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Developing European class actions and keeping them out of the US courts

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I. INTRODUCTION

In 2011 the US Supreme Court ruled that European claimants must take their claims back to their home jurisdictions in Europe. A number of European investors had been filing claims against European companies for many years under the US class actions regime. The plaintiffs generally accused the defendants of misleading shareholders. They typically sued the company, its directors and accountants for compensation. In *Morrison et al. v. National Australia Bank Ltd. et al.* ("*Morrison v. NAB*") the US Supreme Court decided that so called "f-cubed" claims cannot be filed in the United States[2]. F-cubed claims are those filed by foreign, non-US-investors, against a non-US-company in relation to shares bought on a foreign exchange.

In the past two years there have been many claims in the US courts against European companies and their directors relating to allegations of misconduct in connection with securities traded on foreign exchanges. These have been dismissed for lack of subject-matter jurisdiction under the US Federal Rules of Civil Procedure Law. Meanwhile in Europe, further collective action type claims are gaining momentum, at a seemingly increased speed. Following the decision by the US Supreme Court in *Morrison v. NAB*, forum shopping activity is taking place. More detailed EU-wide regulations and collective action type procedures in several European jurisdictions are now available.

Such developments and dynamics raise the question whether insurers' exposure to their global business will remain unaffected or if the claims climate will become tighter in the future. In particular, liability lines such as product liability and professional indemnity, errors & omissions and directors & officers could be in the focus of future development.

This article provides an overview of the current developments in class actions and forum shopping in Europe. It also examines whether the litigation exposure faced by European companies (and consequently their insurers) from US securities class action litigation has been minimized or just shifted to single European jurisdictions. Will the recent developments lead to a "European class action" or other collective action type regimes in the EU?

II. MORRISON V. NAB

On June 24, 2010 the US Supreme Court decided in *Morrison v. NAB* that Sec. 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") does not provide a cause of action to foreign plaintiffs to recover their losses related to f-cubed claims. The case received considerable attention. Briefs (i.e. written arguments) were submitted by the governments of Australia, France and the United Kingdom.

In 1998 NAB, whose shares are not traded in the US, purchased a Florida headquartered

company, HomeSide Lending. HomeSide Lending was in the business of servicing mortgages. In 2001, NAB had to write down the value of HomeSide's assets, which resulted in a decrease of NAB's share price. The Australian claimants had purchased NAB's shares before the write-downs. They sued NAB, HomeSide and both companies' directors for violation of Sec. 10(b) and 20(a) of the Exchange Act. They alleged that HomeSide and its officers had manipulated financial models to make the company's mortgage-servicing rights appear more valuable than they really were.

The Federal District Court for the Southern District of New York dismissed the foreign plaintiff's claims for lack of federal subject matter jurisdiction[3]. The foreign plaintiffs appealed but the Court of Appeals for the Second Circuit affirmed the dismissal. The court focused on the place of the "heart" of the conduct which was in its view Australia and not Florida where the manipulation of the numbers occurred[4]. The US Supreme Court affirmed the Second Circuit's ruling and dismissed the claims. The opinion of the Court, delivered by Justice Scalia, stated that:

> *"Section 10(b) reaches the use of a manipulative deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.*[5]*"*

The Court further quoted the general principle that unless a contrary intent is apparent, the legislation of Congress is meant to apply only within the territorial jurisdiction of the United States. As Section 10(b) Exchange Act is silent as to its exterritorial application, it concluded that Section 10(b) Exchange Act should not be applied extraterritorially[6].

However, the US Supreme Court did not bar all f-cubed claims from US litigation. It made it clear that such decisions need to be reached on a case-by-case basis.

III. DEVELOPMENTS / ACTIVITY IN EUROPE FOLLOWING *MORRISON V. NAB*

The US Supreme Court's decision has had a far-reaching impact on global claims and liability and is therefore of remarkable importance for the insurance industry. This is not only true for liability lines of business but for the claims and litigation culture in Europe in general.

Following the decision in *Morrison v. NAB*, claims in the US against Vivendi S.A. and BP Group were dismissed. Whereas the claims against Vivendi were made as a securities class action, the decision in favour of BP was related to the Gulf of Mexico oil spill and was based on the relevant liability law in the US. Further, the AGEAS N.V. case (see below) shows that US plaintiffs are active in the process of Forum Shopping in Europe.

The filing of class actions in Europe and a corresponding framework for such claims is gaining further momentum, at an increased speed.

1. Class Actions / Collective Redress in Europe

The European Union (EU) and some of its individual Member States are preparing to embrace the concepts of collective redress regimes for consumer claims. In 2008 the European Commission ordered a study to examine the collective redress regimes which are already in place across Europe[7]. In about half of the EU Member States judicial collective redress mechanisms exist, primarily group actions, representative actions and test cases. In other jurisdictions the mechanisms for collective redress are not widely used. Collective redress procedures are often very complex and time consuming. Another key obstacle is funding, as in many states of the EU neither US type contingency fees, nor UK type conditional fees, are allowed.

On November 2008 the European Commission published its Green Paper in which it supported the implementation of collective redress instruments across Europe[8]. After public consultations from November 2010 until April 2011 the EU focused on the following six key principles to guide any future EU initiative on collective redress:

- need for effectiveness and efficiency of redress;
- importance of role of representative bodies;
- means of alternative dispute resolution;
- need for strong safeguards to avoid abusive litigation;
- availability of appropriate financing mechanisms; and
- importance of effective enforcement across the EU.

New Class Action in Italy

On 27 December 2010, the Civil Court in Milan admitted a class action against Voden Medical Instruments SpA. The claimants were an activist consumer association, Codacons, and a number of individual claimants. Voden is a provider of medical devices in the life science and pharmaceutical sectors. The claim was based on alleged defects of Voden's "Ego-rest FLU", a product designed to detect influenza infection. The Court allowed the claim to go forward in respect of an alleged misleading label.

The order by the Court of Milan in *Codacons v. Voden* is the first decision in Italy to declare a class action admissible and the first decision issued in connection with a class claim relating to a product. By the order of 20-27 December 2010, the Court of Milan ordered inter alia the publication of its ruling on admissibility so as to allow class members to opt-in and join the class by 30 April 2011.

New Class Action in the Netherlands

On 11 January 2011, a representative action[9] was filed with the Civil Court of

Utrecht by a class of claimants which consists of 140 institutional investors and a significant number of private investors. The claimants formed a special foundation named "Stichting Investor Claims against Fortis"[10]. Among the group of institutional investors are US investors seeking compensation before the Dutch Court.

The defendants are AGEAS N.V., the insurance arm of FORTIS, some of its directors and officers and the offering underwriter Merrill Lynch. The claims allege a misrepresentation of the economic value of Fortis between May 2007 and October 2008, when Fortis acquired ABN Amro. The claimants further allege that Fortis misrepresented the value of its collateralized debt obligations, the extent to which its assets were held as subprime-related mortgage backed securities, and the extent to which its decision to acquire ABN Amro Holding NV had compromised the Company's solvency. The claimants are seeking EUR 2 billion in compensation.

This case has led to the Netherlands becoming the preferred "portal" for class actions in Europe with important consequences for the insurance industry[11]. In particular, liability lines like PI, E&O and D&O are in the focus of such developments in Europe with a significantly increased risk for insured entities to be sued in the Netherlands.

2. Forum Shopping

Cases

The ruling of the US Supreme Court on 24 June 2010 in *Morrison v. NAB* has had an ongoing impact on European litigation. Some of the major cases where European companies were sued by investors in the US have been dismissed following *Morrison v. NAB.* These cases include:

BP's successful application to a Texas judge to dismiss claims by some institutional investors on the grounds that their claims that company mismanagement caused the Gulf of Mexico oil spill should be tried in British Courts[12].

In *Elliott Associates et al. v. Porsche Automobile Holding SE et al.*[13] the plaintiffs made allegations, and set forth causes of action, based upon violations of the U.S. Federal Securities laws, inter alia Section 10(b) and 10(b)-5 of the Exchange Act. The District Court dismissed the plaintiff's federal securities law claims following Morrison v. NAB.

In the **AGEAS** N.V. case[14] two U.S. Securities claimants filed an action as shareholders of that company in the Utrecht Civil Court. They were members of a specially formed Foundation[15]. The claims and the participation of the U.S. claimants were filed after US litigation was stopped by the US District Court, Southern District of New York. The Foundation in question encourages institutional investors or investors with more than 100,000 shares purchased during the relevant period and nominee shareholders/custodians from any jurisdiction around the world to participate in the Foundation. This is on condition that they have (1) purchased shares in Fortis on the open market between May 29, 2007 and October 14, 2008; (2) participated in the September

2007 Rights Issue; or (3) participated in the June 2008 Accelerated Book-Building offer.

The founders of the "Stichting Investor Claims against Fortis" announced on their website:

> "*As a previously pending U.S. Securities class action representing all interests of all Fortis investors was dismissed in February 2010, the best, and maybe only, alternative for Fortis investors to obtain a funding or liability and potentially a settlement for compensation is to become active in the Netherlands by joining the Foundation in order to provide it with the necessary regional diversity and size to proceed on behalf of all Fortis investors, globally, in a representative fashion*[16 17].

"Brussels I" and other EU Regulations on Jurisdiction and applicable law

The jurisdiction and recognition and enforcement of judgements in civil and commercial matters is governed by the Council Regulation (EC) 44/2001 of 22 December 2000 (Brussels I). Brussels I is part of the "Brussels regime", a set of rules regulating which Courts have jurisdiction in legal disputes of a civil or commercial nature between individuals residing in different Member States of the European Union

The Brussels Regime consists of the:

(1) Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial matters;

(2) Lugano Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters; and the

(3) Council Regulation (EC) No 44/2011 of 22 December 2000 (Brussels I).[18 19]

Apart from the Brussels regime the Rome I (2008) and Rome II (2007) Regulations are aimed at the unification of International Private Law and International Civil Procedure Law. In cross-border-cases under the Rome II Regulation applicable substantive law in tort cases arising from 2008 onwards is the law of the place where the damage occurred[20] The injured party, therefore, no longer has a choice of law between the law of the place of the wrong doing and the law of the place of the occurrence of the damage. Rome II limits this kind of forum shopping and is particularly relevant in product liability cases.

In December 2010 the European Commission published a proposal regarding the reform of the Brussels I Regulation[21].; the final outcome of that proposal is expected to be published in 2012. The key amendments of Brussels I relate to the following[22]:

(1) abolition of "exequatur" procedure (allowance of automatic recognition and enforcement of judgements between EU-Member States);

(2) disputes involving non-EU-countries / International Legal Order;

(3) choice of court agreements; and

(4) arbitration.

(2) above is most relevant so far as class actions are concerned. In cases where the defendant is domiciled outside the EU, Article 4 of the regulation stipulates that each Member State's national law determines its courts' jurisdiction. As national law rules vary between the Member States the parties have unequal access to justice within the EU. The European Commission's proposals are aimed at remedying this lack of uniformity in the EU, preventing a distortion of competition for companies across the EU, and avoiding unequal business conditions.

IV. CONCLUSION

The US Supreme Court's judgement in *Morrison v. NBA* has had a direct impact on litigation in Europe. Subsequent developments should be particularly noted by the insurance industry – especially for liability lines of business like PI, E&O and D&O but also Product Liability.

At present, it seems that the Netherlands offers the most attractive environment to file collective actions, without the negative aspects of the US-class-action-claims regime. There will therefore be less exposure for companies and insurers in connection with SEC-related risks. In addition, the amendment of the Brussels I regulation may lead to a uniform procedure for cross-border related litigation within the EU.

Finally the developments discussed above are likely to lead to a more dynamic approach towards a collective redress regime to address the current challenges imposed by a globalized economy.

Endnotes

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2 Morrison v. NAB, 130 S. Ct. 2869 (U.S. 2010).

3 In re National Australia Bank Ltd. Securities Litigation, 2006 WL 3844465 (SDNY Oct. 25, 2006).

4 Morrison v. NAB, 547 F.3d at 176 (2nd Cir. N.Y. 2008).

5 Morrison v. NAB, 130 S. Ct. 2869, 2886 (U.S. 2010).

6 Morrison v. NAB, 130 S. Ct. 2869, 2877 (U.S. 2010).

7 "Study on the Evaluation of the Effectiveness and Efficiency of collective Redress mechanisms in the European Union"; Civic Consulting and Oxford Economics, Final Report (Aug. 2008).

8 Greenbook of collective redress for consumers, circulation EG 2417/2008.

9 The Netherlands currently has two collective redress mechanisms: the representative collective action in Article 3:305a of the Dutch Civil Code and the 2005 Dutch Act on Collective Settlements Mass Damages.

[10] AGEAS N.V.; "Stichting Investor Claims Against Fortis" has been established as an open foundation under Article 3:305a of the Dutch Civil Code (DCC") upon the initiative of various large institutional investors with substantial losses from their investments in Fortis. For details see http://www.investorclaimsagainstfortis.com.

[11] The Netherlands is an attractive place for group actions also from the perspective of legal costs: In the Netherlands, punitive damages are not allowed, nor are contingency fees possible yet. Lawyers are not allowed to work on a "no cure no pay"-principle. Claims management companies are allowed to work on such basis. The loser pays principle applies, but the compensation will not cover the total lawyers' fees incurred. The amount awarded is based on fixed figures by the courts and based in the amount in dispute and the number of court-related activities.

[12] Derivative action against BP was brought before Houston U.S. District Court, Southern District of Texas, 22 March 2011, Docket No. 4.10-CV-03447.

[13] No. 10 Civ. 00532 (S.D.N.Y. 2010)

[14] See above, under II.1

[15] See http://www.investorclaimsagainstfortis.com, already cited

[16] See http://www.investorclaimsagainstfortis.com, already cited

[17] Against this background it does not surprise that knowledge of the Netherlands as one favourite collective redress portal for US-claimants in Europe is widespread among US lawyers.

[18] Further, the Rome I and the Rome II Regulations aim at the unification of International Private Law and International Civil Procedure Law.

[19] Council Regulation (EC) No 864/2007 of 11 July 2007, European International Private Law on non-contractual obligations (tort law).

[20] Art. 4 para. 1 Rome II

[21] For more details and in particular the proposal's impact from an insurance perspective see: Jonathan Goodliffe, "Jurisdiction in insurance disputes: possible changes", BILA, Journal of the British Insurance Lawyers Association, issue 121, 35.

[22] See: European Commission, Directorate General Law Justice, "Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters", issued 17 December 2010. For the details and underlying reasons for the proposals by the European Commission see the country by country analysis by the Centre for Strategy & Evaluation Services "CSES", on behalf of the European Commission, Directorate General Law Justice, "Data Collection and Impact Analysis – Certain Aspects of a possible Revision of Council Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters – Brussels I", issued 17 December 2010.