

Legal Alert

Recognition of a U.S. Class Action Settlement in the Netherlands (Royal Ahold N.V.)

12 July 2010

The Netherlands as an alternative for settling international mass claims in Europe after *Morrison vs. NAB*

Introduction

A landmark decision was handed down by the Amsterdam District Court on 23 June 2010 regarding the international collective settlement of mass claims. The Dutch court recognised the judgment by a U.S. court approving a worldwide class action settlement under U.S. law, thereby barring any class members who did not opt out from ever bringing a claim against the defendants again anywhere in the world. The principal reason for recognition was that the Netherlands itself has a similar system for collective settlements. The Dutch system is unique in Europe, and makes the Netherlands an attractive jurisdiction for settling international mass claims. This is interesting for Chinese companies facing class actions in the U.S., as well as for Chinese institutional investors suffering damages due to securities fraud related to their shareholdings in overseas companies.

The U.S. Class Action Settlement

Dutch company Royal Ahold N.V. ("**Ahold**") announced on 24 February 2003 a downward restatement of its profits over 2001-2002 by USD

500 million due to an alleged complex fraud at its subsidiary U.S. Foodservice Inc. As a result, Ahold's shares and ADRs plummeted more than 60%. Soon thereafter several class actions were started in the U.S., eventually being consolidated into one action before the District Court of Maryland ("**U.S. Court**"). Besides Ahold, its former CFO and accountant Deloitte were among the defendants.

Ahold reached a collective settlement with the plaintiffs (the "**Settlement**") on 6 January 2006. Ahold agreed to pay USD 1.1 billion to a settlement fund (without admitting to any wrongdoing), to be divided among investors who had purchased Ahold's shares or ADRs from 30 July 1999 through 23 February 2003 (the "**Class**"). The class action, with the exception of the action against Deloitte, would be dismissed, and every investor from the Class who did not send an opt-out request in time ("**Class Members**"), would be barred from bringing a claim against any of the defendants, including Ahold and its former CFO but excluding Deloitte, anywhere in the world. Deloitte was also barred from bringing any claims against the other defendants, but did receive a "**Judgment Reduction Credit**": Class Member's claims against Deloitte, if any, were lowered by an

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amount corresponding to the higher of: (i) the percentage of responsibility of the other defendants, and (ii) USD 1.1 billion.

The U.S. Court finally approved the Settlement on 16 June 2006 (the “**Final Judgment**”) by which the Settlement became binding on all Class Members.

Challenging the U.S. Settlement in the Netherlands

SOBI – an association under Dutch law representing several Dutch Class Members – sued Ahold’s former CFO and Deloitte before the Amsterdam District Court in February 2008. SOBI claimed compensation for the losses suffered by the Class Members it represented, thereby basically citing the same grounds as mentioned in the U.S. class action. None of the Class Members represented by SOBI opted out of the Settlement.

The former CFO was sued only by Class Members who had not received any money from the settlement fund. They, as Dutch citizens, did not feel bound by the Settlement and Final Judgment since they were never actively involved in those U.S. proceedings. Deloitte was also held liable by Class Members who in fact did receive money from the fund. Their main argument was that Deloitte was not a party to the Settlement, and they also did not feel bound by the Judgment Reduction Credit.

The former Ahold CFO and Deloitte argued that the Final Judgment (and the Settlement) is a foreign judgment that should be recognised by Dutch courts, as a result of which all worldwide Class Members are bound by this U.S. collective settlement, even if they did not take actively part in it. The Amsterdam District Court followed this reasoning and ruled on 23 June 2010 that the Final Judgment will be recognised in the Netherlands, and that the former CFO and Deloitte could call upon all decisions in the Final Judgment in their defence against SOBI’s claim (*i.e.* the former CFO may invoke the court-ordered bar against claims by Class Members, and Deloitte may invoke the Judgment Reduction Credit).

The main reason for this decision was that the proceedings for a class action settlement in the U.S. are very similar to the Netherlands’ system for collective settlements. The Amsterdam District Court found in general that the interests of the injured parties were adequately safeguarded by the U.S. system since investors belonging to the Class can object to, and opt-out from, a collective settlement. The Amsterdam District Court further ruled that in this specific case the Class had sufficient time to opt out, and that the possibility to opt out and to object had been effectively communicated to the Class (all known shareholders received an information letter, and 65 announcements had been published in Dutch newspapers).

The Amsterdam District Court left room, however, for one minor exception: if a Class Member states and can prove that in his individual case (i) the abovementioned safeguards were not upheld, or (ii) recognition of the Final Judgment were to be unacceptable in view of the standards of reasonableness and fairness, then the Final Judgment cannot be recognised vis-à-vis that individual Class Member (such facts or circumstances were however not stated by SOBI in these proceedings).

We note that the recognition by the Amsterdam District Court of the Final Judgment is in itself not recognisable in Europe under the Brussels I Regulation or the Lugano Convention. Therefore, other European courts are not bound by this recognition and may or may not grant the same type of recognition to the Final Judgment.

Collective Settlement in the Netherlands

The Amsterdam District Court cited similarities with the Dutch system as a main reason for recognition of the U.S. class action settlement. The Dutch Act on the Collective Settlement of Mass Claims (*Wet collectieve afwikkeling massaschade*, the “**WCAM**”) entered into force on 27 July 2005. Pursuant to the WCAM, the parties to a settlement agreement may request the Amsterdam Court of Appeal (the “**Court**”) to declare the settlement agreement binding on all persons to which it

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applies according to its terms (the “**interested persons**”).

If the Court declares the settlement agreement binding, all interested persons are bound by its terms, unless an interested person timely submits an “opt-out” notice. All other interested persons have a claim for settlement relief and are bound by the release in the settlement agreement. The Court will refuse to declare the settlement agreement binding if, among other things, the amount of settlement relief provided for in the settlement agreement is not reasonable, or the petitioners jointly are not sufficiently representative regarding the interests of the interested persons.

Since the entry into force of the WCAM in 2005, the Court has declared a settlement agreement binding in five cases. The most eminent case is the Shell settlement, approved by the Court on 29 May 2009 (see our earlier [Legal Alert](#)). This concerns a worldwide settlement (except the U.S.) between a Dutch and a British Shell entity and their worldwide shareholders in the relevant period in relation to Shell’s recategorisation of certain of its oil and gas reserves in 2004. Although no case law is available at this point, the decision by the Court implies that its binding declaration must be recognised by courts in all EU Member States under the Brussels I Regulation, and also in Switzerland, Iceland and Norway under the Lugano Convention.

In view of the likely recognition by other European Courts, the collective settlement under the WCAM may prove to be a valuable alternative for certain U.S. class action settlements (recognition of which is uncertain in other European countries). This is reinforced by the recent U.S. Supreme Court decision blocking security class actions by non-US investors related to securities in companies not listed in the U.S. and traded outside the U.S. (the “foreign-cubed-cases”; see the U.S. Supreme Court decision of 24 June 2010 in [Morrison vs. National Australia Bank](#)).

Implications

This recognition of a U.S. class action settlement by a Dutch court is the first case of its kind. It is

uncertain whether similar recognition will be granted in other European countries. A Dutch collective settlement declared binding under the WCAM is, however, likely to be recognised by other EU Member states under the Brussels I Regulation, and also in Switzerland, Iceland and Norway under the Lugano Convention. This makes the Netherlands an attractive country for the worldwide collective settlement of international mass claims. The recent U.S. ban on “foreign-cubed-cases” has reinforced that conclusion.

For Chinese companies facing securities class actions in the U.S. – currently about 16 companies – with a desire to settle such claims, a collective settlement in the Netherlands might be a good, and also less expensive alternative. Chinese institutional investors who are being confronted with securities fraud related to their overseas shares, could also consider initiating a settlement in the Netherlands.

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Contact information

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