# Key Takeaways

Skadden

# The Growth of Collective Shareholder Actions in Europe

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On June 8, 2017, Skadden hosted a webinar titled "The Growth of Collective Shareholder Actions in Europe." The Skadden panelists were international litigation and arbitration partners David Edwards and Anke Sessler, and complex litigation and trials partner Joseph Sacca.

Mr. Edwards began the discussion with some observations on the recent growth in collective shareholder actions in Europe. He explained that this trend could be attributed to multiple factors, including:

- the 2010 decision of the U.S. Supreme Court in *Morrison v. National Australia Bank*, which held that investors that purchased securities outside the U.S. may not bring claims pursuant to the U.S. securities laws;
- the growth in the industries of litigation funding and "after the event" insurance, mitigating risks in a "loser pays" legal system like that in the U.K.;
- the rise of shareholder associations, which facilitate the aggregation of claimants and litigation cost-sharing; and
- a greater acceptance of collective redress mechanisms in Europe.

This acceptance, Mr. Edwards described, is evident in the 2013 recommendation by the European Commission that EU member states adopt collective redress mechanisms; the 2005 Dutch Act on Collective Settlements (WCAM); the 2005 German Capital Markets Model Case Act (KapMuG); and the U.K.'s system of Group Litigation Orders (GLOs). These statutes provided the framework for the remainder of the presentation, as the panelists discussed the context against which each was enacted, their structure and notable examples of litigation pursuant to each framework.

## Dutch Act on Collective Settlements (WCAM)

Mr. Sacca began by describing the Dutch WCAM statute, unique in that it permits the collective, binding settlement of actions on an opt-out basis, though not their collective prosecution; indeed, there is currently no statute allowing for the collective prosecution of damages actions in the Netherlands. Typical parties to a WCAM action, Mr. Sacca described, include the alleged wrongdoer and an organization to represent the allegedly injured parties, which may be a pre-existing organization (like the VEB, a Dutch shareholders' association) or a specially formed foundation (stichting) representative of injured claimants.

### UK Group Litigation Orders (GLOs)

Mr. Edwards talked about the GLO regime under the Civil Procedure Rules in the U.K. Courts may issue GLOs, he explained, where a "number" of claims (theoretically as small as two, but in practice much higher) involving common questions of law or fact have been advanced. The GLO identifies the common "GLO issues," governs the establishment of a "GLO register" for claimants, and specifies the "Management Court" before which the claims will proceed, with any judgment rendered deemed to be binding for all claims on the GLO register. Mr. Edwards noted that the GLO may also impose directives on the management of the claims process, which can include mandates for publicizing the claims, appointment of a deadline for assertion of claims or designation of certain claims to proceed separately as test cases.

### German Capital Markets Model Case Act (KapMuG)

Ms. Sessler then described the 2005 passage of KapMuG in Germany, which was enacted to facilitate the streamlined resolution of substantially similar securities-related actions by way of a model case procedure, whereby resolution of the model case has binding effect on the individual actions involving the same questions of law or fact. Resolution of the model case may include settlement, she noted, which has the effect of binding all plaintiffs who do not affirmatively opt out so long as no more than 30 percent of plaintiffs opt out.

### Notable Cases

After outlining the procedural frameworks in the Netherlands, the U.K. and Germany, each panelist detailed notable actions under each statute. Mr. Sacca began by describing the Royal Dutch Shell WCAM action in the Netherlands, which constituted the earliest major WCAM settlement. Royal Dutch Shell had been sued in a U.S. securities class action following a write-down of oil and gas reserves in early 2004, Mr. Sacca explained, but non-U.S. shareholders risked exclusion from the class as "F-cubed" plaintiffs (*i.e.*, foreign shareholders suing a foreign corporation whose shares they purchased on foreign exchanges). Royal Dutch Shell, a company with strong ties to the Netherlands, reached a settlement with its European investors through a WCAM action, remarkable, Mr. Sacca noted, in that it awarded equivalent relief on a per-share basis to the European investors as the U.S. settlement did to U.S. investors, despite the fact that the European investors lacked the same ability to collectively pursue a liability claim.

Somewhat more controversial was the next major WCAM settlement Mr. Sacca described, that of Swiss reinsurer Converium AG. As with Royal Dutch Shell, the company was the subject of a securities class action in the U.S., which had excluded F-cubed plaintiffs and been previously settled, but unlike Royal Dutch Shell, Converium lacked any significant ties to the Netherlands. Nevertheless, Converium sought a WCAM settlement to bind its European investors in 2010, and a settlement was approved by a Dutch court in 2012 despite a disparity in per-share recovery when compared to the U.S. settlement. The court noted that WCAM claimants, unable to bring a collective action on liability grounds, posed a far weaker litigation risk than their U.S. counterparts.

Next, Mr. Sacca described the Fortis action, which sought settlement of claims against the company relating to alleged misrepresentations arising out of the financial crisis. While a suit had been commenced in the U.S. in 2008, it had been dismissed in 2010 on the grounds that the court could not exercise jurisdiction over the F-cubed claims described in the lawsuit. Thus, Mr. Sacca detailed, multiple foundations and shareholder groups commenced declaratory judgment actions against Fortis in Dutch courts, seeking a declaration that it had engaged in fraud. In March 2016, Fortis announced that it had reached agreement with each foundation and shareholder group to settle the claims, via the WCAM process, for $1.3 billion. This represented the first major WCAM settlement that was not preceded or accompanied by the settlement of a parallel U.S. securities class action.

Mr. Sacca next described several more recent Dutch shareholder actions, including an April 2015 action against British Petroleum (BP) filed by the VEB, which sought a declaratory judgment that BP had misled investors regarding the Deepwater Horizon explosion. While the VEB purported to assert the claim on behalf of all investors that purchased or held BP securities through Dutch accounts, a Dutch court dismissed the case in September 2016 on the grounds that this did not suffice to confer jurisdiction over the claims. Mr. Sacca noted that while the BP action involved a liability determination, rather than approval of a WCAM settlement, it is instructive insofar as it indicates that Dutch courts do not consider their jurisdiction to be without restriction in cases involving shareholder collective actions.

Mr. Sacca explained that the resolution of the BP action casts doubt on the viability of a second putative Dutch collective action involving Volkswagen's emissions scandal. In 2016, he described, two Dutch foundations — both funded by U.S. securities class action firms — announced they would seek to negotiate WCAM settlements with Volkswagen for purchasers of Volkswagen securities outside the U.S. Neither, however, has reported success in enticing Volkswagen to enter into negotiations. Mr. Sacca observed that their struggles are symptomatic of a quirk in Dutch law whereby the WCAM statute allows for the collective settlement of claims, but not their collective prosecu-

tion, so claimants have only limited leverage against a defendant. Thus, in early 2016, Mr. Sacca reported, the VEB commenced a declaratory judgment action against Volkswagen seeking a judgment as to its liability instead, but its prospects are uncertain in light of the precedent set by the BP action.

The BP decision will likewise pose an obstacle, Mr. Sacca next explained, to the efforts of one stichting seeking recovery against Brazilian petroleum company Petrobras in connection with the multibillion dollar bribery scheme that came to light in 2015. A Dutch foundation was formed by several international law firms and a U.S. litigation funding firm to represent purchasers of Petrobras securities outside the U.S., asserting that claims against Petrobras could properly be brought in the Netherlands based on attenuated factors that included the issuance of bonds by a Dutch subsidiary. After Petrobras rejected its settlement overtures, the foundation commenced a declaratory judgment action in January 2017; as with Volkswagen, its viability is doubtful, Mr. Sacca noted, in light of the BP decision.

Mr. Sacca also described a recent shareholder action against Netherlands-based Rabobank Group. A Dutch foundation commenced a declaratory judgment action in 2015 based on the bank's alleged deception of investors relating to interest-rate swaps. Mr. Sacca explained that the bank had defended against the action by attacking the structure of the foundation itself and its suitability to safeguard the interests of its constituents, pointing to the fact that it had been specifically formed by experienced collective action experts to pursue the Rabobank claims and purportedly lacked a system of checks and balances to ensure that the interests of shareholders were not subordinated to the founders' pecuniary motivation. A Dutch court agreed with Rabobank's argument and dismissed the claims, additionally noting that adjudication of Rabobank's alleged wrongdoing would require analysis of each member's individual claim, a method not suitable to class action adjudication. Mr. Sacca commented that although not a WCAM action, the Rabobank action — similar to the BP action — indicates the existence of limits on claimants' ability to bring collective actions.

Mr. Edwards discussed the much-publicized shareholder actions proceeding against RBS in the U.K. As with several of the Dutch WCAM actions, he explained, although a U.S. class action had been commenced in 2009 against RBS alleging fraud with regard to its exposure to subprime mortgage-backed securities, investors that had purchased their shares on non-U.S. exchanges had been excluded from the class after the Supreme Court's decision in *Morrison*. Shareholder groups then turned to actions in the U.K. courts in 2013. These actions, which proceeded under a GLO, eventually encompassed as many as 27,000 claimants, and defending against and seeking to settle them had reportedly cost RBS £100 million. Mr. Edwards revealed that a global settlement had been announced just one day prior, but commented that the lengths RBS had gone to date to obtain this settlement —and the lengths it still must go to achieve approval — can be attributed to the structure of the GLO system, including principally its nature as an opt-in regime, which requires defendants like RBS to expend a significant amount of effort to achieve a global peace. The complexities introduced by these issues have been compounded in the RBS case, too, Mr. Edwards explained, by the involvement of insurers: a relatively new "after-the-event" insurance product, obtained by at least one shareholder group in the RBS action, allows claimants to mitigate the risk of significant legal costs under the U.K.'s "loser pays" policy.

Mr. Edwards detailed another creative litigation funding solution in a GLO action commenced against U.K. grocer Tesco by 125 institutional investors in 2016. He explained that IMF Bentham, an Australian litigation funding firm working in collaboration with a British law firm, has arranged to fund the litigation effectively on a contingency basis. Mr. Edwards observed that the development of novel insurance products and the litigation funding market indicates a shifting attitude in the market toward a "business" model of litigation, and is expected to increase in the future.

Ms. Sessler concluded by describing several notable German shareholder cases arising under the KapMuG regime, beginning with the Deutsche Telekom AG action that spurred the enactment of KapMuG. Following a write-down of Deutsche Telekom's holdings in 2001, Ms. Sessler explained, over 15,000 individual actions had been instituted against the company, and the judicial system had nearly collapsed under the strain of processing the claims. While the passage of KapMuG has not facilitated a quick resolution of the Deutsche Telekom action itself, which is remarkably still pending, Ms. Sessler noted that the statute has enabled the streamlined handling of numerous other cases. These include nearly 1,500 cases filed against Volkswagen AG in connection with the "Dieselgate" scandal, currently suspended during the pendency of a model case proceeding pursuant to KapMuG. The number of cases filed, Ms. Sessler observed, is evidence that large institutional investors have embraced the collective claim resolution process in Germany.