

[informal translation from Dutch]

**AMSTERDAM COURT OF APPEAL
SIXTEENTH THREE-JUDGE CIVIL SECTION**

DECISION

Petitioners:

1. the legal entity under foreign law
SCOR HOLDING (SWITZERLAND) AG,
formerly CONVERIUM HOLDING AG,
with registered seat in Zürich (Switzerland),
counsel: D.F. Lunsingh Scheurleer of Amsterdam
2. the legal entity under foreign law
ZÜRICH FINANCIAL SERVICES LTD,
with registered seat in Zürich (Switzerland),
counsel: R.W. Polak of Amsterdam,
3. the foundation
STICHTING CONVERIUM SECURITIES COMPENSATION FOUNDATION,
with registered seat in The Hague,
counsel: J.H. Lemstra of The Hague,
4. the association with full legal capacity
VERENIGING VEB NCVB,
with registered seat in The Hague,
counsel: P.W.J. Coenen of The Hague,

hereinafter also to be referred to as: SCOR (at any rate Converium), ZFS, the Foundation and VEB.

Defendants:

the legal entities under foreign law:

1. LIECHTENSTEINISCHE LANDESBANK AG,
with registered seat in Vaduz (Liechtenstein),
2. HELABA INVEST KAPITALANLAGEGESELLSCHAFT MBH,
with registered seat in Frankfurt am Main (Germany),

3. METZLER INVESTMENT GMBH,
with registered seat in Frankfurt am Main (Germany),
4. WESTLB MELLON ASSET MANAGEMENT
KAPITALANLAGEGESELLSCHAFT MBH,
with registered seat in Düsseldorf (Germany),
5. SWISS LIFE ASSET MANAGEMENT AG,
with registered seat in Zürich (Switzerland),
6. INTERNATIONALE KAPITALANLAGEGESELLSCHAFT MBH,
with registered seat in Düsseldorf (Germany),
7. DEKA INVESTMENT GMBH,
with registered seat in Frankfurt am Main (Germany),
8. HANSAINVEST HANSEATISCHE INVESTMENT GMBH,
with registered seat in Hamburg (Germany),
9. PENSIONKASSE DER UBS (PENSION FUND OF UBS),
with registered seat in Zürich (Switzerland),
10. BNY MELLON SERVICE KAPITALANLAGE-GESELLSCHAFT MBH,
with registered seat in Frankfurt am Main (Germany),

counsel: J.H.B. Crucq of Amsterdam.

1. The course of the proceedings

The Court of Appeal refers to the interim decision of 12 November 2010 (LJN BO3908).

By letter of 9 February 2011 petitioners submitted a translation of various documents.

On 22 August 2011 defendants filed a statement of defence.

By letter of 19 September 2011 petitioners submitted additional exhibits (numbers 31A-D, 32 and 33).

By letter of 26 September 2011 petitioners inter alia let it be known that E.H. Swaab, *advocaat* in Amsterdam, will act as Dispute Resolution Body.

The hearing of the petition was held on 3 October 2011.

With the permission of the Court petitioners made an audio recording of the hearing. By letter of 27 October 2011 petitioners submitted a transcript of the recording. The transcript forms part of the official record of the hearing.

The Court's decision has been scheduled for today.

2. Petition

The Court refers to the interim decision at 2.1 to 2.3.

3. Jurisdiction

In the interim decision (2.7 to 2.13) the Court gave a provisional ruling on its jurisdiction to hear the petition. The jurisdiction of the Court has not been contested in these proceedings. Nor does the Court see any reason to ex officio retract its provisional ruling.

4. Formal requirements

4.1 The (amended) petition satisfies the requirements of articles 1013(1) and (2) of the Netherlands Code of Civil Procedure (NCCP).

4.2.1 At the hearing of 24 August 2010 the Court directed the manner in which the interested parties are to be notified.

4.2.2 The documents include a statement (with annexes) by junior judicial process server G.J.M. Wouters of The Hague of 19 September 2011, in which a report is given of the manner in which the interested parties have been notified.

The statement shows that:

- 2,454 known interested parties resident outside the Netherlands have been notified by writ, in the language of the country concerned, in accordance with the applicable rules of the EU Service Regulation,
- 8,859 known interested parties resident outside the Netherlands have been notified by writ, in the language of the country concerned, in accordance with the applicable rules of the Hague Service Convention of 1965,
- 24 known interested parties resident on Aruba, Bonaire or Curacao have been notified by writ, in accordance with article 54 NCCP,
- 365 known interested parties resident outside the Netherlands have been notified by registered letter without proof of receipt, in English and with respect to Japan in Japanese, in accordance with the applicable provisions of the Hague Service Convention of 1965,
- 127 known interested parties resident outside the Netherlands have been notified by registered letter without proof of receipt, in English, in accordance with the applicable provisions of the Dutch-British Civil Procedure Convention of 1933,
- 204 known interested parties residing in the Netherlands have been notified by ordinary letter,
- 181 known interested parties residing outside the Netherlands have been notified by ordinary letter, in Arabic, German, English, French, Dutch, Portuguese and Spanish, in the absence of an applicable convention or other applicable international arrangement,
- 4 known interested parties residing outside the Netherlands have been notified by registered letter without proof of receipt, in Arabic, in accordance with the applicable provisions of the Hague Service Convention of 1954.

4.2.3 The documents further show that the hearing was announced in 19 (well-known) newspapers from Germany, France, Italy, Luxemburg, the Netherlands, the United

Kingdom and Switzerland, and in The Wall Street Journal Europe and the European edition of The Economist and via 2 newswires (PR Newswire and Bloomberg LP).

4.2.4 Moreover, the announcement (with relevant documents) was published on the websites *www.converiumsettlement.com*, *www.blbglaw.com*, *www.srkw-law.com*, *www.cohenmilstein.com* and *www.VEB.net*.

4.2.5 In the opinion of the Court it may be inferred from the documents that the notification and announcement took place properly.

5. The agreements

5.1.1 The agreements were entered into on 2 July 2010 between SCOR, the Foundation and VEB (the first agreement) and between ZFS, the Foundation and VEB (the second agreement).

5.1.2 The agreements aim to compensate loss caused, concisely put, by a decline in the value of Converium shares following disclosures by Converium in the period 2002-2004 with respect to its (anticipated) financial results and the provisions to be made for this. The Court references the amended petition at 3.2 and the interim decision at 2.1 and 2.2. The persons to whom the loss was caused are, concisely put, the non-US exchange purchasers. They are further identified at 5.2.1.

5.1.3 Pursuant to its articles of association the Foundation represents the interests of these non-US exchange purchasers. Pursuant to its articles of association the VEB represents the interests of Dutch exchange purchasers.

5.1.4 With this the agreements satisfy the requirement of article 7:907(1) of the Netherlands Civil Code (NCC).

5.2.1 The persons for whose benefit the agreements have been entered into are defined in articles II.A.3, XIII.A.51, XIII.A.55 and annex C of the first agreement and in articles II.A.3, XIII.A.54, XIII.A.60 and annex C of the second agreement. Concisely put it concerns legal and natural persons domiciled outside the United States of America, who purchased Converium shares in the period from 7 January 2002 to 2 September 2004 on a non-US stock exchange, such as the SWX Swiss Exchange, and who incurred a loss. There exists a settlement that is applicable to US purchasers and purchasers of shares on a US stock exchange which was achieved in a (consolidated) US Class Action and which was approved by the US District Court, Southern District of New York on 12 December 2008, which decision became final on 25 June 2009. The US Court excluded the non-US exchange purchasers from participation in the class. For the proceedings concerned the Court refers to the amended petition at 3.

5.2.2 The number of non-US exchange purchasers is unknown. According to an estimate in the agreements the number of (known) non-US exchange purchasers is over 3,000. The amended petition assumes about 12,000 non-US exchange purchasers. According to the

statement by junior judicial process server G.J.M. Wouters of 19 September 2011, as mentioned at 3.2, 12,218 persons have been served notice of these proceedings.

5.2.3 The compensation to be awarded to these persons is stated in sections I.A, II.A, articles XIII.A.49 and XIII.A.72 and annex C of the first agreement and in sections I.A, II.A, articles XIII.A.52 and XIII.A.78 and annex C of the second agreement. The total settlement payment (before deduction of costs and fees) is USD 40,000,000 under the first agreement and USD 18,400,000 under the second agreement. The agreements contain an elaborated settlement distribution plan for the distribution of these sums.

5.2.4 The conditions that the persons must satisfy in order to be eligible for compensation are stated in section II.C, article XIII.A.55 and annex C of the first agreement in section II.C, article XIII.A.60 and annex C of the second agreement.

5.2.5 The manner in which the compensation is determined and can be obtained is stated in sections II.B, II.C and annex C of the agreements.

5.2.6 The name and address of the person to whom the written notification referred to in article 908(2) and (3) NCC (opt-out statement) can be given is stated in articles VII.A.1 (and 5) and XIII.A.2 of the agreements. The statement can be made in writing or by e-mail to the petitioners' administrator:

The Garden City Group Inc
P.O. Box 9616
Dublin, OH 43017-4916
USA
questions@converiumsettlements.com

5.2.7 In view of the above, the agreements satisfy the requirements of article 7:907(2) NCC.

6. The reasonableness of the compensation awarded

6.1 Pursuant to article 7:907(3), preamble and (b) NCC, the Court must refuse the petition if the amount of compensation awarded is not reasonable, in view of the extent of the loss, the ease and speed with which the compensation can be obtained and the possible causes of the loss.

6.2 Contrary to the defendants' view, in assessing the reasonableness of the compensation the Court has taken all the relevant circumstances into account, including the circumstances arising after the determination of the compensation or the entering into of the agreements.

6.3 It is not clear what the amount of compensation per share or per exchange purchaser will be, because the compensation depends on various variables, including the date of purchase and any date of sale of the shares.

6.4.1 The total amount that is available under the agreements for the non-US exchange purchasers is (before deduction of costs and fees) USD 58,400,000.

That sum is proportionally considerably lower than the settlement payment for the (smaller group of) US exchange purchasers (USD 84,600,000), who found themselves in a comparable position to the non-US exchange purchasers insofar as it concerns their loss. According to petitioners the justification for this difference may particularly be found in the fact that the US Court excluded the non-US exchange purchasers from participation in the class, so that they have no effective course of justice for validating their potential legal claims. Defendants have advanced objections on this point.

6.4.2 The Court first and foremost notes in this regard that the events to which the compensation pertains took place in the period 2002-2004 and insofar as known since then outside of the United States no litigation at all has been brought to obtain compensation. Petitioners, submitting reports by experts, have pointed to the various factual and legal circumstances that impede obtaining such compensation in court proceedings outside of the United States of America. Leaving aside whether and to what extent those circumstances render the acquiring of compensation impossible, it is at any rate plausible that they will form a real obstacle for many non-US exchange purchasers to have their potential claims awarded in court outside of the United States of America. In view of their being excluded from participation in the US class, it is not plausible that they would still have effective remedies to this end in the United States of America. For the event defendants wished to argue that this is different, their defence is insufficiently substantiated. Accordingly, the Court has no need of an investigation by experts on this point, as defendants have requested. Accordingly, it may be assumed that the legal position of the non-US exchange purchasers is essentially different to that of the US exchange purchasers. This also means that there is no unacceptable difference in the treatment of equal cases.

6.4.3 In addition to this, the non-US exchange purchasers who do still want to bring their claims to court have the possibility of opting out of the binding nature of the agreements by issuing an opt-out statement, so that they are at liberty to bring individual litigation. However, it is more plausible that in view of the time and the costs and the risks that are associated with conducting individual litigation many of the non-US exchange purchasers will not bring litigation and if therefore would not receive any compensation at all if the agreements are not declared binding.

6.4.4 It is further of importance that the binding declaration will have as a consequence that after the binding declaration the non-US exchange purchasers will in relative terms – certainly in comparison with conducting individual litigation – receive the awarded compensation with ease and speed and against no or very minor costs.

6.4.5 Under these circumstances the Court sees no reason for the judgment that the level of the compensation awarded is in itself unreasonable.

6.5.1 A considerable amount in costs and fees will be deducted from the awarded compensation. The costs are related to the administration and distribution of the amount of USD 58,400,000 and the conducting of the proceedings at hand. Additionally, petitioners have approved an amount for fees and expenses to the Principal Counsel, to the amount of 20 percent of the settlement payment of USD 58,400,000, in connection with the work related to the settlement. Defendants have advanced that this is an excessive consideration, also taking into account that Principal Counsel already received such remuneration in the US proceedings and that the compensation is incompatible with Dutch standards.

6.5.2 In assessing the reasonableness of the American Principal Counsel's fee it is possible, also under Dutch law, to take account of that which is customary in the US and is seen as reasonable. There is cause to do so in this case, because the work was performed to large extent within the American legal system and by U.S. law firms.

6.5.3 For the assessment of the reasonableness it is in the first place relevant that Principal Counsel is a collaboration of three U.S. law firms (Bernstein Litowitz Berger & Grossmann LLP, Cohen Milstein Hausfeld & Toll, P.L.L.C. and Spector Roseman & Kodroff, P.C.), of which a team worked on the case for many years from 2004 onwards, fulltime or otherwise. Principal Counsel has extensively described the work in a memorandum of 13 August 2009.

6.5.4 An indication that the fee of 20 percent of the settlement payment for that work and the result achieved is customary and reasonable in a case such as the one at hand lies in the Order awarding attorneys' fees and expenses of the US District Court of 17 December 2008, in which such a fee is awarded for the work performed and expenses made in the context of the class action.

The US District Court ruled that the fee was 'fair and reasonable and consistent with awards in similar cases'.

A report of the hearing prior to the Order shows that Principal Counsel's work and the reasonableness of the fee was discussed extensively. With this it was also discussed that Principal Counsel would request a similar fee for the current settlement.

6.5.5 Petitioners have further submitted a report of an empirical American study into the level of fees in comparable situations (Theodore Eisenberg and Geoffrey P. Miller, Attorneys fees in class action settlements: an empirical study, NYU Center For Law & Business Working Paper Series CLB-03-017). That study shows that a fee of 20 percent of the settlement payment is not excessive for a case such as the one at hand, but falls within the boundaries of what is customary.

6.5.6 Petitioners have moreover presented a comparison of the fee requested on the basis of a percentage of the settlement payment (fee) with a fee based on the hours spent by

Principal Counsel and its associates on the matter (lodestar calculation). This comparison takes account of both the work that Principal Counsel performed for the U.S. and the non-US exchange purchasers. This is reasonable, because Principal Counsel acted for both groups until the non-US exchange purchasers were excluded from the class. The Order of the US District Court of 17 December 2008 shows that until that point in time Principal Counsel had already spent 65,000 hours on the case, with a value of USD 24.4 million, and that there were complex factual and legal issues involved in the case, in which there was a considerable risk of a lower result or none at all. The comparison leads to the conclusion that the lodestar calculation results in a fee that does not differ essentially from the fee requested.

6.5.7 Defendants have not or insufficiently concretely rebutted that which is considered above, so the Court shall assume this in its decision. With this the Court considers itself to be sufficiently informed about the reasonableness of the fee and therefore sees no reason for additional inquiry, as defendants have requested. On the basis of that which has been advanced and shown, the Court is of the opinion that the fee awarded to Principal Counsel is reasonable. Nor does the amount of that fee mean that the level of the compensation remaining for the non-US exchange purchasers can no longer be called reasonable.

6.6 Nor have any other grounds been advanced or shown that should lead to the judgment that the level of the compensation available to the non-US exchange purchasers is not reasonable. Therefore the Court has no reason to refuse the petition on grounds relating to the reasonableness of the fee.

7. Security for payment

The settlement payment is in one or more segregated bank accounts administered by a civil law notary and sufficient measures have been taken to safeguard that the amount is and remains available to the non-US exchange purchasers. With this the requirement entailed by article 7:907(3), preamble, and (c) NCC has been satisfied.

8. Independent determination of the compensation

The petitioners' administrator determines the compensation with due observance of the provisions of the Settlement Distribution Plan. Disputes can be put to the District Court of Amsterdam or to an independent binding advisor E.H. Swaab, *advocaat* in Amsterdam (Dispute Resolution Body). With this the requirement given by article 7:907(3), preamble and (d) NCC is satisfied.

9. Sufficient safeguards for the interests of aggrieved parties

With respect to the conditions for payment, the treatment of the group of aggrieved parties or other matters, there are no reasons to assume that the interests of the aggrieved

parties are insufficiently safeguarded. This means that the provisions of article 7:907(3), preamble and (e) NCC do not furnish reason to refuse the petition.

10. Representativeness

10.1 Pursuant to article 7:907(3), preamble and (f) NCC the Court shall refuse the petition if the Foundation and VEB are not sufficiently representative with respect to the interests of the non-US exchange purchasers.

10.2 The Court has considered in earlier decisions that it is not required for each petitioner to be separately representative with respect to the interests of the entire group of persons for whose benefit the agreement(s) have/has been entered into. It is sufficient for them to jointly be sufficiently representative. The Court refers to its decisions of 27 January 2007, LJN AZ7033 (Dexia), 29 May 2009, LJN BI5744 (Shell) and 15 July 2009, LJN BJ2691 (Vedior). The Court adds to this that there is insufficient reason to additionally pose the requirement that each petitioner is sufficiently representative for a group of sufficient size.

10.3 VEB may be considered sufficiently representative with respect to the interests of the Dutch exchange purchasers. The Court references its decisions mentioned at 10.2.

10.4 The Foundation was incorporated – by Converium, ZFS and one of the lead plaintiffs in the U.S. Class Action – to represent the interests of non-US exchange purchasers on 18 February 2009. The organization of the Foundation satisfies the principles of the Claim Code as in force since 1 January 2012, on the understanding that the Foundation does not have a Supervisory Committee. However, other (appropriate) forms of supervision have been provided for, in particular by the participants and by an independent auditor. The Foundation has sought and obtained support for realising its object from 29 foreign organisations that represent the interests of shareholders and institutional investors. These include European representative organisations and various representative organisations and institutional investors from countries where most of the known non-US exchange purchasers are domiciled, these being Switzerland and the United Kingdom.

These representative organisations and investors have expressed their support as participant by entering into an agreement with the Foundation or as supporter. In this connection it is also relevant that the representativeness of the Foundation has not been disputed and that no other organisation is known that has taken on the interests of the non-US exchange purchasers. Lastly, significance is to be given to the fact that the Foundation has undertaken activities to publicise the agreements and to discuss the agreements at major international investor conferences.

Taking these circumstances into account, the Court considers the Foundation and VEB to be sufficiently representative with respect to the interests of the non-US exchange purchasers, so that the requirement contained in article 7:907(3), preamble and (f) NCC is satisfied.

11. Sufficient size of the group

In view of the number of known non-US exchange purchasers the group of persons for whose benefit the agreements have been concluded is of a sufficient size to justify the binding declaration. With this the requirement contained in article 7:907(3), preamble and (g) NCC is satisfied.

12. The legal entity providing the compensation is party to the agreement

The compensation is distributed by the administrator on behalf of the Foundation. The Foundation is party to the agreements, so the requirement contained in article 7:907(3), preamble and (h) NCC is satisfied.

13. Awardability of petition

The conclusion is that the agreements satisfy the statutory requirements and that there are no statutory or other grounds to refuse the petition. The Court of Appeal will therefore grant the petition.

14. The opt-out statement

14.1 Pursuant to article 7:908(2) NCC the binding declaration has no effect with respect to a person entitled to compensation who, within a period of time determined by the court of at least three months after the announcement of the court decision meant in article 1017(3) NCCP, informs the person meant in article 7:907(2)(f) NCC in writing not to wish to be bound.

14.2 Petitioners have requested the Court to determine the time period meant in 14.1 at three months, ending on the last day of the third month following the calendar month in which the announcement referred to in 14.1 is made. The Court has no reason to decide other than has been requested.

14.3 For the person entitled to compensation who could not be cognisant of his loss at the time of the announcement of the court decision referred to in 14.1, the agreements provide (articles VII.A.5) the time period for submitting the opt-out statement at six months after the entitled person has been informed in writing that he is eligible for compensation and that he may opt out from the binding declaration. The Court considers this arrangement reasonable and in accordance with the law.

14.4 The Court has noted that the agreements permit the opt-out statement to be made both in writing and by e-mail.

14.5 According to article VII.A.4 and 5 the opt-out statement must contain the name, the address and the telephone number and/or e-mail address of the entitled party. That is an allowable requirement. In addition, the entitled person will be requested to provide information on his transactions with respect to Converium shares. The Court considers this arrangement allowable. The fact that the validity of the opt-out statement may not be

made dependent on the provision of further information, as is also expressed in the agreements, does not constitute an obstacle to requesting further information that petitioners need for establishing the value represented by the shares held by the non-US exchange purchasers who are opting out of the binding declaration, also with a view to SCOR's and ZFS's right to cancel the agreement (article XI of the agreements).

14.6 The opt-out statement is to be made to the administrator referred to in 5.2.6.

15. Notification and announcement of the court decision

15.1 Petitioners must send notice of this decision, as soon as possible after it has become final, to the known non-US exchange purchasers in the language in which the non-US exchange purchasers were notified of the hearing. The notice may be sent by regular letter or by e-mail, on the understanding that the notice must be served under observance of the Hague Service Convention 1965 to non-US exchange purchasers domiciled in Switzerland.

15.2 The notice must also be published on the websites mentioned in 4.2.4 in all the languages in which it is sent.

15.3 The notice must at any rate contain the information stated in section IV.A.1(b) of the agreements.

15.4 Petitioners may suffice by having the court decision itself and an English translation thereof perusable and downloadable on the websites mentioned in 4.2.4 and available on request from their administrator.

Additionally, the decision may be consulted and downloaded from the website of the Court (www.rechtspraak.nl, actualiteiten/dossiers) and also available on request from the Court registry.

15.5 Petitioners must additionally announce this decision, as soon as possible after it becomes final, in/on:

- the newspapers mentioned in 4.2.3 and the newswires mentioned there,
- the websites mentioned 4.2.4.

15.6 The announcement must at any rate contain the information as stated in section IV.A.2(b) of the agreements.

16. Decision

The Court:

16.1 declares the agreements of 2 July 2010, of which a copy is attached to this decision, to be binding upon the non-US exchange purchasers (as defined in articles II.A.3, XIII.A.51, XIII.A.55 and annex C of the first agreement and articles II.A.3, XIII.A.54,

XIII.A.60 and annex C of the second agreement) and their legal successors under universal or particular title, as meant in article 7:907(1) NCC;

16.2 directs that the time period within which a non-US exchange purchaser may let it be known in writing or by e-mail not to wish to be bound by the agreement, as meant in article 7:908(2) NCC, on three months, ending on the last day of the third month following the calendar month in which the announcement meant in 15.4 is made;

16.3 directs that the time period within which a non-US exchange purchaser who could not be cognisant of his loss at the time of the announcement referred to in 15.5, may let it be known in writing or by e-mail not to wish to be bound by the agreement, as meant in article 7:908(3)NCC, at six months after the exchange purchaser has been informed in writing that he is eligible for compensation and that he may opt out from the binding declaration.

16.4 directs that the court registrar will issue a copy of this decision, both in writing and electronically (in pdf) to counsel to petitioners and counsel to defendants;

16.5 directs that petitioners shall make the notifications and announcements meant under 15.1 to 15.6;

16.6. dismisses all other requests.

This decision is rendered by justices W.J.J. Los, A.H.A. Scholten and J.W. Rutgers and read out in open court on 17 January 2012.