1. General Information on Collective Actions in the Netherlands

1.1. Introduction

The Dutch collective redress system has witnessed important development over the last few years as incidents of mass damages increased. After having implemented representative group actions in its legal system, a mass bodily harm case prompted the Dutch legislator to look for a comprehensive device to handle many claims against a plurality of defendants. Without adopting a US class action-style mechanism, the collective settlement device has some shared characteristics as the Dutch legislator had to arrange its implementation promptly.

Consequently, the Netherlands currently has two collective redress mechanisms: the representative collective action in Articles 3:305a-c of the Dutch Civil Code (Burgerlijk Wetboek; BW); and the 2005 Dutch Act on Collective Settlements Mass Damages (Wet collectieve afhandeling massaschade; WCAM). Dozens of group action have been filed over the years and several settlements have been litigated under the WCAM regime. In addition, it is expected at least some mass disputes regarding unit linked insurances involving thousands of Dutch households and several insurers and banks will be resolved under this Act in the near future. Before elaborating on these two collective redress regimes, the context within which the group litigation operates is briefly described in this section. Subsequent sections follow the questionnaire in the sense that it distinguishes between general (s. 2) and procedural issues (s. 3).

1.2. Background Information on the Dutch Legal System

The Netherlands is a civil law country. It originates from the European continental canonical procedure and has the same origin as e.g. French procedural law. After 1838 the Code of Civil Procedure was introduced and developed independently as to have taken a character of its own.{{footnote}}

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{{footnote}} Asser, Groen, Vranken & Tzankova 2006. From the end of the eighteenth century until 1813 the Netherlands was a French vassal State (from 1811 a group of departments in the French empire) and
The judges are appointed, not elected, and the Netherlands is not familiar with a jury. Furthermore, there is no US-style discovery. There are only limited possibilities to obtain documents, but various court orders may remedy these limitations.

First of all, parties may voluntarily produce documents to base their arguments in their briefs. Secondly, the courts orders can relate to (expert) witnesses. Where a court orders the parties to provide certain documents, under the *exhibitieplicht* (exhibition obligation), and a party refuses to comply, the court may ‘draw any conclusions it deems appropriate’. However, no contempt of court is known. The court may however reverse the burden of proof where a party fails to comply with a court order obliging the party at any stage of proceedings to provide access to the records or documents that party is obliged to draw up and to keep. In commercial litigation, very detailed information concerning the facts and circumstances of the case can be obtained through the inquire procedure. These reports produced in commercial litigation can be brought as evidence into any civil procedure. Witnesses can be heard by the judge before and after the commencement of the legal proceedings and in case of an interim judgment to substantiate certain allegations. Although the lawyers of the parties to the legal dispute may ask questions; no cross-examination is provided for.

These general rules of civil procedure do not differ in cases of collective actions or settlements, except that the WCAM regime has an in-built hearing stage during which individual persons and representative organizations can bring objections forward. Subsequently, the court must address all objections before declaring the settlement legally binding.

### 1.3. Background on the Introduction of the Collective Settlements Procedure

The Dutch ‘class actions’ system needs some further elaboration as the Dutch legislation on collective settlements has been implemented against a very specific background, *i.e.* the DES litigation initiated by six persons against thirteen manufacturers of DES (a hormone drug) in 1986. After the Dutch Supreme Court’s decision, a centre was established to register the DES users that sustained bodily harm in order to preserve future rights against the DES procedures. Within a few weeks 18,000 members were registered. Next, the pharmaceuticals and insurers that initiated the negotiations for a final settlement as the total number of persons negatively affected by the drugs in the Netherlands was estimated to amount to 440,000. A settlement was concluded and a fund established that contained €35 million, provided that the settlement was final for all Dutch victims. In order to effectuate the settlement including the concluded condition statutory regulation was necessary. As further potential mass damages either consisting of bodily harm or non-bodily damages were anticipated in an era of globalization, the collective settlement device was implemented partly in the Civil Code (Articles 7:907-910 BW) and partly in the Code of Civil Procedure (Articles 1013-1018 Rv).

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2 Cf. Art. 162 Rv. See also Art. 843a Rv in case a party shows a legitimate interest the court can order the other party to produce specific documents related to the parties’ legal relationship. In practice, these orders are not often issued.

3 Art. 2:344-359 BW. And see further the country report by J. van Békum, J.B.S. Hijink, M.C. Schouten en J.W. Winter on the conditions to request such a procedure. The employment of the procedure as a fact-finding mechanism for a non-contractual liability case, or fishing expedition, is accepted.

Although generally very positively evaluated by practitioners and scholars alike, some problems or matters are not fully addressed: several relate to the globalization, e.g. jurisdiction. The recent orders on the settlements Shell and Vedior demonstrate another trend of judicial ingenuity or activism.

2. General Issues on Dutch Collective Actions

The Netherlands is familiar with two collective regimes designed to deal with a series of homogeneous claims: the already-mentioned representative group action in Articles 3:305a-c BW; and the WCAM procedure, which is a settlement procedure. The first procedure fits the principles and general rules of Dutch civil procedure, as an association or foundation represents the interested individuals, who are known to the parties and who have actively bestowed the representative body with the power to initiate legal proceedings on their behalf. Thus, this action adopts a kind of opt-in approach. Further, no questions of causation or damages are addressed, since one can only litigate for an injunctive or declaratory relief under Articles 3:305a-c BW. It is mainly about the alleged conduct of the defendant.

However, the second procedure provides for an innovative collective resolution where certain persons are represented that are even unknown to the representative parties. It consists of an opt-out approach. As such an approach departs from the ‘ordinary’ civil procedural principles, several additional rules of procedural law had to be included in the Code of Civil Procedure to allow WCAM procedures that aim for legally binding settlement covering all similar claims. Consequently, no further claims will be litigated in the future, unless one has timely opted out.

The arguments for the introduction of the first type of collective or group action were: to enable people with individual non-recoverable claims to bring actions; to enhance access to justice; and prevention. As described in the Introduction, the WCAM had a specific background that might explain why it has introduced a collective settlement device on an opt-out basis and why it had the support of the industry. Principles of legal certainty and predictability were central to its introduction and design. However, the Dutch legislator did not aim at a transformation of the Dutch legal system into a perceived aggressive American litigating society. This may explain the lack of pressure tools for ‘coerced’ settlements. The WCAM starts with an out-of-court-settlement that can be brought about by public media coverage and public outcry.

2.1. Nature and Number of the Actions

‘The Netherlands is unusual, in that its procedure deals only with the settlement of a multi-party litigation, (…)’

The law does not restrict the actions based on the WCAM to a particular area of law or to certain sectors, such as banking and financial services, product liability or competition. Rather, the WCAM was moreover introduced to address the problems surrounding the bodily harm cases concerning the DES drug. Notwithstanding its broad scope, more recent WCAM procedures concern financial mass damages, e.g. in Dexia (securities lease); Vie d’Or (life

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6 Hodges 2008, p. 70 (original emphasis).
7 Amsterdam Court of Appeals 25 January 2007, LJN: AZ033 (Dexia).
8 Amsterdam Court of Appeals 29 April 2009, LJN: BI2717 (Vie d’Or).
insurance policies); Shell\(^9\) (misleading information in securities case); and Vedior\(^10\) (securities); bringing the number of WCAM cases at 5 and 1 pending within a time span of proximately 4 years, (with a dramatic increase in 2009).

The representative group action has however been used more frequently. Within the timeframe 1994-2007, thirty-two cases have been reported\(^11\) and the number of these group action increases. The latter group actions are also not limited to a particular field and they are employed with respect to a variety of affairs. For instance, they may concern the lawfulness of an asylum procedure\(^12\) and the representation of women in a political party,\(^13\) but also webpages offering free mp3 files;\(^14\) pyramid schemes;\(^15\) the stopping of the lay off of a group of employees;\(^16\) the legionella bacterium on the West Friese Flora causing the Legionnaire’s disease to various visitors to the Flora;\(^17\) misleading prospectus by market introduction of World Online;\(^18\) bankruptcy cases;\(^19\) annual accounts;\(^20\) prospectus liability;\(^21\) general terms;\(^22\) securities;\(^23\) collective labour agreement.\(^24\)

The Netherlands does not provide for these actions within a criminal law context. After a conviction, and depending on the circumstances, a subsequent case can be brought before civil courts to obtain additional redress. As a crime is a violation of the law, it also constitutes a private wrong.

2.2. Relief

However, the group action does explicitly not provide for monetary relief\(^25\) nor can a declaratory judgment on liability for sustained damages be asked for.\(^26\) As pointed out above, group actions can only provide injunctive or declaratory relief. This is one of the main shortcomings of a group action. The WCAM addresses this defect. Consequently, where one would like to obtain pecuniary compensation, the represented interested persons on whose

9 Amsterdam Court of Appeals 29 May 2009, \(\text{LJN: BI5744 (Shell Petroleum N.V. and the Shell Transport and Trading Comp Ltd et al v. Dexion Bank Nederland N.V. et al)}\).
10 Amsterdam Court of Appeals 15 July 2009, \(\text{LJN: BJ2691,JOR 2009, 325 (Vedior)}\).
12 HR Supreme Court, September 2004, \(\text{NJ 2006, 28)}\.
13 HR September 2004, \(\text{NJ 2005, 474 (SGP I)}\); and see also Court September 2005, \(\text{NJ 2005, 473 (SGP II)}\).
14 Court Haren May 2004, \(\text{NJ 2004, 357; LJN: AO9318}\).
15 Court of Appeals October 1997, \(\text{NJ 1998, 251}\).
16 Court Zutphen 9 December 2003, \(\text{NJ 2004, 158; LJN: AN9739 (Dumece)}\). See also: Court of Appeal The Hague, 3 June 2005, publ. 27 July 2005, \(\text{LJN: AU0185 (ABYAKABO FNV v. Kraamzorg NL B.V.)}\).
17 Court Alkmaar 12 December 2002, \(\text{NJ 2003, 689; LJN: AF1817 (Legionella)}\).
18 Court Amsterdam May 2007, \(\text{JOR 2007, 154; and Court Amsterdam October 2004, JOR 2004, 329; HR 27 November 2009, LJN: BH2162 (World Online)}\).
20 Court Amsterdam April 2004, \(\text{JOR 2004, 131 (Ahold)}\).
21 Court Amsterdam December 2003, \(\text{JOR 2004, 79, (ABN AMRO v. WOL et al); Court Amsterdam 11 June 2008, publ. 12 December 2009, LJN: BH2720 (Stiching Claim Lengai v. Feedertines B.V. et al)}\)
22 Court of Appeals The Hague August 1998, \(\text{JOR 1999, 78 (Consumentenbond v. ASR)}\).
23 HR May 2009, \(\text{LJN: BH2822 (Effectenlease)}\).
24 HR November 1997, \(\text{NJ 1998, 268 (Kuipers Logistics)}\).
25 Art. 3:305a(3)(last sentence) BW: ‘[The action] on pecuniary compensation cannot …’.
26 Confirmed in HR 13 October 2006, \(\text{LJN: AW2077, 2080, and 2082 (consequently referring the case to Amsterdam Court of Appeals for WCAM procedure: Court of Appeals 29 April 2009, case No. 200.009.408)}\).
behalf the group action has been brought before the court, must seek monetary compensation in a subsequent case. Therefore, the group action is considered as a springboard to further individual or joined litigation or a (WCAM) settlement. The Vie d’Or instances provide for a fine illustration. They were initiated as representative group actions but in order to obtain monetary compensation the Supreme Court referred to the possibility of the WCAM procedure.

2.3. **Initiation of Collective Actions**

‘[T]he Netherlands has innovative legislation under which settlements of mass damage claims may be certified by a court and so become binding on all members of the group unless they opt out’.27

The following sections summarize the initiation of the two Dutch collective actions by the representative bodies in s 2.4 and s 2.5 respectively, as the Netherlands is not familiar with non-representative actions. Another question addressed in the section 2.5 concern the transnational aspects of the WCAM as the Court transformed the Dutch procedure into a global collective settlement mechanism. There are no limitations to the quality of defendants. For instance, group actions have been brought against private and public persons, *e.g.* the State, in the SGP II and the Asylum cases. Most cases – especially, under the WCAM regime – are however brought against private legal persons. As the WCAM regime is however initiated by a petition, not by a writ, it is not apposite to label those companies as defendants. Further, there are no explicit limitations as to the quantity of defendants; but the cases must be manageable.

2.4. **Representative Group Actions**

2.4.1. **Types of Organizations**

The group action must be commenced by representative organizations such as a generic investors’ or consumers’ organization, or a special purpose vehicle. According to Article 3:305a (1) BW, it concerns ‘a foundation or association with full legal capacity’. Where an organization has its registered office abroad but is nevertheless placed in the list referred to in Article 4(3) EU directive 98/27/EC on consumer protection,28 that organization may represent the interested persons as well. In accordance with Article 3:305d BW, the Dutch Consumer Protection Organization, the foundation Authority on Financial Markets (AFM), and foundations or associations with full legal personality in accordance with its articles of association protecting the collective interests of consumers can demand the person who violates the Act on the protection of consumer interests to terminate its allegedly illegal acts before the Court of Appeals of The Hague.

According to Article 3:305b BW, ‘legal persons’ ex Article 2:1 BW can include public law bodies. Thus, certain public legal bodies can also initiate a complaint, provided that they represent the similar interests of other persons and to the extent that they protect the interests of those persons. In sum, where it concerns consumer protection many more bodies can thus be considered to be representative bodies in a group action. Beyond the context of consumer protection, the generic investors’ organizations in the Netherlands are the VEB and Eumedion. Additionally, special purpose foundation or association can be easily established,

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if a legal opportunity presents itself. For instance in the bankruptcy *Vie d’Or* case, the Foundation *Vie d’Or* was established especially for the purpose to represent the negatively affected insured and other creditors in these civil legal proceedings against several supervisors of the bankrupted *Vie d’Or*.\(^{29}\)

In *Best Sales B.V.* case,\(^{30}\) the British Office of Fair Trading as a foreign consumer organization could successfully initiated a group action in accordance with Article 3:305c (1) BW. In the *World Online* case, the VEB created the additional foundation (*stichting*) Stichting VEB-Action WOL\(^{31}\) only for this particular case, so as to ensure all interested investors, including foreign investors, could be represented, even though the VEB’s articles of association does not limit itself to Dutch shareholders; its activities are territorially confined in practice.

### 2.4.2. Requirements: Representativeness, Commonality, and Numerousity

With regard to representation, particular emphasis is given to the articles of associations of the organizations that aim to represent the injured persons. The interests of the group the organization is seeking to protect must be covered by its articles. Otherwise, the foundation or association has not satisfied the condition of representativeness and the organization would be inadmissible. This approach to the rules on standing also means two or more organizations can bring separate collective actions in respect to the same issue, if the court finds both of entities satisfy the test of representativeness. However, the courts take also into account the actual practice of the foundations or associations.\(^{32}\)

Furthermore, the law requires that the interests of the group members must be similar\(^{33}\) for a collective action. As evidenced by courts’ practice and as intended by the legislator, standing can be obtained relatively easily, because the collective action does not provide for monetary compensation, and no individual assessments on causation need to be made.\(^{34}\)

Finally, there are no explicit requirements concerning the number of persons involved. However, the cases must be manageable.

### 2.4.3. Conclusion on Group Actions, and Initiation of the WCAM

Apart from the shortcoming that no monetary damages can be claimed under Article 3:305a BW, several additional drawbacks of the representative group action for both plaintiffs and defendants alike are identified. First, these judgments bind only the organization and the defendant, not the represented nor the non-represented persons that have omitted to opt in. Hence, the representative action will not prevent the injured parties from bringing individual actions on the same grounds but rather serves as a stepping stone to bring multiple cases before courts for monetary redress.\(^{35}\) Plaintiffs must initiate subsequent individual actions and

\(^{29}\) See Court of Appeals The Hague 27 May 2004, *LJN*: AP0151, 01/1086 (*Vie d’Or*).

\(^{30}\) President Court Breda 24 October 2006, *IER* 2007, 17, (*Office of Fair Trading v. Best Sales B.V.*).


\(^{32}\) See *SPG I* and *SPG II* cases.

\(^{33}\) Cf. Art. 3:305a(1) BW: ‘*gelijksoortig*’ [similar]; and also in: Art. 3:305b(1) BW.

\(^{34}\) According to the legislator in *MvT* 22 486, No. 3, at 2.

\(^{35}\) Tzankova & Lunsingh Scheurleer 2009, footnote 21: ‘Recent experiences show that this may happen especially in so-called “two-stage” collective actions, where the representative organization seeks [a] declaration that the defendant acted unlawfully so individual group members can try to obtain damages in subsequent individual proceedings. This does not seem to happen in collective actions for injunctions’. 
establish causation, liability, and damages. In other words, group actions can stretch and strain court proceedings, if they are regarded (and actually initiated) as a springboard to another legal action for instance for monetary compensation, which is becoming more and more important in modern economies.

According to the legislator in the early 1990s, an examination of the individual ‘particularities’ would take more time for rendering a judgment on the classification of the acts as a wrong. Nevertheless, individual particularities such as causation and damages are simply being passed on to another court, which does not make the court system more efficient. Collective group actions may thus not satisfy the objectives of legal certainty and efficiency. These drawbacks of opting in; not addressing individual particularities; and not providing monetary compensation were addressed by the WCAM, which was inspired by American-style class actions, without copying them.36

2.5. WCAM

2.5.1. Provision

Pursuant to Article 7:907(1) BW

‘[a]n [settlement] agreement concerning the compensation for damages caused by an event or similar events entered into by a foundation or association with full legal capacity with one or more other parties, who undertake thereby to compensate these damages, may, upon the joint request of the parties that have concluded the agreement, be declared binding by the court upon [the class of] persons to whom the damages have been caused, provided the foundation or association, by virtue of its articles of association, represents the interests of these persons’.

‘Persons to whom the damages have been caused’ also comprise those who have acquired a claim with respect to these damages by general or particular title.

The Act was originally intended to apply only to the resolution of mass bodily injury claims, such as the DES case.37 This is however not true for the subsequent cases that were already outlined. Potential38 defendants and representative organizations can try to reach an out of court settlement, which can be brought about by the pressure from politics, the ombudsman, and media.39 After the conclusion of such a settlement, the parties jointly petition to the court to obtain a court order declaring the agreement legally binding. If approved, no further claims that are covered by the settlement can be brought before courts. Thus, the WCAM aims at legal certainty.

36 See the website of the Department of Justice: <http://www.justitie.nl/onderwerpen/wetgeving/wet-collectieve-afwikkeling-massaschade/> (an English version is provided as well).
38 As they are not held liable, since they can settle the case before any civil liability procedure is pending. This is one of the reasons why this collective action in principle does not fully compensate all damages; the principle of proportionality.
2.5.2. Contents and Approval of the Settlement Agreement

The agreement shall include the description of the group or groups of persons and the various subclasses on whose behalf the agreement was concluded, according to the nature and seriousness of their loss. Besides, it must provide information on the (estimated) number of members of the groups; the compensation to be awarded; eligibility criteria for compensation; the procedure to determine and to obtain the compensation or the method of payment; and the name and place of residence of the person to whom the written notification referred to in Article 7:908 [i.e. the opt-out] can be sent.40

The following requirements must be met for the approval of the settlement agreement: (a) the compensation amount may not be unreasonable; (b) the defendant’s performance must be sufficiently guaranteed; (c) the representative organization must adequately represent the class; and (d) the number of class members must be sufficient to warrant ‘certification’. Nonetheless, no fixed number or threshold is set. In the Shell order, a threshold of 5% or more of the estimated class members was agreed upon in the settlement agreement which was approved by the court. On a case-by-case basis, the court decides whether such a threshold is fair and reasonable.

The court may reject the settlement agreement.41 Thus, the court must take account of the nature, cause and extent of loss suffered; the simplicity and expediency of the payment method; the defendant’s assets; the nature of the legal relationship between the defendant and the interested persons (class members); adequate representation; the group of persons for whom the agreement is concluded must be sufficiently large to justify the declaration; a legal entity, which is not a party to the agreement, will provide the compensation, pursuant to the agreement; and the availability of insurance.

Furthermore, the opt-out period must be stipulated in the agreement that must be at least three months.42 One may however freely opt for a longer opt-out period, for instance, if the number of affected interested persons is very large. An approved settlement is deposited at the court registry for inspection. The court may also decide the order to be published by other means, e.g. through websites. This allows for flexibility. As the opt-out approach provides legal certainty and brings conclusion of the case, it allegedly departs from the principle of an individual’s consent to be bound. Therefore, procedural issues for instance notification has to be scrutinized attentively by the court. As is recognized, collective settlement agreements are based on proportionality. Hence, the individual compensation amount may be lower compared with individual litigation. On the other hand, where an individual claim is rather small, a separate individual may not litigate as the legal costs may be greater than the claim. United together these small claims may be brought before court on a cost-benefit analysis. Again, the opt-out approach allows for the possibility to litigate independently, where one’s claim is assumed to be more successful or greater, compared to the other claims. As the claims are not similar in that particular case, one of the conditions for collective settlement may however not be satisfied, i.e. commonality. The opt-out approach is moreover favoured since it is more efficient as it lowers the burden on the court system for all interested persons

40 Art. 7:907(2)(a)-(f).
41 Cf. Art. 7:907(3) BW.
42 Cf. Art. 7:908(2) BW: ‘The declaration that the agreement is binding shall have no legal consequences for a person entitled to compensation who has notified (…) in writing, within a period to be determined by the court of at least three months following the announcement of the decision referred to in Article 1017(3) of the Code of Civil Procedure that he does not wish to be bound’. This is the opt-out period for class members; the opt-out period for ‘defendants’ may continue no longer than 6 months after the end of the opt-out period for the class members, provided this latter opt-out is stipulated in the agreement.
are included. Ignorance, inertia, or unfamiliarity with the legal possibility may prevent interested persons to take the affirmative step of opting in, and so effectively lose their rights.43

2.5.3. Representative Organizations

The requirement of representation is codified in Article 7:907(1) BW. However, the requirement is not specified in the Act. Nonetheless, Parliamentary history stated that representativeness can be derived from various factors. Several factual circumstances are mentioned to be relevant: the other activities of the representative foundation or association on behalf of the persons involved; the acceptance of the organization by those persons to represent their interests and the number of persons represented by the entity; and the extent to which the representative organization has actually acted on behalf of the persons involved and has represented itself as such in the media.44

In the *Dexia* order, the Court examined the objective of the foundations and associations concerned by its articles of association, the activities of these foundations and associations next to the filing of the WCAM request, such as their websites, their mailings to the interested persons, their activities in the media, and earlier activities in the field of litigation in connection with the issues that concerned the settlement agreement. Moreover, the Court held it is not required that each petitioner is representative for all concerned persons. It suffices the joint petitioners are adequately representative for a substantive large group of interested persons.45

Additionally, the Court further elaborated upon this requirement in its *Shell* order. The Dutch foundation representing the interested persons had a significant number of foreign participants and supporters. The VEB represents the interests of investors generally and has been very active in representing the interests of investors especially in commercial litigation. The two other representative organizations were pension funds and as such they do not represent the affected investors as they serve another purpose.46

3. Procedural Issues concerning Dutch Collective Actions

This part addresses various procedural matters, such as jurisdiction, damages approach, case management and costs issues. Especially, the WCAM proceeding is concentrated upon, as it partly departs from the ‘ordinary’ procedural rules. This part is mainly limited to the WCAM procedure, because the group action – as elaborated above – does not touch upon the matters of ‘individual particularities’, such as damages. The (consumer) group actions are only with regard to ‘jurisdiction’ worth mentioning.

45 *Dexia* order, para. 5.26.
46 *Shell* order, paras. 6.3-6.4 (concerning Art. 7:907(1) BW) and paras. 6.21-6.25 (concerning the requirement in Art. 7:907(3)(f) BW).
3.1. **Jurisdiction**

3.1.1. **Representative Group Action in Article 3:305d BW**

Concerning the group action, no additional jurisdictional rules apply. Where a group action is initiated for declaratory relief, namely that the conduct of the defendant is unlawful, the case is initiated by a writ. Consequently, the place of residence of the defendant determines the jurisdiction of the district courts. In case of legal persons, the place of incorporation or registered office or headquarters determines the courts’ jurisdiction. However, as already mentioned above, in case of consumer protection, the court of appeals of The Hague has exclusive jurisdiction in these consumer group action cases.47

3.1.2. **The WCAM procedure**

The Amsterdam Court of Appeals has exclusive jurisdiction in first and final instance.48 Although cassation is possible, it is hardly feasible since all parties must agree to it, while they all requested the legally binding order in the first place. When the Dutch legislator introduced the WCAM for remedying the consequences of the internal (DES) case, no due regard had been paid to transnational cases.49 The Shell securities case and the later Vedior case illustrate the extraterritorial effects of certain acts.50 As the Shell securities case delivers the authority to rely on whether the WCAM settlement could include non-Dutch residents as well, this case is examined here.

The Shell case is the first international or transnational mass damage case that has been settled under the WCAM regime. Excluding the US shareholders, the settlement was concluded for the benefit of the worldwide group of Shell’s shareholders, who purchased their shares from 8 April 1999 through 18 March 2004 on many stock exchanges other than the NY SE. One of the issues in a transnational case to be resolved was whether the Court of Appeals had international jurisdiction to declare the settlement binding.51 The matter is governed by the EU Brussels I regulation as the case can be qualified as a ‘civil or commercial’ matter under Article 1(1) Brussels I and the 1968 Brussels Convention and the Lugano Convention, and the interested persons are regarded as persons in the sense of Article 2(1) and 3(1) of these legal documents that are to be sued before the courts of the State where they have their

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47 Art. 3:305d BW. The Consumer Authority has the power to enter into collective settlements, but it has announced to exercise this power with restraint because private law enforcement should be left to private parties, such as the Dutch Consumer Organization (Consumentenbond).

48 Art. 1013(3) Rv.

49 It was held that Dutch foundations or associations can ‘normally’ not be expected to represent a group of foreign claimants. See MvT II 2003-2004, 29 414, No. 3, at 16. Despite this position, the government is moving towards supporting the position that it may be possible. See MvA I 2004-2005, 29 414, No. C.

50 In the Vedior case, the WCAM settlement was a global settlement as the American interested persons were covered by it as well, whereas in the Shell securities case, the US court had jurisdiction concerning the claims of Americans. See for the American Shell case: De Jong 2007, p. 311-316; and De Jong 2008, p. 31-32; see for the extraterritorial implications: Polak 2006, p. 2346-2355; see for an overview of all proceedings i.e. the SEC settlement and the US class action and the Dutch WCAM proceeding: <http://www.royaldutchshellsettlement.com/Documents/RDS%20Settlement%20Schema_EN.pdf>.

51 See ILA International Civil Litigation and the Interests of the Public, Transnational Group Action, Report and Resolution, submitted to the ILA 73rd Conference, August 17-21, 2008 (identifying that jurisdiction and notification are problematic). See for a European approach e.g. Tzankova 2007b, p. 2634-2642.
domicile.\textsuperscript{52} Thus, the supranational Brussels I regulation and the international documents supersedes applicable Dutch private international law provisions.

However, one may question whether there is a person ‘to be sued’ in such a case where the parties have agreed to a settlement agreement and jointly request a binding declaration under the WCAM. Nevertheless, one may argue that the represented interested persons for whose benefit the settlement has been concluded are the persons to be sued, because these persons are being affected, i.e. bound, by the legally binding declaration, but so are the Dutch Shell Petroleum N.V. and the English The Shell Transport and Trading Company Limited (STT). Yet, only those represented persons are to be notified of the request for the declaration and they may submit objections. Thus, they may be considered as ‘defendants’ for the purpose of applying Brussels I.

Thus, the supranational Brussels I regulation and the international documents supersedes applicable Dutch private international law provisions.

With respect to the persons domiciled in the Netherlands, the Court had jurisdiction on the basis of Article 2(1).\textsuperscript{53} With regard to the interested persons that were domiciled outside the Netherlands, but domiciled in one of the other EU Member States or Contracting Parties the Court could base its jurisdiction on Article 6(1) provided the stipulated condition – of such a close connection between the claims that good administration of justice demands the simultaneous resolution in order to prevent irreconcilable decisions – was satisfied.\textsuperscript{54} The argument of good administration of justice prevailed to concentrate jurisdiction in the Netherlands. Besides, STT and the Dutch Shell Petroleum N.V. acted in concerted action, they were closely interwoven entities and moreover the parties did not object the jurisdiction of the court.

Regarding the persons that were neither domiciled in the Netherlands nor in Europe, the Court further based its international jurisdiction Dutch private international law, for five out of the six petitioning parties (Shell Petroleum N.V.; the special purpose foundation Shell Reserves Compensation Foundation; the generic investors’ association VEB; the foundation Pensioenfonds ABP; and the foundation Stichting Pensioenfonds Zorg en Welzijn) are located in the Netherlands. In a procedure initiated by a petition to the court, Dutch courts can have jurisdiction on Article 3 Rv, if at least one of the parties requesting the legally binding declaration is domiciled in the Netherlands. So, even if the case is substantially unconnected to the Netherlands, but one of the parties to the settlement is a Dutch foundation or association, or a special purpose foundation or association is ad hoc established, the Amsterdam Court of Appeals will have jurisdiction. This broad jurisdictional scope concerning non-Europeans transformed the WCAM-procedure into a global settlement procedure. It also highlights the importance of adequate representation.\textsuperscript{55}

\textsuperscript{52} Shell order, paras. 5.15-5.27.
\textsuperscript{53} Shell order, para. 5.18.
\textsuperscript{54} Shell order, para. 5.20. See on Art. 6(1) Brussels I ECJ Freeport v. Arnoldsson (on the strict connection between the claims); and ECJ Roche (spin in the web theory was not upheld). On the enforcement of judgment see recently ECJ 23 April 2009, Case C-167/08, Draka NK Cables Ltd et al v. Omnipol Ltd (holding that Art. 43(1) Brussels I regulation must be interpreted as meaning that a creditor of a debtor cannot lodge an appeal against a decision on a request for a declaration of enforceability if he has not formally appeared as a party in the proceedings, at para. 31; and the redress procedure is made available only to the applicant and the defendant, at para. 30). The latter judgment may have implications for the represented interested persons as they are not formally parties to the legal proceedings, the representative organizations however are.

\textsuperscript{55} See for the same finding on its implications: Polak 2009, p. 12: ‘This implies that if the persons for the benefit of whom the settlement agreement is concluded are located in several countries, each national group may be represented by a separate entity. One would think that it is not required that each entity will become a party to the settlement agreement, but that these entities can form a Dutch association (…) that
3.2. **Notification**

Next to the jurisdictional question, the *Shell* case also demonstrated how to deal with transnational notification problems. Notification is important (1) for starting the negotiations for a settlement agreement or litigation, and (2) after the agreement has been declared legally binding. The WCAM provides for direct notification to the ‘known’ interested persons and public notification through advertisements in Dutch and foreign newspapers to the ‘unknown persons’.

In accordance with the WCAM provision in Article 1013(5) Rv, notification must be done through newspapers and at websites. As far as the known persons are domiciled in the EU, direct notification is governed by Council Regulation No. 1393/2007.\(^{56}\) In the *Shell* case, 111,588 notices were sent to the shareholders. The direct notice to the known class members may be given by ordinary mail. Bailiffs must notify the other non-Dutch Europeans. Regarding the non-European persons, notification must be in accordance with treaties that may apply. Additionally, a public notice can be published in newspapers worldwide. Further publications are issued by the petitioners and media coverage may be taken into account when deciding whether the notification requirement has been sufficiently satisfied. The emphasis on the notification is justified by the opt-out approach of the WCAM; as many as reasonably possible must have had the knowledge of the (possible) commencement of the collective action.

After the order is delivered, the notification is further relevant as the opt-out period starts as of the day of the publication in the newspapers that the order is final. Thus, notification is provided twice. The WCAM procedure consists of following steps: first the negotiations start between the representative organizations, secondly where the out of court settlement has been agreed upon a petition is filed for the court approval, the first notification of the interested members is initiated, after which the filing of objections by the individual group members or by other representative organizations is possible, this is followed by a fairness hearing. Then the court approves the settlement agreement and determines the opt-out period. The second notification is sent and after the opt-out period the settlement becomes legally binding. If the persons has not timely opted out, in principle no legal action can be made concerning the same legal issue.

3.3. **Case Management**

Although the power of the court to interfere with the contents of the settlement agreement is rather limited as the settlement has been negotiated and concluded between the relevant parties and the aim for a swift settlement was expressed during the implementation of the WCAM. The court can only hold that either the amount of compensation or the process of determining the compensation is unfair. However, the *Dexia* case demonstrates the court can exercise discretionary powers.\(^{57}\) For instance, the court appointed on its own initiative an expert panel with regard to issues that were brought up by some objectors. The court established a team of 30 people including 10 judges to deal with the individual claims of those acts as party to the settlement agreement and as petitioner, or that these entities agree to become a participant (…) in a Dutch foundation’. The global scope is affirmed in the subsequent WCAM *Vedior*.\(^{56}\)


Tzankova & Lunsingh Scheurleer 2009, at footnote 24; and see Bestebreurtjes & Van der Krans 2007, p. 48 (expert research by AFM ordered by the Court of Appeals 20 June 2006, LJN: AX8970.)
Consequently, judicial activism is stimulated within the context of the review process of the settlements in order to satisfy the main purpose of the WCAM, an efficient legal device to deal with mass damages.

### 3.4. Damages Approach, Legal Costs, and Funding Issues

The WCAM introduced a ‘damage scheduling’ approach, under which compensation is awarded to claimants not on the basis of their personal characteristics but rather on the basis of the characteristics of the group of which the particular individual claimant is a member. According to Article 7:907(2)(a)-(c) BW the settlement must contain categories of loss and it ought to determine the appropriate category for a victim by using a number of factors. A victim will then make a claim for the corresponding class compensation payment. In paragraph (d) it is required that the agreement describes the conditions to be met by a victim in order to be eligible for such a compensation payment. Thus, this approach corresponds to the method of ‘subclassing’.

In the Netherlands, punitive damages are not allowed, nor are contingency fees possible yet. In the *Dexia* opt out cases, the individuals were often represented by claims management intermediaries that work on a ‘no cure no pay’ fee basis. Claims management companies are able to agree to ‘no cure no pay’ fees, whereas lawyers cannot.

The free rider problem is well-known in these procedures where the interested persons are passive members of a class or group. In the *Dexia* case, the persons represented by the leading parties contributed each 45 euro. The costs in a Dutch civil action are primarily lawyers’ and experts’ fees. In the Netherlands, financing legal actions is structured through legal aid and legal insurance. The latter is increasing in the Netherlands, as free legal aid is income-dependent. Furthermore, the loser pays principle applies, but the compensation will not cover the total lawyers’ fees incurred. Under Dutch law the loser pays only a small portion of those costs. The amount awarded is based on fixed figures by the courts and based on the amount in the dispute and the number of court-related activities. The successful party is entitled to recover legal expenses reasonably incurred in the pre-action phase; this test is known as the double fairness test. Court fees are awarded but they are capped at €5,916 (court of appeal). Attorneys’ fees in collective action do not have to be approved by the court.

### 3.5. Miscellaneous

Various proposals are currently been brought forward. Examples of several proposals are to establish a separate fund or insurance; or a pilot of contingency fees or no cure no pay that would stimulate law firms to specialize in this type of litigation. Currently, the generic investor association VEB finances its actions through membership fees and donations.

In the *Shell* case, all costs linked to the establishment and the execution of the settlement agreement are being born by Shell. These include the costs concerning the escrow and cash accounts where the compensation amount is deposited and potential costs of a possibly to be established dispute settlement body concerning the payments. Shell also pays for copies of the

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58 Hodges 2008, p. 74 and note 90 (information provided by Tzankova, April 2008).
60 Hodges 2008, p. 74.
61 Tzankova & Lunsingh Scheurleer 2007, p. 19, No. 28. See more on funding: Schonewille 2007, p. 2633 (proposal to establish a fund); Hartlief 2007, p. 2595-2596 (proposal of insurance); and Tzankova 2007a, p. 171-204.
62 Art. 6:96(2)(b) and (c) BW and further developed in case law.
order and of the settlement agreement to those persons. After the opt-out period, the amount is transferred from the escrow account that is supervised by Shell and the Compensation Foundation together to the cash account managed by the Foundation. The latter must pay the interested persons and an Administrator is the subcontractor to execute the settlement agreement. These costs do not decrease the compensation for the interested persons, which amounted to the unconditional USD 352,600,000. The reasonableness of the compensation was assessed by the court through expert opinion; experts who were designated by the Shell in the Shell case. The Court must examine whether the claims of those persons on whose behalf the agreement was concluded is sufficiently guaranteed. Although there are yet only a few WCAM orders, it is illustrative that in the DES case the settlement fund was €35 million; in Dexia €1 billion for 300,000 claimants; €45 million for 11,000 former policy holders in Vie d’Or; in Shell, the amount is USD 352,6 million; and in Vedior, the court approved a settlement of €4,25 million.

4. Summary

The Netherlands is familiar with two representative collective action: (1) a ‘group action’ in Article 3:305a BW; and (2) the WCAM procedure where an out-of-court settlement is brought to the Amsterdam Court of Appeals to declare it legally binding.

One can only be represented by a foundation or association that according to its articles of association is representing the interests of the persons and aims to protect their interests. Group actions concern a range of affairs, but in cases of consumer protection some additional rules are provided. For instance, the Court of Appeals of The Hague has exclusive jurisdiction, and potentially more bodies may represent consumer interests. Although the WCAM can also be applied to all kinds of mass damages, it is currently employed mainly in financial affairs.

The group action can only be brought for injunctive or declaratory relief, not for monetary damages. Consequently, the action can be employed as a stepping stone to other legal actions before a Dutch civil court to obtain monetary compensation. The judgment is only binding between the representative organizations and the defendants. These drawbacks are addressed by the WCAM that was introduced because of the mass bodily harm caused by the DES drug.

As of 2005, the WCAM (Act Collective Settlement Mass Damages) provides for a rather effective and efficient mechanism to deal collectively with similar numerous claims. Since the 2009 Shell order, which has been implicitly affirmed in the Vedior order, the WCAM can be applied beyond the Dutch national borders. Notification in such transnational cases is even more important than in internal instances, but more problematic. Nevertheless, it is important to address this problem as the WCAM departs from ‘ordinary’ civil procedural rules and provides for an opt-out approach. As a result of the opt-out, the allegedly injured persons are bound by the settlement if the settlement is approved, and if the opt-out period of at least three months has expired. Furthermore, the WCAM is generally positively evaluated. However, it lacks pressure tools to force a potential defendant into a settlement. Moreover, it does not provide for proper adjudication. Some may view this positively as the WCAM can be considered as an ADR mechanism. Besides, the Amsterdam Court of Appeals that has

63 Shell order, paras. 6.28, 6.32, and 8.7.
64 Shell order, para. 6.10.
65 Art. 7:907(3) BW.
exclusive jurisdiction in these instances has developed some case management techniques that counter the original envisaged marginal judicial scrutiny of the out-of-court settlements.

Current proposals and debates concentrate on funding issues that relate to the free rider problem.
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