

ruling

AMSTERDAM COURT OF APPEAL

civil law and tax law section, team I

case number: 200.191.713/01

ruling of the three-judge civil division of 5 February 2018

regarding the request for an order to declare an agreement binding as referred to in article 7:907(1) of the Dutch Civil Code (DCC) of:

1. **AGEAS S.A./N.V.**,
registered in Brussels, Belgium,
attorney: H.J. de Kluiver in Amsterdam,
2. **VERENIGING VAN EFFECTENBEZITTERS**,
registered in The Hague,
attorney: P.W.J. Coenen in The Hague,
3. **DRS BELGIUM C.V.B.A.**,
registered in Brussels, Belgium,
attorney: K. Rutten in Utrecht,
4. **STICHTING INVESTOR CLAIMS AGAINST FORTIS**,
registered in Amsterdam,
attorney: J.H.B. Crucq in Amsterdam,
5. **STICHTING FORTISEFFECT**,
registered in Utrecht,
attorney: A.J. de Gier in Utrecht,
6. **STICHTING FORSETTLEMENT**,
registered in Amsterdam,
attorney: M.H. de Boer in Amsterdam,
petitioners,

versus

1. **Ronald Alexander HIJMANS**,
residing in Houten,

2. **Laurens DIJS,**

residing in Almere,

3. **Johanna LEIJTEN,**

residing in Etten-Leur,

4. **defendants**, as included on a list received on 10 February 2017, choosing their address for service in Bleiswijk,
attorney: J.B. Maliepaard in Bleiswijk,

5. **Jean-Patrick ANDRÉ,**

residing in Genval, Belgium,

6. **defendants**, as included on a list received on 10 February 2017, choosing their address for service in Bleiswijk,
attorney: J.B. Maliepaard in Bleiswijk,
defendants.

In the following, the petitioners are referred to individually as Ageas, VEB, Deminor, SICAF, FortisEffect and the Stichting. Petitioners 2 to 5 are referred to jointly as the interest organisations.

The defendants 1 to 4 are referred to as Hijmans et al., the defendants 5 and 6 are referred to as André et al.

1. **Course of the proceedings**

On 16 June 2017 the Court rendered an interim judgment in this case. For the course of the proceedings until that date the Court refers to that interim judgment.

On 12 December 2017 the petitioners filed a submission after interim judgment, including annexes.

2. **The further assessment**

2.1. The interim judgment addressed, among others, the compensation to be distributed to the interest organisations if the agreement is declared binding. In the interim judgment it was considered that doubts have arisen regarding the extent to which the interests of the entitled parties who are not part of the group of investors represented by the interest organisations carried any weight in the ultimate negotiating result reached, even if it is taken into account that these amounts will not be deducted from the total

settlement amount to be made available to the entitled parties. In addition, it was considered in the interim judgment that the interest organisations have provided insufficient disclosure with respect to the costs they had incurred and will incur and/or their revenue model, or that they at least had not substantiated this any further with documents.

2.2. According to the submission after the interim judgment the petitioners did not amend the compensation to be made available to the interest organisations. According to the petitioners the total amount at issue here of €45 million does not detract from the reasonableness of the compensation made available to the entitled parties. According to the petitioners, this amount, as a percentage of the total settlement amount, is customary and in line with the market.

2.3. The Court is of the view that the arguments put forward by the petitioners skirt around the core of the problem, because the ratio between the total amount distributed to the interest organisations and the total settlement amount cannot be decisive, but only whether, alongside the interest organisations' own interests and those of the group of investors they represent, the interests of the other entitled parties are also sufficiently safeguarded. In order to make that assessment, the interest organisations must provide disclosure regarding the financial interests that they themselves have in a binding declaration. In that context it is relevant that the amount of compensation which each of the interest organisations are to receive vary greatly, that the interest organisations are financed in different ways, that not all of them have incurred the same amount of costs and that their revenues are not, in advance, restricted merely to those amounts to be received from Ageas. The Court holds to its finding that the petitioners must practice transparency with respect to the interest organisations' costs and revenues and thus provide openness of affairs.

2.4. It will be decided that each of the interest organisations has to provide disclosure concerning, and to render account for, the costs and compensations relating to the WCAM application. At the same time they must provide the greatest degree of firm detail about their revenue model. This concerns, where applicable, the following:

- an overview of the costs incurred and expected to be incurred, to be itemised and properly documented;
- the compensation received and still to be received such as (success) fees, the investments of the group of investors they represent or other investors and the discount/percentage to be received on the compensation amounts which the group of investors they represent will receive, such to be itemised and substantiated with documents;
- any other information that may help to clarify the revenue model.

2.5. In addition, the Court wishes to be informed by Ageas how it will account for, in fiscal and accounting terms, the amount in compensations to be distributed to the interest organisations: of importance is if it makes a difference for Ageas whether this amount is or is not part of the total settlement amount to be distributed pursuant to the agreement.

2.6. In the context of the petitioners' point of view that the amount in compensations for the interest organisations are customary and in line with the market, the Court wishes to be informed in a general sense by the parties regarding the various revenue models that are used by interest organisations in the market and/or that are customary, the advantages and disadvantages thereof, as well as the compensations and the profit mark-ups that are customary in the market, such, to the extent possible, to be substantiated by documents and, possibly, publications. The Court is of the view that it is not yet sufficiently established in case law and scholarly opinion which compensation is reasonable relative to the risks run by interest organisations.

2.7. The Court wishes to devote sufficient attention to this matter and for this reason wishes to deal with this separately to the greatest degree possible; and, therefore, separately from the content of the agreement and the reasonableness of the compensations to be distributed to the entitled parties. In order to be able to conduct a satisfactory debate on this matter, the oral hearing already scheduled for 16 March 2018 will be used for this purpose. At the same time interested parties and third parties will be offered the opportunity to express their views in writing on this matter, which, if desired, they may explain further during the oral hearing on 16 March 2018. It concerns a general invitation to submit views in writing and to provide information, and will also be placed on the website. The Court may place requirements on the persons and organisations that can submit views and on the form, content and scope thereof. The Court may set aside documents that have been submitted that fail to meet the requirements that may reasonably be placed upon them.

2.8. Any further decision will be stayed.

3. Decision

The Court:

determines that the petitioners are to express their views by means of a submission by no later than 6 March 2018, as found in 2.4 through 2.6;

determines that interested parties and third parties may submit their views in writing no later than 6

March 2018 by sending their written views to the email address reserved for WCAM cases (Amsterdam Court of Appeal): wcam.hof-amsterdam@rechtspraak.nl, as found in 2.7;

stays any further decision.

This decision was rendered by J.W. Hoekzema, M.P. van Achterberg and P.F.G.T. Hofmeijer-Rutten and declared in public in the presence of J.G.E.Y. Lok as clerk on 5 February 2018.