KESSLERTOPAZ MELTZERCHECK LLP

THE NETHERLANDS

REMEDIES THAT CROSS BORDERS

In the immediate aftermath of the Morrison decision, many attorneys and commentators predicted that the Netherlands would become a sort of haven for global securities class actions because of the Dutch procedural mechanism known as the Dutch Act on the Collective Settlement of Mass Claims (Wet Collectieve Afwikkeling Massaschade, or "WCAM"). The WCAM allows parties to a dispute to negotiate a settlement and then apply to the Amsterdam Court of Appeals to have the settlement declared legally binding on all similarly situated members (the "class") who did not opt-out. The WCAM (discussed in more detail below) looked to be an effective mechanism for investors to seek monetary relief on a class-wide basis. The reality, however, is shaping up to be much different. While the Netherlands remains a viable option for shareholders, it is not necessarily an appropriate forum for all cases. Nevertheless, there are circumstances where pursuing redress via the Netherlands can be the best option for a group of investors.

The Legal System Generally

The Netherlands is a civil law country, which means actions at law typically arise under the Dutch Civil Code (e.g. an action arises when a person commits an act prohibited by the Dutch Civil Code), other statutes and regulations, or under a dispute stemming from a contractual agreement between the parties. Unlike other civil law countries, the Dutch legal process is adversarial in nature and not inquisitorial. Judges play a more passive role and the parties (if self-representing) or their attorneys are responsible for presenting the evidence and arguing in support of their position. There is no trial by jury and all civil cases are typically decided before a panel of three appointed judges.

The Netherlands is divided into eleven districts and civil proceedings are typically brought before three-judge panels in the district where there is jurisdiction. Generally, jurisdiction is conferred depending on the circumstances and may be based on things like, inter alia, the place of

residence of the defendant, an agreement between the parties, or the type of contract. There are certain courts that have exclusive jurisdiction over particular types of actions. For example, consumer group actions are the exclusive jurisdiction of The Court of Appeals in The Hague and requests stemming from the WCAM are the exclusive jurisdiction of the Court of Appeals of Amsterdam.

Decisions of the district courts may be appealed to one of four courts of appeals. The court of appeals will review both the factual and legal findings of the district court. On appeal, a five judge panel will review the case. After the judgment of the court of appeals is issued, a party may appeal to the Supreme Court. The Supreme Court is a court of cassation and it will only review the legal interpretation of the court of appeals and not any of the facts in dispute.

Discovery

There is no real procedure for pre-trial discovery as there is in the United States. Parties may voluntarily produce documentation in support of their position or the court may order the parties to provide certain documents. If a party refuses to comply the only consequence is that the court may either "draw any conclusions it deems appropriate" or it may shift the burden of proof to the non-complying party. "Fishing expeditions" are not allowed and generally requests to the court to compel the production of documents are limited to specific documents that are already known to exist.

Depositions are not allowed and witnesses may only be heard by the judge. A witness may be heard by the judge either before (via a provisional hearing) or after the commencement of legal proceedings. Both parties may ask questions of the witness, however, there is no real cross-examination.

Detailed information concerning facts and circumstances of a potential case may also be learned via Inquiry Proceedings (enquêteproceduire). Inquiry Proceedings are a legal procedure used to investigate the affairs and course of action of a company for potential mismanagement. Labor unions, the public prosecutor, and shareholders (who independently or collectively as a group own either 10% of the shares of a company, or shares with a nominal value of 225,000 Euros, or own shares of a lower threshold amount stipulated in the company's articles of association) have the right to initiate an inquiry procedure through the Enterprise Chamber, an independent division within The Amsterdam Court of Appeals. To initiate an inquiry procedure, an application must be submitted. The application to be submitted is a formal document that must contain specific information including the name and address of the company, a description of what information is sought and the foundation for the inquiry. The applicant is free to attach any documents in support of the request to the application. Upon receiving the application, if there are well-founded reasons to doubt that a company's policies or conduct are in conformity with the law, the Enterprise Chamber may first order an inquiry and appoint an inspector. Inspectors are typically scholars, lawyers or auditors and they investigate and create a report on the policies and conduct of the company and, if applicable, the responsible individual(s). That report provides a foundation for either the company or its shareholders to address the problems independently or for the Enterprise Chamber to order specific

measures including, but not limited to, the annulment of resolutions, suspension or dismissal of board members, and the temporary appointment of new board members. The Enterprise Chamber has no authority to determine liability and award damages because determining liability and awarding damages is left to courts of first instance. However, the reported findings from the proceeding may be used as evidence in subsequent litigation to establish liability and damages. The report's findings are not binding on the court of first instance, but courts typically consider it persuasive evidence.

Costs of litigation and attorney fees

Lawyers' and experts' fees are the primary costs in civil litigation. The Netherlands has a loser pays system in which the successful party is entitled to recover both attorney fees and legal expenses that were reasonably incurred. Generally the attorney fees awarded by the court represent only a small portion of the actual costs because the court utilizes fixed figures based upon factors such as the amount in dispute and the number of court-related activities that occurred. Dutch attorneys are prohibited by the rules of ethics from taking cases on a contingency fee basis. Court fees are capped.

Litigation is typically funded through legal, legal insurance, or litigation funding. In collective actions, associations and foundations fund litigation through membership fees, donations, and litigation funding. In the WCAM context, attorney fees and other court costs are frequently negotiated with defendants as part of the settlement terms or foundation members agree in advance with a litigation funder to pay a portion of any recovery in exchange for the litigation funder covering all costs and expenses incurred as part of the litigation.

Overview of the Netherlands' Securities Laws

There are four primary laws that regulate the Dutch securities market: 1) Financial Supervision Act (Wet op het financieel tozicht, or "Wft"), 2) the Act on the Supervision of Financial reporting (Wet toezicht financiële verslaggeving), 3) the Dutch Securities Depositary Act, (Wet giraal effectenverkeer), and 4) the Act on Prevention of Money Laundering and Financing of Terrorism (Wet ter voorkoming van Witwassen en Financieren van Terrorisme). The Wft contains many provisions that are similar to provisions in U.S. securities laws. For example, listed companies in the Netherlands have a continuous disclosure obligation to disclose price-sensitive information or any information that is likely to have a material impact on the price (including facts and information that is not public knowledge), liability for the contents of a prospectus, and there are restrictions on insider trading. Breaches of the Dutch securities laws, and more specifically the Wft, can lead to a company being criminally and administratively sanctioned.

Generally a company's liability is based on general tort law but error, defaults, or unlawful acts that are breaches of the Wft and any of its related regulations also give rise to causes of action. Under Dutch tort law, issuers can be liable for misstatements made in a prospectus, periodic reports, and any ad hoc information the company published. Section 6:194 of the Dutch Civil Code

provides that anyone who issues a statement about products or services is acting wrongfully towards another party if the statement is misleading in any way. In pursuing a claim for a false or misleading statement, there is no requirement that investors prove scienter. That is, the investors do not need to demonstrate that the company acted with any intent or knowledge of the wrongdoing. Dutch law presumes that if misstatements were made in any of the company's filings, the directors, executive management, and board members are responsible for them and the burden is on the defendants to prove that the statements are not attributable to him.

In order to pursue a viable claim, Dutch Law requires proof of causation. Causation in this context requires both that there is "cause in fact" (that is that the damages occurred as a result of the defendant's action – in the securities context that means that the share price was what it was at the time of purchase or sale as a result of defendant's actions)) and legal cause (in the securities context, that inquiry typically centers around reliance: did the investor rely upon the defendant's misstatement or omission in making its investment decision?). Similar to the U.S., Dutch law does not require an investor show specific reliance. Instead the Netherlands has adopted a theory that is similar to the U.S. fraud-on-the-market doctrine. In the Dutch Supreme Court's notable decision in the World Online case, the court acknowledged that savy investors are guided by a multitude of sources of information and that proving reliance or causation from a misstatement or omission to a specific investment decision could be impracticable. In recognizing this, the court established a presumption of causation between the misleading statement and the investment decision. As a result, there is no direct proof of reliance required under Dutch law. Instead, it may be sufficient for an investor to claim that he would have bought the shares at a lower price.

Collective Securities Litigation in the Netherlands

Under the Dutch Law, there are two different procedures that allow for the resolution of group claims: the Collective Action proceeding and the WCAM. Neither is akin to the U.S.-style class action. The Collective Action Proceeding may only be used to establish the liability of a defendant (or seek other declaratory relief) and not to pursue claims for damages and the WCAM procedure requires the voluntary settlement between the parties before the proceedings may commence. What follows is an explanation of the two different mechanisms.

The Collective Action

Article 3-305a of the Dutch Civil Code provides that a "Representative Organization" may pursue collective action to establish the liability of a defendant or to obtain other declaratory relief as long as the claim is to protect "similar interests" of its members or other persons. A Representative Organization need not have its own direct financial interest in the claim – its interests in pursuing the claim can be merely to further objectives in its governing documents (for example seeking to defend the rights of its members). A Representative Organization includes either a Foundation (stichting) or an Association (vereniging). A Foundation is a legal entity that has no existing or set members and that may be set up solely for the purpose

of pursuing a collective action or settlement (examples: Foundations were established in both the Fortis and Shell securities cases in order to pursue collective remedies). An Association, on the other hand, is a legal entity which has members and aims to achieve a specific purpose (example: the Dutch Association of Shareholders also known as the Vereniging van Effectenbezzitters or VEB). Both Foundations and Associations must be not-for-profit legal entities and they must be legally independent and not owned by any one person – even the person who established the entity cannot exercise ownership rights. Both Foundations and Associations are able to accept third party funding.

To pursue a collective action, the Representative Organization files a complaint to establish the liability of a defendant or seek other declaratory relief. The complaint cannot seek any damages. As mentioned above in the Discovery section, if Inquiry Proceedings were pursued, the Representative Organization may use evidence and the report of findings from the Inquiry Proceedings as evidence of a defendant's wrongdoing. While the collective action is proceeding, any applicable limitations periods are tolled for all covered members. Once a collective action reaches a judgment, individual members can bring individual damage claims by either filing an independent complaint, joining with multiple other individuals to file a joint complaint, or by selling claims to a third party who then bundles the claims and commences proceedings in her own name as owner of the claims. Upon conclusion of the collective action (when the Representative Organization prevailed), it is also possible that the Representative Organization and the defendant are able to negotiate a settlement and then use the WCAM procedure to have the settlement declared binding and deemed globally applicable.

The WCAM

The WCAM is an act that is designed solely for the purpose of making settlement agreements binding and enforceable against parties (and absent class members). In order to fall under the purview of the act, the settlement must deal with either damages caused by a singular incident or a series of similar incidents. This act does not contain any mechanism by which a court can determine liability. If one party wishes to incentivize another party to negotiate a settlement, they must use either the collective action procedure, publicity, litigation in another country, or some other means. Once parties have entered into a settlement agreement, this act allows them to apply to the Amsterdam Court of Appeals to have the settlement agreement declared binding and enforceable.

A Representative Organization is the only entity that can commence a WCAM procedure, however, it should be noted that because a Foundation can be established solely for the purpose of pursuing a legal action, it can be established after a settlement has been negotiated. The settlement need not be negotiated by the Representative Organization, it can be negotiated by individual plaintiffs or others. Once a settlement has been reached, the Representative Organization submits the settlement to the Amsterdam Court of Appeals in Amsterdam and seeks to have the agreement declared binding and enforceable upon all interested persons (that is those that would be part of a "class"). The Class must have all suffered a loss as a result of the same

facts or circumstances. Once the Amsterdam Court of Appeals receives the settlement agreement and application to declare it binding, it sets a deadline for class members to object to the terms of the settlement. The Court of Appeals then reviews the application and any decisions and renders a decision. If the court approves the settlement, then the settlement is binding and enforceable against all class members (unless a class member took steps to "opt-out"). Any class member who does not choose to opt out is able to share in any proceeds from the settlement but they are prohibited from bringing or continuing any legal action against the defendant that concerns the same facts or circumstances.

To date there have been six settlements that have been declared binding by the Amsterdam Court of Appeals and one additional settlement is currently pending. Of those 7 cases, 4 cases concerned securities. Those cases are:

- *Royal Dutch Shell* – A securities case with a defined class of 500,000 worldwide (except for U.S. based investors) investors. The settlement of $352.6 million was approved in 2009.
- *Vedior* – A securities action on behalf of 2,000 members who sold their stock on the day rumors started to spread about merger talks between Vedior and Randstad. The Dutch Association of Shareholders, the VEB, alleged that Vedior failed to timely inform the market of the merger talks and as a result there were investors who were denied the benefit of the higher share price that was available after the news was disclosed. The €4.25 million settlement was approved in 2009.
- *Converium* – A securities action with a defined class of about 12,000 members resident in the Netherlands, the U.K., and Switzerland. This action was brought by two Associations in the Netherlands over alleged misrepresentations made by two Swiss Companies (Scor Holding AG and Zurich Financial Services, Ltd.) in relation to their financial situations. The settlement of $58.4 million was approved in 2012.
- *Ageas* (formerly known as Fortis Bank) – A settlement of €1.2 billion was announced in this action in March 2016. The settlement is currently pending before the Amsterdam Court of Appeals and a hearing is scheduled for March 24, 2017. Once approved, the settlement will be the largest class settlement ever agreed to in Europe.

Potential Developments: Introduction of U.S.-Style Class Action in the Netherlands

In November of 2016, the Dutch Minister of Security and Justice submitted to the Dutch House of Representatives a legislative proposal to introduce U.S.-style class actions in the Netherlands. The proposal seeks to modify the current law (which, as described above, only allows collective actions for the purposes of seeking a declaratory judgment) and allow a Representative Organization to bring a claim for damages in the District Court of Amsterdam on behalf of a defined class. There is no limitation in the proposal on the type of claims (e.g. consumer, shareholder, environmental) that could potentially

be pursued under this new mechanism. Additionally, the current legislative proposal includes the following interesting provisions:

- Where there are multiple competing proceedings initiated by different Representative Organizations, the court would appoint the one it deems most suitable as the lead representative organization for all of the defined class members. The lead representative organization would need to be able to demonstrate expertise, have a sufficient number of claimants supporting them, and be sufficiently capitalized.
- Although the actions would be "opt-out", because of the need for the lead representative to demonstrate that a large number of claimants support their candidacy to be a representative, for all practical purposes, claimants would still likely need to opt-in with a particular group.
- Defined class members can choose to "opt-out" at the beginning of the certified class action, but their individual proceedings could be stayed for up to a year at the request of the defendant. Although the class action would toll the statute of limitations for all those who are defined class members, parties who chose to opt-out would need to take action within 6 months after opting out.
- The law leaves in place the requirements that a stitching or association be a non-profit entity and continues to allow Foundations to be formed on an ad-hoc basis, however, it would implement stringent governance requirements for the organization's board and supervisory board including: requiring D&O insurance, requiring that the board members have a non-profit background, requiring the preparation of financial statements, and requiring that the organization have a website and communication structure.
- There must be a "sufficiently close connection" with the jurisdiction of the Netherlands in order for the case to be allowed to proceed. To meet that jurisdictional requirement, one of the following conditions must be met: 1) the majority of the defined class members represented by the Representative Organization must reside in the Netherlands, 2) the defendant has a residence in the Netherlands, or 3) the event (or events) on which the claim is based took place in the Netherlands.
- Currently under Dutch law, adverse costs are fixed by the court. Under this new proposal, the lead representative organization could recover the real costs of the litigation if the parties reach a settlement. Conversely, the lead representative organization would be liable for any adverse costs if it loses the action.
- Any settlement would need to be approved by the Amsterdam District Court. It is unclear whether the approval of the settlement would utilize the existing WCAM proceedings or whether this proposal seeks to limit the jurisdiction and extra-territorial application of the WCAM.

At present the adoption of a U.S.-style class action is merely a proposal and there has been a lot of criticism (primarily from the business community) regarding the proposal. As a result, although the proposal is slated for

legislative discussion in 2017, it might not be enacted in its present or any other form.