective Settlements Act (known as WCAM). Recently, the Amsterdam Court of Appeal has even opened its doors for cases that bind mostly non-Dutch nationals. To foreign (including American) companies, it can be an attractive alternative solution to settle claims from victims residing in different countries, because it is a choice opportunity that can be used to end cross-border mass disputes.

### Converium Case

In 2001 Zürich Financial Services Ltd. (ZFS) sold all of its shares in its daughter

company Swiss Reinsurer Converium Holding AG, currently known as SCOR, through an initial public offering. The shares were listed in Switzerland and (as American Depository Shares) on the New York Stock Exchange.

After a succession of events, Converium announced that it was forced to increase its reserve. The value of Converium shares then plummeted. This led to several securities class actions starting in 2004. Approximately 12,000 investors all around the world were involved, including 200 Dutch, 8,500 Swiss and 1,500 United Kingdom investors.

The actions resulted in a settlement agreement that was eventually consolidated on Dec. 12, 2008, before the United States District Court for the Southern District of New York. But according to the court in New York, this settlement applied only to the purchasers

domiciled in the U.S. and the purchasers of shares on the U.S. stock market. The so-called “F-cubed” cases were excluded: Non-U.S. persons who had purchased their shares of a non-U.S. company on a non-U.S. exchange market were left empty-handed.

The decision of the United States Court for the Southern District of New York in the Converium case that it had no jurisdiction with regard to the F-cubed actions was confirmed by the Supreme Court in its judgment in the case of *Morrison vs. National Australia Bank* on June 24, 2010. The court thereby acknowledged that the American courts do not have jurisdiction to pass judgment on the F-cubed actions in security class actions.



## The Road to Amsterdam

With regard to the non-U.S. purchasers, Converium and ZFS had to find an alternative solution. They concluded a settlement in the Netherlands with the Stichting Converium Securities Compensation Foundation (founded on Feb. 18, 2009, for the Dutch victims) and the VEB (association of stockholders).

Parties asked the Amsterdam Court of Appeal to declare the settlement agreement binding for everyone who was not part of the American settlement. The court first examined whether it had jurisdiction to effectuate this international and mainly F-cubed settlement (only 200 of the over 10,000 claimants are Dutch). Based on the articles 1, 2 and 5 of the *Regulation on jurisdiction and enforcement of judgments in civil and commercial matters*, the court concluded that it had jurisdiction because, among others, the VEB and the Stichting Converium Securities

Compensation Foundation were founded and residing in the Netherlands.

Once the court had determined that it had jurisdiction, it could hear the case with regard to all victims included in the settlement. In contrast to the United States and all other countries, the declaration of the Amsterdam Court that a settlement is collectively binding therefore also applies to cases that are F-cubed.

## WCAM

The WCAM entered into force in July 2005. The immediate reason for the introduction was the Dutch “DES daughters” case. In this case, the pharmaceutical product DES (diethylstilbestrol) had led to certain physical abnormalities in children, mainly girls, born to women who had taken DES during pregnancy.

These “DES daughters” started their individual claims for damages in 1986. It wasn’t until 2000 that a collective agreement for payment of compensation was concluded between the DES Center

(the interest group of DES daughters) and the involved pharmaceutical companies, which provided compensation. Based on the WCAM, the Dutch court declared the settlement binding on all victims. Only one of the tens of thousands of daughters used the facility to opt out. Due to the WCAM, this settlement could also be made to apply to future DES claims, even until today.

The most important aspect of the WCAM is that it binds the entire group of victims, wherever they are domiciled and whether or not they were part of the settlement negotiations. As soon as an agreement on the payment of compensation is concluded, both parties can file a joint request to have the agreement declared binding by the Court of Appeal in Amsterdam. This court has sole jurisdiction to hear WCAM cases. Once the agreement has been declared binding, it is no longer possible for individual victims to file a claim for compensation, unless a victim has explicitly chosen to opt out in time, based on a period to be set by the judge.

Finally, it should be noted that the WCAM applies only to settlement agreements. Dutch law does not allow for damage claims to be filed collectively. Damages can only be claimed individually.

## Conclusion

The possibility to declare collective settlements binding upon all aggrieved parties, irrespective of their nationality, exists only in the Netherlands – specifically, in Amsterdam. The Amsterdam Court of Appeal has exclusive jurisdiction to end cross-border mass disputes, giving certainty to both the company and the victim. However, there must always be at least a slight link between one of the parties of the settlement and the Netherlands. 