

Sworn translation from Dutch to English of:
Decision by the Amsterdam Court of Appeal in case no.
200.070.039/01 rendered on 12 November 2010

Leiden, 24 February 2011

Translator's statement:

The undersigned, A.J.B. Burrough, registered as sworn translator for the English language at the District Court of The Hague and registered in the Dutch Register of Sworn Interpreters and Translators (RBTv) under no. 1963, hereby faithfully declares that the attached English translation is a faithful representation of the Dutch original (which is the authentic text).



A.J.B. Burrough MA (Leiden)

Sworn Translator

Attached:

- 1) English translation, 21 pages total



[translation from Dutch]

[stamp: in the Name of the Queen]
12 November 2010

AMSTERDAM COURT OF APPEAL

SECOND THREE-JUDGE CIVIL SECTION

DECISION

in the matter of:

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

1. Course of the proceedings

The petitioners are hereinafter jointly referred to as petitioners and individually as Converium, ZFS, the Foundation and VEB.



By petition of 9 July 2010, with exhibits, petitioners requested a binding declaration with respect to an agreement between Converium, the Foundation and the VEB and of an agreement between ZFS, the Foundation and the VEB, hereinafter together "the agreements". The agreements were entered into on 8 July 2010 and according to petitioners are agreements as referred to in article 7:907 of the Netherlands Civil Code [NCC], on which provision the petition is based.

In response to the petition a case management conference was held on 24 August 2010, in which the processing of the petition and certain related issues were discussed with petitioners. An official record was drawn up of this case management conference, which has been added to the case file.

By letter of 1 October 2010 petitioners sent the Court of Appeal an amended petition with further exhibits. In the amended petition the petition to declare the agreements binding has been supplemented and clarified with regard to certain points mentioned by the Court of Appeal during the case management conference.

By letter of 15 October 2010 petitioners requested that the Court of Appeal review the petition on the basis of the amended petition, while maintaining the original petition as part of the case file. The Court of Appeal understands that they hereby have also wished to express their desire that the review will take into account any further exhibits sent, or still to be sent, to the Court of Appeal after 1 October 2010.

At the case management conference petitioners were presented with the option of the Court of Appeal first rendering a decision on its jurisdiction to hear the petition, before – depending on said decision – the interested parties are served notice of a hearing at which the substance of the petition will be dealt with. Petitioners requested that the



Court of Appeal grant them a period of time to confer on this option, which time was granted.

By letter of 10 September 2010 the petitioners subsequently requested the Court of Appeal to express itself on the matter of its jurisdiction as stated above. This is the purpose that the decision at hand serves.

2. Assessment

2.1 Petitioners have based the petition to declare the agreements binding, in summary and insofar as relevant to the assessment of the jurisdiction of this Court of Appeal, on the following. Converium and ZFS are legal entities under Swiss law, both domiciled in Zürich, Switzerland. Until 11 December 2001 ZFS held all shares in Converium, at the time called Zurich Re. On 11 December 2001 a market flotation took place in which said shares were reissued to investors and listed on the SWX Swiss Exchange, a Swiss stock exchange, and American Depositary Shares derived from these shares were listed on the New York Stock Exchange, a stock exchange in the United States. In the period from 7 January 2002 through 2 September 2004 Converium made repeated disclosures from which it can be derived that its previously disclosed reserves for risks pertaining to certain anticipated liabilities arising from its enterprise's business were insufficient and required adjustment. Following these disclosures the prices of the abovementioned securities on the aforementioned stock exchanges dropped. Certain investors, who suffered losses as a consequence of these declines in price, hold Converium and ZFS culpable for acting – the Court of Appeal understands this to entail the inadequacy of the reserves made and the alleged misleading representation thereof, in particular as shown



by the aforementioned disclosures – in violation of, concisely put, disclosure rules under U.S. securities legislation and as a consequence caused damage to investors.

2.2 On the bases outline above, investors brought various actions for damages against Converium and ZFS in the United States, which were later combined. The combined cases were brought as a so-called "consolidated class action" before the United States District Court for the Southern District of New York. On 6 and 19 March 2008 this court ruled it lacked jurisdiction to hear claims of natural persons and legal entities who had purchased Converium shares on the SWX Swiss Exchange or on another stock exchange outside of the United States and who were domiciled outside of the United States at the time of purchase. Accordingly, these persons would not be able to derive any entitlement to damages under a possible favorable judgment, as they were excluded from the "class" for the benefit of which the judgment would be given. The action at aforementioned District Court ended in two settlements under which Converium and ZFS are held to each pay compensation to the natural persons and legal entities with regard to which the District Court did declare to have jurisdiction, accordingly, concisely put, persons who – within a certain period – purchased Converium shares on the SWX Swiss Exchange or at another stock exchange outside of the United States and who at that time were domiciled in the United States, as well as persons who purchased American Depositary Shares on the New York Stock Exchange regardless of their domicile, insofar as the settlement awarded compensation to these persons. The District Court approved the abovementioned settlements on 12 December 2008. This approval became final on 25 June 2009. As a result, the settlements have in principle – except to the extent that the persons concerned have by



means of an appropriate act withdrawn themselves from the class to which they belong according to the District Court – become binding upon the natural persons and legal entities with regard to which the District Court assumed jurisdiction, so that they are unable to bring any further claims against Converium and ZFS other than claims based on the settlements.

- 2.3 The agreements for which the binding declaration is being sought in the current proceedings serve to also award compensation to others who have suffered damage from the conduct of Converium and ZFS as referred to above under 2.1, accordingly also to natural persons and legal entities who are unable to derive any rights from the abovementioned settlements, to the extent that they would be eligible for compensation under the terms of the agreements. This concerns persons who purchased shares in Converium on the SWX Swiss Exchange or on another stock exchange outside of the United States and who were domiciled outside of the United States at the time of purchase. To this extent, the agreements are complimentary to the settlements approved by the District Court: together they provide, as occasioned by what are in fact the same acts by Converium and ZFS, for compensation to all persons who – within a certain period – purchased Converium shares on the SWX Swiss Exchange or on another stock exchange outside of the United States or American Depositary Shares on the New York Stock Exchange, regardless of their domicile at the time of the purchase concerned, to the extent that the agreements or the settlements award them compensation. According to the amended petition the number of natural persons and legal entities for whose benefits the agreements have been concluded – and to whom the petition to declare binding pertains – is approximately 12,000, for over 3,000 of which the names and addresses are known. This group



comprises - again, according to the amended petition - about 200 persons known to petitioners domiciled in the Netherlands. Other persons known to petitioners for whose benefit the agreements have been concluded are domiciled in other member states of the European Union, contracting states to the (amended) EVEX Convention - the Lugano Convention of 2007, which came into force for the Netherlands on 1 January 2010 and is to be applied by the Court of Appeal in pursuance to article 63(1) of the convention - and which do not also belong to the European Union, and in states that are neither members of the European Union nor contracting states to the aforementioned convention. Additionally, the number of natural persons and legal entities for whose benefit the agreements have been entered into and who are domiciled in Switzerland - which is not a member of the European Union but is a contracting state to the EVEX Convention, with the qualification that this country is still subject to the original 1988 EVEX convention - has been estimated at about 8,500 and the number domiciled in the United Kingdom - which is a member of European Union - at about 1,500.

2.4 In both cases the counterparties of Converium and ZFS to the agreements are the Foundation and the VEB. These are legal entities under Dutch law, both with registered seat in The Hague. According to their articles of association, the Foundation and the VEB represent, again according to petitioners, the interests of the persons who suffered damage for which the agreements serve to provide compensation. The Foundation has been incorporated in order to enter into the agreements for the benefit of these persons - these being persons who purchased Converium shares within a certain period on the SWX Swiss Exchange or on another stock exchange outside of the United States and who at the time of purchase were domiciled outside of the United States. Additionally, it



is the legal entity that, after the agreements are declared binding, will distribute the compensation awarded under the agreements from the monies that were or will be paid to the Foundation for this purpose – as shown by an exhibit to the agreements: to an account at a bank in the Netherlands – by Converium and ZFS. The agreements impose an obligation to this end upon the Foundation, in particular in articles II.A.3. In this context, the Foundation's articles of association provide – in article 3.1 (b) – that its object includes the distribution of the compensation awarded under the agreements, with due observance of their provisions. Accordingly, the agreements provide for the payment of monies by Converium and ZFS to the Foundation to compensate the damage of persons for whose benefit the agreements have been entered into, after which the Foundation, upon the agreements being declared binding, is held to distribute the compensation awarded to the persons entitled to it according to the agreements. The Foundation's object statement in its articles of association is in line with this.

- 2.5 The partial decline of jurisdiction by the United States District Court for the Southern District of New York referred to in 2.2 not only has as its consequence that the natural persons and legal entities to which it pertains cannot bring any claims for damages against Converium and ZFS on the basis described in 2.1 – in particular – by means of the class action brought before said District Court, but also that these persons cannot derive any entitlement to compensation under the settlements approved by the District Court and that these settlements do not impose any obligations on them. The agreements for which the binding declaration is being sought in the current proceedings have been entered into for the benefit of persons with respect to which the



District Court declined jurisdiction and for this reason these persons cannot in principle be bound to the agreements by a decision of the District Court. To bring about such binding effect, a decision is required by another court, which does have jurisdiction, a condition for which - besides the jurisdiction - is that the national law to be applied by this court provides the possibility to declare the agreements binding in such way that the persons on whose behalf they have been entered into are in principle bound by them. Dutch law provides this possibility since 27 July 2005 - on the understanding that the persons concerned may let it be known not to wish to be bound in accordance with the provisions of article 7:908(2) and (3) NCC - which makes it the only national legal system of a member state of the European Union that provides for said possibility. This Court of Appeal has already applied the option of declaring a settlement binding in an earlier matter in which a United States court - the United States District Court for the District of New Jersey on 13 November 2007 - had declined jurisdiction to hear claims for damages brought in a class action by investors in certain securities with domicile outside of the United States who had purchased the securities concerned on a stock exchange outside of the United States. That class action also ended in a settlement that provided for the award of compensation to the natural and legal persons with regard to which the United States court had declared to have jurisdiction and approved said settlement, which as a result in principle became binding on the abovementioned persons. This settlement was complemented by a second settlement occasioned by what *de facto* were the same acts, which provided for compensation to persons with respect to whom the United States Court had declined jurisdiction and which this Court of Appeal subsequently declared binding



(Decision of 29 May 2009 in re. "Shell", NJ 2009, 506, JOR 2009, 197).

2.6 To this extent, this Court of Appeal is familiar with the system of various mutually complementing settlements, which together, occasioned by in essence the same facts, provide compensation to persons who incurred damage, regardless of their domicile, to the extent to which the settlements award them compensation. The Court of Appeal is also aware of the fact that the partial decline of jurisdiction by the abovementioned United States courts has as a consequence that the persons with respect to which the court declined jurisdiction cannot derive any rights from a settlement approved by said court in a class action and that such settlement also does not impose any obligations on them. Additionally, the Court of Appeal is aware of the resulting need to have a different, non-United States court with jurisdiction - and who on the basis of the applicable national law has the possibility - to render a settlement binding with respect to persons with regard to whom the United States court declines jurisdiction, which need is made explicit in the current proceedings - as well as in the proceedings that resulted in the Decision of 29 May 2009 by this Court of Appeal in regard to "Shell". With regard to the latter it is also relevant that the decisions by the abovementioned District Courts have in the meantime been followed by the decision of 24 June 2010 of the Supreme Court of the United States in regard to Morrison and others versus National Australia Bank Ltd. and others (561 U.S. (2010)), to which reference is made in the amended petition and in which the [U.S.] Supreme Court found, concisely put, that the United States courts do not have jurisdiction to hear claims of investors domiciled outside of the United States with regard to conduct that allegedly violates United States securities laws if such conduct pertains to shares that



were sold or purchased on a stock exchange outside of the United States. In doing so, the [U.S.] Supreme Court took as point of departure that the effect of a United States law is as a rule limited to the territory of the United States, unless the legislator has indicated a different, more extensive, objective (a "presumption against extraterritoriality"), which objective, in the case concerned – which also concerned shares in a legal entity with seat outside the United States – was lacking. The [U.S.] Supreme Court decision in regard to Morrison and others versus National Australia Bank Ltd. and others not only shows that the United States District Court for the Southern District of New York rightfully declined jurisdiction to hear the claims of investors domiciled outside of the United States against Converium and ZFS with respect to Converium shares purchased on the SWX Swiss Exchange or another stock exchange outside of the United States, as a result of which the settlements approved by the District Court do not bind these investors; but also that the Supreme Court upholds earlier case law in which the United States court declined jurisdiction to hear claims of persons domiciled outside of the United States occasioned by alleged violations of United States laws that led to damage outside of the United States. After all, the [U.S.] Supreme Court decision of 14 June 2004 in regard to F. Hoffman-La Roche Ltd. and others versus Empagran S.A. and others (542 U.S. (2004)) already shows that the [U.S.] Supreme Court is of the view that U.S. courts do not have jurisdiction to hear claims from persons without domicile in the United States with regard to alleged violations of United States antitrust laws, if such violations that form the bases of the claims caused damage to persons outside of the United States, regardless of the damage caused domestically.



2.7 The current question is whether this Court of Appeal has jurisdiction to hear a petition to declare binding two settlements – the agreements – in a case in which a United States court has declined jurisdiction with respect to the persons for whose benefit these have been entered into. Bearing in mind the considerations above, this also raises the question as to whether this Court of Appeal in circumstances such as those at hand in these proceedings – and as described in 2.1 through 2.4 – has the competence to render binding a settlement that complements a settlement approved by a United States court in the context of a class action, so that the respective settlements will together in principle be binding upon the persons who suffered damage, and which they serve to compensate, regardless of these persons' domicile, and whether this Court of Appeal can accordingly provide for the need as referred to above. In answering this question a distinction must be made among the states in which the natural persons and legal entities for whose benefit the agreements have been concluded – and to whom the petition pertains – are domiciled, as depending thereupon the jurisdiction of this Court of Appeal is determined by different rules. With regard to persons who on the date on which the original petition was filed (9 July 2010), which marked the start of these proceedings and therefore counts as the record date for establishing the jurisdiction of this Court of Appeal, were domiciled in a member state of the European Union or in a contracting state to the (amended) EVEX Convention that is not also a member of the European Union – which latter group, as stated in 2.3, contains some 8,500 persons domiciled in Switzerland –, it is foremost clear that these proceedings must be deemed to be a civil and commercial matter as referred to in article 1(1) of the EEX Regulation – the Brussels I Regulation – and the EVEX Convention. After all, the petition to declare binding serves to create a civil law contract



between petitioners and the persons for whose benefit the agreements have been entered into, this being – as follows from article 7:908(1) NCC – the binding of the latter to the agreements as parties, in such manner that these agreements will in principle have the consequences between these persons and the petitioners – to the extent that they are party to these agreement – of a contract of settlement as referred to in article 7:900(1) NCC. As these proceedings are to be considered to be a civil and commercial matter as referred to in article 1(1) of the EEX Regulation and the EVEX Convention, the jurisdiction of this Court of Appeal with respect to the persons referred to above needs to be determined with the aid of the further provisions of said regulation and convention. In this it is relevant that the petition has a double purport.

- 2.8 In the first place the petition aims to bring about the effectuation of the obligations of Converium and ZFS to pay compensation to the persons for whose benefit the agreements are entered into, as is recorded in the agreements. After all, these obligations were entered into under the condition – as shown by articles II.A.1, II.A.3 and X.B of the agreements read together – that the agreements will be declared binding, so that they only come into effect if said condition is satisfied. As the petition precisely aims to bring this about, the obligations of Converium and ZFS under the agreements can be deemed to at least in part form the basis of the petition. This is also the case if it were to be assumed that these obligations would only come into being after the agreements are declared binding – upon the satisfaction of the condition concerned – as this leaves unaltered that the petition serves to bring these obligations into effect. The preceding entails that under the provisions of article 5, preamble and (1) of the EEX



Regulation and the EVEX Convention jurisdiction to hear the petition – with respect to persons domiciled in a member state of European Union or a contracting state to the EVEX Convention that is not also a member of the European Union – lies with the court of the place where the obligations under the agreements are to be performed. In this, significance must also be given to the judgment of 1 October 2002 of the Court of Justice of – now – the European Union in regard to Verein für Konsumenteninformation versus Henkel (case C-167/00, NJ 2005, 221), in which the Court of Justice ruled that the jurisdiction rule with respect to obligations arising from tort, as laid down in article 5, preamble and (3) of the EEX Convention also applies to preventive action aimed at preventing – by means of a court injunction – damage relating to tort, i.e. in cases where there is as yet no obligation for damages when the claim is brought. Application of the same principle to contractual obligations that have not yet come into effect and – as here – are conditional on the agreement being declared binding, leads to the judgment that the jurisdiction rule of article 5, preamble and (1) of the EEX Regulation and the EVEX Convention are applicable to the petition that seeks to achieve the effectuation of said obligations and to that extent is based thereupon, so that the competent court is the court of the place where the obligations are to be performed. This is additionally in line with the judgment of 4 March 1982 of the Court of Justice in regard to Effer versus Kantner (case 38/81, NJ 1983, 508) in which jurisdiction of the court of the place where a contractual obligation was performed was assumed in a case in which the creation of the agreement under which the claim was brought was subject to dispute and accordingly the existence of said obligation had not yet been established.



2.9 In 2.4 it is described that the agreements, upon being declared binding, oblige the Foundation to distribute the compensation amounts awarded from the monies that were or will be paid to the Foundation for this purpose – to an account at a bank in the Netherlands – by Converium and ZFS, to the persons entitled to such compensation according to the agreements. The Foundation's object statement enables it to perform this obligation. The Foundation is a legal entity domiciled in The Hague, i.e. in the Netherlands. As the Foundation will – have to – distribute the amounts awarded under the agreements from the monies it received or shall receive from Converium and ZFS, it follows from the provisions of the agreements that the obligations of Converium and ZFS recorded therein are to be performed in the Netherlands. The Dutch law that governs the agreements in pursuance to their articles XII.H – which include a choice of law – does not compel a different view. The above is not prejudiced by the fact that the Foundation, according to the amended petition, will use assistance of a legal entity domiciled in the United States (The Garden City Group Inc., with registered seat in Melville, New York): after all, this does not affect the fact that the Foundation will distribute the compensation amounts – and is under obligation to do so – to the persons entitled under the agreements. As the obligations under the agreements are to be performed in the Netherlands, it follows from article 5, preamble and (1) of the EEX Regulation and the EVEX Convention – under the proviso to be mentioned in 2.13 – that the Dutch court has jurisdiction to hear the petition with respect to persons domiciled in a member state of European Union or a contracting state to the EVEX Convention that is not also a member of the European Union. Article 1013(3) of the Netherlands Code of Civil Procedure [NCCP] exclusively bestows such jurisdiction on this Court of Appeal.



2.10 In the second place, the petition to declare binding serves to achieve that the natural persons and the legal entities who suffered the damage that the agreements serve to compensate can no longer bring any – possibly awardable – claims against Converium and ZFS, before whatever court or on whatever basis, besides claims for performance of the obligations of Converium and ZFS under the agreements. After all, upon being declared binding the agreements will in principle have the consequences of a contract of settlement as referred to in article 7:900 (1) NCC to which the persons with regard to which they have been declared binding will be bound as parties, unless they have timely let it be known in writing not to wish to be bound, as referred to in article 7:908 (2) and (3) DCC. This entails that said persons in principle – regardless of any earlier rights they may have had and in line with the legislator's express intention, as is shown by the explanatory memorandum to the *Wet collectieve afwikkeling massaschade* [Collective Settlement Act] (Parliamentary Documents II, 2003-2004, 29 414, no. 3, p. 4 and 18) – will no longer be able to bring claims for compensation of the damage for which the agreements award compensation, other than on the basis of the agreements. As a result, the petition to declare binding also serves to achieve that the persons who suffered damage will not be able to bring claims against Converium and ZFS – unless they issue a statement as referred to above – seeking a higher compensation than is provided for in the agreements. As stated in 2.4, according to the amended petition, some 200 persons known to petitioners who the petition intends to have bound by the agreements are domiciled in the Netherlands. It follows from article 2 (1) of the EEX Regulation and the EVEX Convention that the Dutch court – and pursuant to article 1013 (3) NCCP therefore this Court of Appeal – has jurisdiction to hear the petition to declare binding with respect to these persons.



2.11 It is conceivable, if not directly evident, that with respect to the question as to whether the persons who incurred the damage for which the agreements award compensation are, on whatever basis, entitled to a higher compensation than that awarded by the agreements, a different court – might – decide differently than the Dutch court would if it were to decide that the agreements are to be declared binding thus that the persons who suffered the damage are in principle – regardless of their earlier rights – no longer entitled to bring a claim for higher compensation. Insofar as the petition to declare binding, bearing in mind the considerations above, may be considered to be a collection of claims directed against the persons to which it pertains in order to achieve that, in principle, none of them – unless he or she timely gives notice of opting out – will be able to bring a claim against Converium and ZFS for a higher compensation amount than is provided for in the agreements, there for this reason exists such a close connection between these claims that the sound administration of justice requires the claims to be simultaneously heard and judged in order to avoid incompatible court decisions in the event that the claims were to be individually adjudicated. An equally close connection is likewise in place between the petition and possible – preventative – claims by Converium and ZFS in other member states of European Union or contracting states to the EVEX Convention that are not also European Union members, that aim to establish that persons who incurred damage are not entitled to higher compensation than as provided for in the agreements. With respect to both aspects, the assessment of the petition in the current proceedings provides for simultaneous treatment and adjudication to avoid incompatible court decisions, taking into account that granting the petition will have as a consequence that the persons who suffered damage will



in principle no longer be eligible to claim a higher compensation than the amount provided by the agreements, so that they would in principle be unable to successfully bring such a claim in any court in a member state of the European Union or in a – different – contracting state to the EVEX Convention, while refusing the petition will leave their rights unaffected. It follows from the forgoing that article 6, preamble and (1) of the EEX Regulation and the EVEX Convention entail that the Dutch court and therefore this Court of Appeal – with the proviso to be mentioned under 2.13 – besides persons domiciled in the Netherlands, also has jurisdiction to hear the petition with respect to persons domiciled in a member state of European Union or a contracting state to the EVEX Convention that is not also a member of the European Union.

2.12 The considerations in 2.8 through 2.11 each independently, i.e. as independently supporting grounds, contribute to the conclusion – subject to the proviso to be mentioned in 2.13 – that this Court of Appeal has jurisdiction to hear the petition with regard to natural persons and legal entities who on the filing date of the original petition were domiciled in one of the states referred to above. With respect to persons to whom the petition pertains and who are, or at any rate at the time, were, domiciled in a different state, this Court of Appeal has jurisdiction pursuant to the provisions of article 3, preamble and (a) and (c) NCCP in conjunction with 1013(3) NCCP. It follows from article 3, preamble and (a) NCCP that the Dutch court – with regard to persons not domiciled in a member state of the European Union or in a contracting state to the EVEX Convention – has jurisdiction to hear the petition if one or more of the petitioners are domiciled in the Netherlands. This condition has been satisfied: the Foundation and the VEB are domiciled in the Netherlands.



Moreover, it follows from article 3, preamble and (c) NCCP that the Dutch court has jurisdiction if the matter is otherwise sufficiently connected to the Dutch legal order. This is also the case. After all, as described in 2.9, the obligations of Converium and ZFS under the agreements, upon these being declared binding, are to be performed in the Netherlands, as the Foundation will – have to – distribute the compensation awarded under the agreements and the Foundation is domiciled in the Netherlands. This involvement of the Foundation means the matter is sufficiently connected to the Dutch legal order. Article 1013 (3) NCCP further provides, as aforementioned, that this Court of Appeal has exclusive jurisdiction to hear the petition.

2.13 It follows from articles 25 and 26 of the EEX Regulation and the EVEX Convention and article 72 NCCP that this Court of Appeal must review ex officio whether it has jurisdiction to hear the petition. As described in 2.10 the purport of the petition entails that if it is granted the natural persons and the legal entities who will in such case be bound by the agreements, in principle – unless they timely issue a written statement as referred to article 7:908(2) and (3) NCC to not wish to be bound – will no longer be able to bring claims against Converium and ZFS in regard to the damage for which the agreements award compensation, before whatever court, other than on the basis of the agreements. To that extent, granting the petition will – unless they have issued a statement as aforementioned – restrict the access to the courts for the persons with regard to whom the agreements are declared binding. Bearing in mind the right of access to the courts as enshrined in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in article 17 of the Dutch constitution and the importance that is to be attributed to these provisions –



and that the legislator attributes to them, as is shown to the explanatory memorandum to the *Wet collectieve afwikkeling massaschade* (Parliamentary Documents II, 2003-2004, 29 414, nr. 3, p. 4) –, and additionally bearing in mind the procedural principle of *audi et alterem partem* that follows from the aforementioned provisions and is further laid down in article 19 NCCP, which principle must also be observed in the current proceedings, the Court of Appeal will therefore defer its decision on its jurisdiction to hear the petition until the persons to whom the petition pertains have had the opportunity to express themselves on this. Contrary to the petitioners, who have devoted chapter 5 of the amended petition to the jurisdiction of this Court of Appeal, such persons have not yet had such opportunity, as they have not yet been given notice of a hearing at which the petition will be dealt with. As this notification has not yet taken place the Court of Appeal also finds occasion in article 26(2) of the EEX Regulation and the EVEX Convention to defer its decision on its jurisdiction. The above entails, for the same reasons, that the considerations given in 2.8 through 2.12 are exclusively provisional judgments, which the interested parties to be notified – as well as petitioners – will be able to comment on when the petition is reviewed on its merits. The Court of Appeal will decide subsequent to that. It must also be noted in this context that the Court of Appeal did not intend by its considerations in 2.8 through 2.12 to reverse any of the considerations on jurisdiction made in the decision of 29 May 2009 in regard to “Shell” (NJ 2009, 506, JOR 2009, 197). The considerations there have in parts been supplemented and facts and circumstances that were characteristic of the case that resulted in the decision, but which are not, or less, relevant in the current proceedings, according to the amended petition, have been ignored.



2.14 Petitioners may now proceed to serve notice to interested parties of a hearing at which the petition will be reviewed on its merits, such matters as directed by the Court of Appeal at the case management conference and with due observance of that which is stated on this in the official record of said case management conference. In serving the notices petitioners must additionally state that the Court of Appeal has given its provisional judgment that it has jurisdiction to hear the petition and that interested parties may express themselves on this, if so desired, on the occasion of the review on the merits. Lastly, petitioners must notify the Court of Appeal – as specified below – of the date or dates on which the hearing on the merits can be held, which the Court of Appeal, taking into account the unavailability dates that petitioners specified to the Court of Appeal for this purpose, has set at 16-17 June 2011 or 3-4 October 2011, as to be chosen by petitioners, in which the second day is meant as an overrun day for the event that the hearing cannot be finalized on the first day.

2.15 All further decisions are deferred.

3. Decision

The Court of Appeal:

directs that petitioners must before 1 January 2011 inform the Court of Appeal (attn. of the clerk of the court, Ms M. van Vuuren) in writing of the date on which the hearing of the petition will be able to be held (16-17 June 2011 or 3-4 October 2011);

directs that petitioners must serve notice to the interested parties to the petition of the hearing at which the hearing on



the merits of the petition will take place, as directed by the Court of Appeal at the case management conference and with due observance of that stated in the official record drawn up of said conference;

directs that petitioners must also state in such notice – referencing this court decision – that The Court of Appeal has given its provisional judgment that it has jurisdiction to hear the petition and that interested parties may express themselves on this if so desired;

directs that this decision will be issued to petitioners in digital format, besides on paper;

defers all other decisions.

This decision is rendered by Justices W.H.F.M. Cortenraad, A.D.R.M. Boumans and A.H.A. Scholten and was read out in open court on Friday 12 November 2010.

[illegible signatures]

the clerk of the court

the president

[stamp: issued for true copy to mr. D.F. Lunsingh Scheurleer,
Court Registrar]
[ends]

