Roundtable Discussion:
The Netherlands and the Future of European Securities Litigation

Hosted by:
Institutional Investor Educational Foundation (IIEF)
UvA Center for Financial Law
The Free University (VU) Institute for Financial Law and Corporate Law

Moderator:
Edgar du Perron, Dean and Professor of Private Law at the Amsterdam Law School

Setting the Stage—Edgar du Perron
After welcoming the participants and acknowledging the event co-hosts, Mr. Perron announced that Chatham House rules would be followed to encourage frank and open dialogue. Only the moderator’s comments will be attributed by name in this summary. He then asked Ianika Tzankova to put the discussion in context with an introduction. Ms. Tzankova is a professor of comparative mass claim litigation at Tilburg University and a lawyer in private practice.

Introduction - Ianika Tzankova
I am an academic with a particular interest in mass claims and disputes. I’d like to share my perspective on what’s going to happen in The Netherlands in the next five years. The Netherlands has a unique system for the resolution of mass claim disputes. In Belgium and Germany, proposals for similar systems have been made. For now, it’s The Netherlands where there’s the potential to develop from a normal civil law jurisdiction into a significant player in the global resolution of mass claims disputes. This doesn’t mean we have the perfect situation. I see three themes of concern:

- **Special purpose foundations.** The European tradition requiring standing from special purpose foundations has some issues in terms of representativeness. Especially in cross border situations, we have a task to explain to the outside world why we think special purpose foundations are representative for all types of claimants. By contrast, in the U.S., much effort is made to show representativeness.

- **The funding dynamics.** Unlike the U.S. class action system that inspired the Dutch legislature to enact a collective settlement system, we do not have judicial oversight over fees. We see the Amsterdam Court of Appeals becoming increasingly critical towards fees, especially when they come out of the settlement fund. Third party funders have also discovered The Netherlands and they evoke different types of issues.

- **Private international law.** The Shell and Converium cases have gained a lot of critical international attention. In Shell and Converium, there have been many objections but no objections about jurisdiction. So one would think if all the interested parties are happy with the situation, what’s the problem? Unfortunately, I think this is not the vision in Brussels, where proposals have been put forward to regulate cross-border collective redress and private international law issues. I see a tendency to stick to traditional notions.

We don’t tend to see proxy fights in the UK on anything like the scale in the U.S. However, UK law does vest shareholders with stronger, enforceable rights.

Moderator: You raised three themes: private international law issues relating to recent Dutch cases, funding dynamics and the judicial control over fees, and the use of special purpose foundations in the Dutch mass claim system. Are there any other topics the participants wish to discuss?

U.S. Attorney, Shareholder Activist: The Converium settlement involves a non-Dutch company. Will that settlement be recognized throughout Europe or will the Brussels ruling be binding only in The Netherlands?
“Within the European rules framework, there’s at least one big question that remains: Can class members be viewed as defendants under Rule 2?“  
- Antitrust Litigator, NL

“If you really do view the Dutch settlement act as casting the class members as defendants rather than plaintiffs, the judgment recognition argument may be conceptually easier to make.“

U.S. Corporate Attorney: We’ve spent a lot of time in the U.S. fighting what’s largely an academic question – whether foreign countries would recognize U.S. class action judgments. There are just two or three cases on this topic, so it’s largely academics arguing back and forth. However, you really do have a recognition framework under the Brussels regulation if you view the class members as defendants.

Class Action Litigator, NL: The way I understand it, as long as one court has taken jurisdiction, either on the basis of the main rule of Article 2 or on one of the alternative bases, and then the case moves forward in another forum within either the European Union or a member state per the Lugano Convention, I don’t think there’s any room for that second court to question the decision of the first court to take jurisdiction.

Antitrust Litigator, NL: Within the European rules framework, there’s at least one big remaining question: Can class members be viewed as defendants under Rule 2? We have some indications about how the Dutch courts view their jurisdiction and whether they think their decisions will be recognized by the Greeks, Spanish, Portuguese, etc. In many of these cases, this question is never raised. There are one or two decisions in which there was an American class settlement on a global basis that has been challenged in Europe and you get exactly the discussion that you want, namely the discussion about whether the court abroad is going to be recognized. In the context of that discussion, first, is there an internationally accepted basis for jurisdiction? Second, under Article 2, can you view the class members as defendants? And third, does recognizing the court in any way come into friction with the national public order? It’s a reasonable question whether a court in France or Greece or Portugal or anywhere else in the EU will accept that it’s in line with their public order. I don’t agree that it’s so simple.

Class Action Litigator, NL: I’m not saying that it’s simple. I’m saying that the recognition issue is the test of 34.1 or 34.2, not the question of whether the court will re-litigate a decision on the jurisdiction itself.

U.S. Corporate Defense Attorney: But you say that the public order question always remains.

Class Action Litigator, NL: The point I’m trying to make is that you cannot, in the second court, re-discuss (outside the context of 34) the basis of the first court taking jurisdiction. Then there’s only the question of recognition.

“The fear is that courts in many European countries will challenge jurisdiction under the public order exception.”

Moderator: You seem to be in agreement that if the Dutch court has assumed authority under the rules, then another court cannot materially discuss the issue of jurisdiction under the articles itself. But they can do it under the public order exception. The fear is that many courts in many European countries will do that.

Class Action Litigator, NL: We have certain procedural rules for the squeeze-out of minority shareholders, and rules for notification of those shareholders. Those national Dutch rules that say that it is sufficient to put an advertisement in a Dutch international newspaper. Apparently, the assumption is that if one decides to invest in a Dutch-listed company, then the investor makes an active decision to enter this legal sphere and should follow whatever is published on that company.

Corporate Advocate, NL: The question remains whether rules and regulations related to class actions would qualify as part of company law. If you talk about a squeeze-out, there’s little doubt that that’s a part of company law. Company law, according to the rules of private international law, will be determined by the national laws of that company.
“As long as the Dutch court keeps broadening its assumption of jurisdiction to countries that are far away...it’s not inconceivable that the issue of recognition will be raised.” - U.S. Corporate Attorney

“Why would a party make a big issue about jurisdiction when they always have the opportunity to simply opt-out of the mass claim settlement?”

Corporate Counsel: In the Shell case, it was not sufficient for the court to just place an ad; we had to serve with bailiffs or registered mail every shareholder for whom we had an address. It was a difficult and costly exercise. I don’t think that’s a point of corporate law; I think it’s procedural law.

Another pragmatic observation on the jurisdictional point: Why would a party make a big issue about jurisdiction when they always have the opportunity to simply opt-out of the mass claim settlement? From a pragmatic point of view, one compares what one could receive without incurring any cost by not opting out with what, with great cost and great uncertainty, one could achieve outside the settlement. If the settlement is inherently fair, it just doesn’t pay to start a procedure outside the settlement.

“There is much to be gained by providing more transparency to the proceeds distribution process.”

Law Professor: The percentage of the fund that has been actually paid out to the interested parties should be publicly available information. My understanding is that in the U.S., Canada and Australia, there is no duty to report about the settlement distribution process, and it’s a black box situation. I find it interesting, since in class actions everything takes place out in the open. Yet once there is a binding declaration and the settlement distribution process starts, we don’t know anything about what’s going on. Especially in the Dutch situation, making those results publicly available might help address some of the concerns that are being raised in relation to funding and the representativeness of the organization. It might affect the way people look at settlements in relation to private international law issues.

Corporate Defense Attorney, NL: It may be that the question of recognition will never be raised in court because to raise the question you must have a party that has not opted out, but has the willingness and funding to start litigation. That’s a very unlikely scenario because a party that really wants to challenge the settlement opts out, and then there’s no problem of recognition.

Moderator: Will the recognition issue in practice be a problem? In the end, I think it has a lot to do with notification rules. As long as everybody knows what is happening, then you can expect the people who have an interest to opt-out.

Corporate Attorney, U.S: For many years it has not been raised in relation to American global settlements, but it has been raised recently. It has been adjudicated in the Amsterdam court in the case of an American settlement – the Arvad settlement. As long as the Dutch court keeps broadening its assumption of jurisdiction to countries that are far away, and if notification doesn’t reach some areas where there’s a political local interest, it’s not inconceivable that the issue will be raised.

“Most people will know about the opt-out possibility and use it.”

Securities Litigation Attorney, NL: Most people will know about the opt-out possibility and use it. However we have a concrete example in the Qwest case, where a lot of Dutch investors did not want to be bound by the U.S. class settlement. There was a collective opt-out by the VEB as a representative of these shareholders without an actual power of attorney for some of those shareholders. People in The Netherlands relied on the fact that the VEB has done this categorically on their behalf. The same thing could happen in reverse, where a group of Americans or Australians who do not want to be bound by the Dutch settlement will just rely on one of the associations to give a generic opt-out and not file individual opt-outs. It may not be that academic.
“Isn’t it the case that the Amsterdam Court of Appeal will test its own authority to hear the case? There will be a point where the Dutch court will say, “This is too far away from our jurisdiction.”” - Director, Shareholders’ Association

“People follow the money.”

Corporate Counsel: People follow the money. The type of party that would raise a jurisdictional issue is usually of such sophistication that they do read the Financial Times and equivalents in other countries. They will have seen the notifications. You need to think about the types of shareholders you have. Institutional investors follow these matters. They are represented by the VEB in The Netherlands (and their equivalents in some other countries) so what remains is a very small group who could perhaps have missed it. But I don’t think that group has the resource or the sophistication to put up jurisdictional arguments and start a case separately.

Corporate Defense Attorney, NL: What happens in practice is that sophisticated investors will indeed send an opt-out notice and there will be organizations like the VEB who will encourage their members to do so themselves – but many people will not do so. If the opt-out folks start an action, then others will jump on the bandwagon. There will be some who did not send in an opt-out notice, which means that as part of the suit there will be people who have forgotten to do so.

Corporate Defense Counsel: We have two big cases now where that is happening – the Ahold and Qwest settlements. They haven’t opted out and they’re raising the issue.

Corporate Counsel: The Shell situation was entirely different. Maybe the other settlements were not as fair. In an opt-out situation, there is risk for both the party that initiated the settlement as well as the party that opts out. Both face uncertain results and the potential for great cost and hassle.

Director, Shareholders’ Association: Isn’t it the case that the Amsterdam Court of Appeal will test its own authority to hear the case? In a matter like the Coverium case, that is one of the interesting questions.

There will be a point where the Dutch court will say, “This is too far away from our jurisdiction.” In the Qwest case, the question of whether or not we were bound by the American settlement was one of a whole bundle of legal problems that we faced before we could get to any kind of solution in the court. We always knew that getting a settlement in the Qwest case would not be primarily a matter of legal position. Getting compensation from what basically were co-shareholders really involved 80% non-legal considerations.

“An issue that has not been addressed so far in the context of private international law is the choice of law or applicable law.”

Corporate Defense Attorney, NL: An issue that has not been addressed so far in the context of private international law is the choice of law or applicable law. If you have an alleged wrongdoing by a company with a dispersed shareholder base across the globe, and the alleged act happened after January 11, ’09, at least in the European context Round 2 law applies in the country where the harm was felt. How would you build a case, first in the claim phase and then in the settlement phase, where a Dutch or European court would have to apply potentially 10 or 12 different sets of rules in adjudicating the case or ruling whether the settlement is fair or reasonable?

Securities Litigator, NL: We’re doing it right now in the airline cartel litigation. The case is pending in Amsterdam and I’m plaintiff counsel for hundreds of European companies who want to claim damages from 11 airlines that were part of the air cargo cartel. We decided to ask the Dutch Court for a declaratory judgment that a tort was committed under the laws of ten EU member states – plus Switzerland. That’s a major burden on the court, but I’m confident that the courts, as enthusiastically as they responded in the Coverium matter, are happy to take this on as long as they consider themselves to be the appropriate forum for class litigation. I’m not sure that having to deal with different legal systems forms a meaningful obstacle if you really want to litigate.
“What’s a Swiss court going to think of a settlement approved by a Dutch judge in which a Swiss class action member gets a fraction of, for example, what a Dutch class action member gets?” - Defense Counsel, NL

Corporate Attorney, U.S: This happens a lot in the U.S., not in securities cases where it involves federal law, but in non-securities cases where there could be 50 states’ different laws. We have experts who group the laws to show that there really aren’t 50 different types of laws but really only two or ten – or however many they can be distilled to. In the settlement context, it’s a lot easier. The court doesn’t have to actually decide anything, but can take a more global view of whether the settlement is fair, even given the differences in laws.

Defense Counsel, NL: The court does need to decide whether the settlement is fair – which can be challenging if you have ten systems and a settlement where everybody gets the same. Different countries have different limitation periods (one year in Switzerland, five in France, ten in some others) and whether they all will see the settlement as fair becomes relevant. What’s a Swiss court going to think of a settlement approved by a Dutch judge in which a Swiss class action member gets a fraction of, for example, what a Dutch class action member gets?

“From an investor’s perspective, if you start proceedings against a company in which you’re an investor, in effect you’re harming yourself.”

Law Professor, NL: Picking up on a previous comment, that there were other, non-legal drivers for the VEB in the Quest case. I don’t know if you were referring to the importance for VEB to make a point to improve corporate governance. From an investor’s perspective, if you start proceedings against a company in which you’re an investor, in effect you’re harming yourself. Even if ultimately an insurance company has to pay, you’re likely to be an investor in that company as well.

“Is class action a good instrument for improving corporate governance? Wouldn’t you rather do that in a dialogue with a company?”

“Getting to a settlement would actually help the company get the share price up to a more attractive level.”

Director, Shareholders Association: I meant that the drivers of the Quest settlement were largely non-legal. We think they were mostly reputational. As for investors being hurt by litigation, you would be right in the Ahold or Shell settlements, where the company itself had to pay the damages. Quest is a bankrupt company and our co-shareholders, KPM, footed the bill. We think it’s important that the rules of the game are established and adhered to, and you sometimes need a case like this to make sure the markets understand that.

We represent shareholders that have been damaged in a certain period, and they are not by definition the same people who are currently invested in the stock. Recent investors have bought stock knowing the court case was pending, and that has an effect on the share price. Getting to a settlement would actually help the company get the share price up to a more attractive level. We do know this is a problem in litigating against companies that our members hold stock in, but it is the price we’re willing to pay to make sure the rules of the game are adhered to. We do think that the liable party should pay.

Securities Litigator, U.S: This issue was raised in the U.S. in the late ’80s and early ’90s in nearly every class action. It was called the ‘equity conflict.’ Courts in the U.S. universally rejected the equity conflict argument as a reason to not certify the class, for exactly the reasons stated here. The shareholder base in most corporations turns over sufficiently (70-80%), even with heavy institutional investment, that the claimant group in a case is not the same as the current shareholders. This is an issue that has been extensively litigated in the States. In a case my firm litigated – Tyco – a famous Harvard professor named Lucian Bebchuck wrote a strong opinion to the court about why the equity conflict should not be a reason to not certify a class in the U.S.
“Holland may be a great country for class action settlements, but should we encourage global class actions? To achieve that, The Netherlands would have to have a better system for discovery.” - Litigation Attorney, NL

Securities Litigation Attorney, NL: The professor is right that class actions bring high cost to the companies involved. Effectively it’s a zero sum game. If you have been defrauded as an investor, the shareholders who bought the stock later will pay for the damages that you receive.

I do think there is money leaking away – the total cost of the litigation itself. Especially in relation to U.S. securities class actions, these lawsuits are so prohibitively expensive that one wonders if it’s such a good system. Companies just have to settle because of the cost of litigation and discovery. I don’t always agree with that, because discovery is a way to get the truth on the table – even though it may be very expensive. Holland may be a great country for class action settlements, but should we expand that and encourage global class actions? To achieve that, The Netherlands would have to have a better system for discovery, because now you can have preliminary witness hearings, but very limited options for discovery. Where is the right equilibrium?

“Should we expand the role of the Dutch courts to take on class action litigation?”

Corporate Defense Attorney: You would have to change the binding nature of a judgment in a group action. In the current system, it only binds the organization bringing the claim and the defendant, but it has no effect on the members of the group in whose interest the claim is brought. In order to have a fair system, you should change that. Otherwise, a defendant could never win a case – just not lose it. Another claimant could come along, structure the case differently and you’d start all over again.

You would need a system for decisive resolution of the case and that brings up the whole question of how fair that is for the rest of the group who may not agree with the tactics of the interest group that happens to be first. The system in the U.S. also has its issues with regard to the selection of lead plaintiffs and lead counsel. I think you would see a shift in the debate to all kinds of preliminary issues. I don’t know, within the Dutch context, that we could get to a system that would be fair to all.

Director, Shareholders Association: I agree with the problem, but isn’t this really a problem of collective damages, not collective action? This is what you already have if you have numerous plaintiffs, whether or not they organize themselves. The potential for class actions might actually limit the number of issues to be resolved.

“In many cases, the only viable option for a claimant is to hope there is a collective that brings the case.”

Corporate Attorney, NL: Your point presupposes that you have an issue at hand where it does make sense for an individual to pursue his claim – but in many cases that’s not the case. In many cases, the only viable option for a claimant is to hope there is a collective that brings the case.
“The Dutch legislature is considering a representative test, something we don’t have. They’re not considering improving the one-way effect of the settlement, and not considering allowing collective actions for damages.” - Law Professor

Law Professor: It might be interesting to get an update on a few legislative developments in The Netherlands. Currently the Dutch Act is under revision. A proposal has been put forward to improve the Dutch Act on a couple of issues – but none of those we’ve discussed today except for proposals about notifications for non-Dutch parties. Addressing another relevant topic, the legislature is considering a representative test, something we don’t have. This is the only point that the Dutch Legislature is considering. They’re not considering improving the one-way effect of the settlement, and they’re not considering allowing collective actions for damages. The general feeling in The Hague with regard to collective actions is that things will not change one way or the other in the near future.

“From a political perspective, I think the Dutch government may welcome settlement tourism but would not welcome claim tourism.”

Moderator: The claim culture is something they do not want. In the claim situation, you need a Dutch claimant or at least a strong connection, and to invite litigation against your own companies may not be good policy.

Director, Shareholders Association: There are lots of situations where there are real damages and liability - but it is not economically feasible for individuals to go through the whole process of litigation and appeals. We, together with other consumer organizations, feel that the protection that the law offers would be enhanced by a mechanism of class action. Having a mechanism for class action doesn’t mean that you will always have to pay. It can be quite possible for a court to throw out frivolous lawsuits. You do need a case with merits. In my experience, we only pursue cases with merits. (laughter).

Corporate Board Advisor, NL: I’d like to talk about the use of special purpose vehicles under Dutch law. It cannot always be said that they are always representative of a class. Is this something we want to encourage or discourage?

“I can imagine a future where the VEB has become more and more important – and there could be a situation of monopolists."

Law Professor: Established organizations like the VEB and Consumentenbond, which is a Dutch consumer organization, do not always act in the same cases. At some point, will we get into a monopolist situation? Ideally, should collective settlements be initiated by long-standing organizations and special purpose vehicles set up properly and representing individuals in specific cases? I can imagine a future where the VEB has become more and more important – and there could be a situation of monopolists. We could have special purpose vehicles on the one hand and monopolists on the other. The combination of those two might not be what we want to have.

Corporate Counsel: I want to sound a word of caution about The Netherlands moving in the direction of allowing worldwide class actions and amending the Mass Claim Damages Act to accommodate that. A lot of parties in Asia believe the class actions in the U.S., with their contingency fees and jury trials, discourage investment in the U.S. and listing in the U.S. So I think the Dutch government is wise to be cautious in this area and to consider the investment climate for headquarters in The Netherlands. I see dollar signs in the eyes of law firms and others who are on the receiving end of these matters. I think it will be self-defeating if The Netherlands as a jurisdiction thinks it can become the center of worldwide class actions. I think it will trigger a reaction somewhere else. In the end, we will have lost the position of attractiveness for headquarters that we have in part created with a favorable tax climate.

Corporate Attorney, U.S: On the issue of the special purpose vehicles, I understand that it might sound suspicious to create an entity to do a very specific thing. On the other hand, the special purpose vehicles used in the Coverium and Shell settlements involved massive numbers of participants.
"To have anything along the lines of a representative class action, if you give it into the hands of lawyers as the U.S. has done, it will be a market on its own and lawyers will be very busy and wealthy as a result." - Defense Counsel, NL

You could almost say that the special purpose vehicle is more representative of the class than is a non-special purpose vehicle class representative as we have in the U.S.

**Law Professor:** I agree with the observation. But I would very much welcome allowing other longstanding organizations like pension funds to be the representative party in certain types of cases. We tried that in Shell and it wasn’t a successful attempt, but that doesn’t mean it wouldn’t be an option to explore in the future.

**Corporate Attorney, U.S.:** I don’t know whether you could do this under Dutch law, but suppose the pension funds in the Shell case that were not allowed to represent the class had something in their charters giving them the power to do that. Would that have satisfied the court’s objection?

**Law Professor:** No, I don’t think so.

**Defense Counsel, NL:** The key issue is who is going to be the driver in the process. If we are going to have anything along the lines of a representative class action, if you give it into the hands of lawyers as the U.S. has done with no checks and balances, it will be a market on its own and lawyers will be very busy and wealthy as a result.

If you’re going to allow entities to represent unknown group of plaintiffs, we need to have checks and balances. What the Dutch government has done is they’re introducing this in the context of our collective action system, where you cannot actually sue for damages. It doesn’t affect all those litigation vehicles that are advertising their services and collecting powers of attorney.

In some cases, we see very well run vehicles that properly represent their constituents. But we also see examples where 15-16 of these entities suddenly pop up, some of them run by 23 year olds who just received their law degree and are not insured against their own mistakes. Most importantly, the victims have no idea which entity to go with. We have no checks and balances right now.

"In the context of 305b of the Collective Action Act, the government is considering introducing a representativity test."

But what about all those special purpose vehicles that are collecting claims actively in The Netherlands and outside? Right now, the Dutch government seems to be sidelined on that issue because some of these people have said they will introduce self-regulation. A claims code has been written that is supposed to self-regulate that sector. Of course, as we’ve seen in many other countries including England, what will happen is that all the proper representative entities will do so, but all the improper entities who don’t know what they’re doing will simply not join it.

"This is not about lawyers or others with dollar signs in their eyes. It’s about access to court for the individual citizen."

**Director, Shareholders’ Association:** That’s become more and more of a void in our democracy. It’s very expensive to start a law suit and take it through to the end – especially if you’re litigating against a big company. Collective action fills that void to an extent.

I need to make an advertisement for the VEB. We’re not the only organization that can be a representative in a collective action. Holland is an associations country by tradition. I don’t think that you have to choose between these long-standing organizations with large membership and a special purpose vehicle. The special purpose vehicle can very well be representative; we use it in a lot of our cases just for logistic and liability reasons. For example, in the investment insurance policies matter, we’ve organized and set up a foundation. The representativeness is very important and should be a critical issue. I agree that having a foundation set up by a 23 year old should be looked at critically. I don’t want to lock it up only for organizations like the VEB; it’s not a monopoly.
“305a doesn’t really mean a lot. It gives the association the power to ask for something that any individual investor can ask for. Whatever judgment the 305a association gets is not binding on anybody.” - Defense Counsel, NL

Litigator, NL: I want to say something about the claims code you mentioned. I was a member of the committee that devised that code. I agree that we need government involvement to really enforce those types of rules. That has already been recognized by the government with the change in the WCAM regarding the representativity test. The change says that it may be relevant whether a special purpose entity actually follows the rules of the claim code. So there is already some legal backing of this code, and it may indeed help if the ministry is willing to monitor the code to make a difference between bonafide special purpose vehicles and others. And if it doesn’t work, I would not be surprised to see the government make a law of this because we will need it.

We have seen 15 or 20 special purpose vehicles in the DSB case, and they are not all great. So there must be some distinction at some point.

“One of the problems now is that a 305a foundation is not entitled to sue for damages and may not be representative enough.”

Litigator, NL: For that reason, in the last actions in which I’m involved we have opted for a different system whereby a special purpose vehicle operates on the basis of assigned claims. Then the group, the class itself, is making a voluntary decision to commit from the start to this particular action.

However, such a group is not allowed to propose any settlement to the Dutch Court of Appeals because it is not a 305a foundation. So we run into the Kafka-esque situation where a group that is more representative is not able to propose such a settlement. If it wants to do that, it should form a 305a foundation. Then you may get a distinction between the interests of the 305a foundation and the interests of the claim funder, who doesn’t want to release its hold on the case.

“Some mechanism of consolidating these kinds of battles to streamline litigation would be a good idea, but it doesn’t need to be a U.S. style class action system.”

Litigation Attorney, NL: 305a doesn’t really mean a lot. It gives the association the power to ask for something that any individual investor can ask for. Whatever judgment the 305a association gets is not binding on anybody. The only reason to use such a foundation is that it has a sort of representativeness that could get you a settlement. I’m not in favor of introducing U.S. style class actions in The Netherlands. I think rationally for a defendant it’s not a good thing to be fighting four different foundations, because it creates a lot of uncertainty. For the claimants, it’s not a very efficient way to get the issue resolved. Some mechanism of consolidating these kinds of battles to streamline litigation would be a good idea, but it doesn’t need to be a U.S. style class action system.

Securities Litigator, U.S: It seems to me that the solution to the problem, as stated before, is to follow the money. What will happen, I think, is that a defendant facing multiple representative actions will look to see whether they have substantial long-term liability, and if they do, then they will seek to settle. That’s what happened in the Shell case.

For example, let’s say you have 23 representative foundations suing Shell. I would guess that the corporate counsel would decide which of the groups actually has a legitimate claim. He would then craft a settlement, perhaps using a foundation, and then resolve the matter in a representative way.

Is that absolutely the most efficient way to get to the answer? No. But it probably works in the long run because the defendant will decide who really represents the group and who they want to negotiate with. Once you’ve decided to settle, then the class action system is wonderful for defendants because they can wrap everybody up at once.
“In The Netherlands, we have a situation where collective action itself is not regulated but the settlement situation is. Is that better than a system in which the claims are also collectively dealt with?” - Corporate Counsel, NL

Corporate Defense Attorney: You could think of a system that could take away, in a securities context, a number of these issues. I was inspired by a U.S. court in the *Vivendi* case, where the U.S. court said, “We don’t have jurisdiction because the company charter says that any dispute should be brought in a French court.” Would it be feasible to create a more predictable dispute resolution system by just incorporating, in the corporate charter, rules about potential disputes between shareholders and the company? These rules, for instance, could appoint a certain court to hear those claims, perhaps creating a special corporate entity charged with representing the interests of the shareholders. Within the Dutch company sphere, you also have a Workers’ Council that has the specific role of representing the interests of the workers.

“If we could start with a clean sheet of paper, would it be feasible to come up with a system that looked at the relationship between the company and the shareholder as a kind of contract?”

Each company could make up its mind if they want it. Some companies may want to have a predictable dispute resolution system for exactly the reason just pointed out.

Securities Litigator, U.S: I actually litigated that issue. We had a case in the U.S. against a French company called Alstom, which had provisions in its charter stating that all such claims needed to be brought in France. The U.S. court, at least for claims under the U.S. securities laws, rejected that charter provision as having any impact on the ability to limit claims. Obviously that would not necessarily apply in Europe.

The court, prior to *Morrison v. NAB*, had rejected an argument that claims of French citizens in New York should be disallowed under the *Vivendi* provision. Then *Morrison* came along and wiped away the case. At least in the U.S., there is reason to believe that such provisions would not be considered effective.

Corporate Attorney, U.S: believe there has been litigation about whether you can do things with your corporate charters and I believe the courts have said that you can’t put arbitration provisions in by-laws. However, I think those cases have suggested that you could put those provisions in a charter.

Securities Litigator, U.S: Maybe, but if you do a transaction on a U.S. exchange and it violates Section 10b of the Federal Securities Act of 1934, I don’t think you can contract out of a violation of federal law.

Corporate Attorney, U.S: But you may have to arbitrate instead of litigate if it’s in your charter?

Securities Litigator, U.S: I’m not clear about that because the Federal Securities Act of 1934 gives exclusive jurisdiction for those things to the federal courts. It’s an interesting question, but I would guess not.

Corporate Counsel: A company can have an arbitration clause in its articles and still choose to use the mass claim damages act like Shell has done. But where there is the possibility of class actions in The Netherlands, then I believe companies would prefer to go the route of arbitration, because with class actions a less constructive attitude becomes part of it.

Corporate Counsel: We prefer for Shell to be known for its superior products and its very generous dividend every year, not for this once in a hundred year settlement of a misunderstanding about reserves recategorization. For the record, the SEC has since adopted the same rules that Shell used and was fined for inadequate disclosure. The Shell case goes back to what’s known as the unification. It was the catalyst for a corporate governance restructuring and unification. In the articles of Royal Dutch Shell PLC, which was a company not directly involved in the settlement, it says that any dispute with shareholders is subject to arbitration. If this would ever come up, then it would have to be adjudicated in arbitration.
“I think that we will have a new international private law. The practicalities in the end will dominate the discussion, and the Dutch way of dealing with these things may well be the way of the future.” - Moderator Edgar du Perron

Moderator: Do the institutional investors here have any views on the system, leaving aside the technicalities of U.S. law?

Director, Shareholders Association: The idea of having a resolution mechanism in the bylaws is interesting but I would see the risk of being too much under the influence of management. I'm not opposed to arbitration. That can speed up things immensely, but I question whether having it forced upon you would hold up under Dutch law.

Discussion Summary

Moderator Edgar du Perron turned to Geert Raaijmakers, Law Professor at Free University, to provide a brief synopsis of the discussion.

These have been very interesting discussions. Obviously, our experience in The Netherlands with mass claims is relatively young and we can learn a lot from the U.S. experience. It’s about designing the best and most efficient system and you are all players in that system. Our discussion touched on:

- The question of recognition in an international context, and the international law aspects of that, is a major issue.
- There are efficiencies to be gained by concentrating claims.
- We may want to encourage settlement tourism, but maybe not damage tourism.
- Regarding special purpose vehicles, there are questions about representativeness.
- We all agreed that we should watch out for the 23 year old in a student house.
- A code is a useful instrument to create some order, but we probably need some government enforcement.
- We had an interesting discussion about creating a resolution mechanism in bylaws; there are clear benefits but also some downsides.

“It’s basically been a discussion about how to create the best and most efficient system.”

We need to balance the need for investors to have efficient access to the court and the potential nuisance and cost factor (and cost leakage) of litigation that may be to the detriment of us all. We haven’t solved all these issues, but have gained a better understanding.

Moderator: Edgar du Perron: I think that we will have a new international private law. The practicalities in the end will dominate the discussion and the Dutch way of dealing with these things may well be the way of the future.

As to mass claims, I think we need to get our own house in order before we can internationalize what we have. So I don’t expect any major developments in this arena in the near future.

As for settlements, as long as we’re as reasonable and polite as we were here today, then—after a quick fight at the start—a lot of settlements will follow and the VEB will be involved in a lot of them.

The Roundtable was adjourned as scheduled at 10:00 AM.