

Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from The Netherlands

TOMAS ARONS AND WILLEM H. VAN BOOM*

Abstract

With the enactment of the 2005 Collective Settlement of Mass Damage Act (WCAM 2005) the Dutch legal system and indeed Dutch society has taken a significant step towards a more efficient resolution of mass damage claims. The WCAM 2005 seems especially promising for attaining relatively swift settlement of mass securities claims in the Dutch context. Since, however, stock traded on the Amsterdam exchange is not exclusively owned by shareholders resident in The Netherlands, the obvious question is to what extent settlements under the WCAM 2005 have cross-border effect. Against this background, this paper has a twofold purpose. First, we aim at providing a general outline of the Dutch legal system concerning the collective settlement of mass damage claims. Secondly, we discuss issues of international jurisdiction, cross-border recognition, *res judicata* and enforcement of opt-out securities settlements under the WCAM 2005. Have the Dutch found a new export product with the enactment of the WCAM 2005?

1. Introduction

As far as collective mass claim settlement is concerned, it has been said that “the European landscape is a mixed bag of differing collective redress mechanisms”.¹ One of the legal systems in this “mixed bag” is the small jurisdiction of the Kingdom of The Netherlands. With the enactment of the 2005 Collective Settlement of Mass Damage Act (WCAM 2005), the Dutch legal system and, indeed, Dutch society has taken a significant – although far from perfect – step towards a more efficient resolution of mass damage claims.

What prompted enactment of the WCAM 2005? It seems that the practical operation of fundamental values in private law has ultimately led to a growing call for a more efficient resolution of mass damage claims. Such fundamental values are, for instance, the concept of party autonomy, the right to be individually heard in private

* Tomas Arons and Willem van Boom are PhD researcher and professor of private law respectively at Erasmus School of Law, Rotterdam, The Netherlands. The article was concluded in December 2009; later developments were not included.

¹ Sorabji et al., *Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure for Collective Actions* (2008), at 37; published online: http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf.

law issues, and the principle that actions and remedies are to be invoked exclusively by the interested or injured person. Key to these fundamental values is the concept of individual autonomy that places individual rights and duties at the nucleus of civil law and civil procedure. Dutch civil procedure is by no means different from this traditional way of thinking. In real life, however, individuals can prove to be insignificant in the enforcement of their private rights. Costs of individual proceedings – in terms of financial expenditure, time, strain, and anxiety – may well outweigh expected benefits. Moreover, if the masses do go to court individually, a multitude of similar individual claims may exert undue pressure on court efficiency.

This seems to be especially true for securities litigation. Take for example the 2004 Royal Dutch Shell oil reserves overstatement. Royal Dutch Shell is an international oil company based in London and The Hague. Its shares are traded on several European stock exchanges and approximately 90 percent of all shares are held by European investors. In 2004, shareholders experienced a significant drop in share value when it was discovered that Shell had artificially inflated oil reserve statements in its past annual accounts. As a consequence, three board members resigned and internal audit procedures were amended. The United States Securities and Exchange Commission (SEC) fined Shell a \$ 120 million penalty for breach of US securities regulations.² Moreover, two major Dutch shareholders lodged proceedings against Shell in the USA in order to obtain compensation. Meanwhile, however, the WCAM 2005 had come into force and European lawyers of both these shareholders and Shell seemed to agree that reaching a European settlement rather than pursuing the American class action would be beneficial to all (European) parties involved. So, in 2007 Shell reached a settlement with representatives of major European shareholders. Parties to the settlement agreement were institutional investors such as Dutch pension funds and the Dutch Stock Owners Association (Vereniging van Effectenbezitters (VEB)) as well as the Shell Reserves Compensation Foundation,³ the ad hoc SPV charged with distribution of the settlement proceeds. The parties' intention was to petition the Amsterdam Court of Appeals under the WCAM 2005 to declare the settlement binding upon all non-US investors. The settlement agreement was subject to the Amsterdam Court of Appeal's (the Court) declaration that the settlement is binding for all of the shareholders that it covers. Furthermore the settlement was declared subject to the agreed opt-out provisions. In 2009, the Amsterdam Court granted the binding declaration.⁴

² *SEC v. Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, p.l.c.*, civil Action No. H-04-3359 (August 24, 2004; U.S. District Court Southern District of Texas, Houston Division).

³ The Foundation is a legal entity representing all shareholders covered by the settlement agreement. The Foundation's participants, that are all fully supporting the settlement agreement, include 133 institutional investors (including APG, PGGM, DEKA, Norges, UBS and Morley, amongst others) as well as Euroshareholders, the organisation of European shareholders associations, and 18 other organizations representing individual shareholders from France, Germany, Italy, Sweden, The Netherlands and a number of other countries.

⁴ Amsterdam Court of Appeal, 29 May 2009, LJN NI5744, *Ondernemingsrecht (OR) 2009*, 109; *Jurisprudentie Ondernemingsrecht (JOR) 2009*, 197

The settlement was heralded by the Dutch press as a brilliant effort to reach an efficient level of compensation while avoiding the contingency fee-driven US-style class action.⁵ It was estimated that over 500.000 persons or entities would be entitled to compensation under the settlement. This logistical challenge was the least of the worries of the parties to the settlement. The settlement of the reserve-related claims was complicated for a number of other reasons the most important of these being that although shareholders were predominantly European there were obviously American interests involved as well. As a consequence, several securities fraud class actions against Shell were filed in the United States District Court for the district of New Jersey. These claims were consolidated and resulted in a settlement for shareholders residing in the USA or having bought their stock in the USA. It was agreed that the European settlement would lapse if the New Jersey Court would assume jurisdiction over non-US class members before the Amsterdam Court of Appeal rendered a binding declaration. In the end, both the US consolidated class action claims and the Dutch settlement were declared binding by the courts in New Jersey and Amsterdam respectively. Thus, an intricately dovetailed duo of collective settlement vehicles were upheld and they are currently being executed.

Now consider the alternative in absence of the US class action and the Dutch WCAM 2005. Individual claimants would either need to voluntarily consolidate their claims or file their individual claims individually in disparate courts. The stress this puts on claimants, courts and societal resources can be considerable. If collective mechanisms such as the WCAM 2005 can provide for cost-efficient compensation, then they are worth consideration. Obviously, this in itself does not demonstrate the superiority of such mechanisms over individual claims adjudication systems. Indeed, there are many issues of collective settlement mechanisms that deserve in-depth debating. One of these issues, which will present itself in the following sections, is the tension between on the one hand the fundamental legal principle of procedure holding that individual claimants cannot be stripped of their rights to compensation and that they must have a proper opportunity to present their case before a court, and on the other hand the need for modern society to search for more efficient methods of dealing with mass litigation issues. Hence, there can be good policy reasons for allowing individuals to join forces in group actions, either in person or by the intermediate instrument of interest group associations. This does not imply that the aforementioned fundamental principles are to be rejected or disregarded. It does mean, however, that they may need to be recalibrated in light of the practical effects they have in modern society.⁶ The 2005 Collective Settlement of Mass Damage Act is to be considered a serious effort of such a recalibration.

⁵ See, e.g., NRC Handelsblad 12 April 2007, under the caption “Shell wijst de weg in Europese massaclaims” (“Shell points the way forward in European mass claims”).

⁶ On this topic in Dutch legal writing, see for example Asser et al., *Een nieuwe balans – Interim-rapport Fundamentele herbezinning Nederlands burgerlijk procesrecht* (Den Haag 2003); Asser et al., *Uitgebalanceerd – Eindrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht* (Den Haag 2006); Tzankova, *Strooischade – Een verkennend onderzoek naar een nieuw rechtsfenomeen* (Den

Given the added value that the WCAM may have for the amiable settlement with expedient closure for all parties involved, the question is to what extent this Dutch piece of legislation has any export value. Obviously, that is a question that needs to be answered primarily by others than the Dutch themselves. Therefore, in the following sections, we will merely provide an outline of the Dutch legal system concerning the collective settlement of mass damage claims. Secondly, we focus on the recent use of the WCAM 2005 in the settlement of multiple securities claims. More in particular, we discuss issues of international jurisdiction, cross-border recognition, res judicata and enforcement of opt-out settlements under the WCAM 2005. Finally, we will reflect on the potential 'export value' of the Dutch WCAM 2005.

2. Individual Substantive Rights and Collective Actions

Under Dutch law, no one has an action without sufficient interest.⁷ Thus, the right to be heard in court is accessory to the legitimate interest in the action. Furthermore, an action cannot be separated from the right it aims to protect.⁸ This is relevant, for instance, in cases of assignment of the claim; the action then follows the substantive right to compensation.

As a rule, the individual whose interest has been violated is the holder of the claim, and he has the exclusive right to pursue the claim in court. Voluntary pooling of individual claims is allowed, either by assignment of the claim or by giving mandate (power of attorney, litigation procuration, debt collecting mandate) to a representative to initiate a civil procedure on behalf of the interested parties. Assignment of claims for compensation is broadly accepted under Dutch law.⁹ Unlike some other legal systems, such claims can be readily assigned to a foundation or association, or even to a natural person¹⁰.

Assignment gives the new creditor the same position in court as the original creditor. Therefore the use of a pooling device, such as assignment or mandate, does not change the nature of the individual claims. In a case of mass damage, this may cause logistical problems for the assignee of the aggregated claims. For example, in a recent case some 1400 disappointed investors assigned their right to invoke nullity of their

Haag 2005); Tzankova, *Toegang tot het recht bij massaschade (thesis Tilburg)* (Deventer 2007); Van Boom, "Efficacious Enforcement in Contract and Tort" (inaugural lecture Rotterdam, The Hague 2006).

⁷ Article 3:303 Civil Code (Burgerlijk Wetboek).

⁸ Article 3:304 Civil Code.

⁹ Note in its World Online-judgment (27 November 2009, LJN BH 2162, OR 2010,21, JOR 2010,43) the Dutch Supreme Court ruled that the notification of the assignment to the debtor as required in Article 3:94 (1) Civil Code has to contain the full name of the assignor such that debtor is able to raise the same defences against the assignee as he could have raised against the assignor as guaranteed by Article 6:145 Civil Code (consideration 4.4.1).

¹⁰ Note, however, that assignment to an attorney/solicitor with the goal of filing the claim is not allowed; see art. 3:43 Civil Code. This prohibition is founded on the fundamental idea that an attorney should have no financial interest in a case other than his fees. At this moment, conditional fee arrangements are not yet allowed under Dutch law.

investment contracts to a foundation.¹¹ The right to nullification (rescission, voiding the contract) was based on misrepresentation allegedly caused by insufficient transparency and lack of due care on the part of the investment bank. The foundation took all 1400 cases to court in one single action. However, for nullification to succeed in court the claimant must show a number of specific circumstances relevant for his case. The foundation neglected to furnish a detailed account of these circumstances both in the summons and in each of the 1400 case files. As a result, the courts of first as well as second instance rejected the 1400 amalgamated claims for nullification. In essence, voluntary amalgamation does not materially alter the standards developed for and applied to individual cases by the civil courts.

Apart from such voluntary pooling of individual claims, there were a number of cases in the 1970s and 1980s in which foundations and associations pleaded to have standing in court in the interest of individuals who were merely identified in the abstract sense (e.g. “all persons living in the area Y and affected by tortious act Z”) and which in any case had not necessarily been given explicit authority to initiate proceedings on their behalf. Note that in this period there was no general statutory framework whatsoever for assessing whether or not foundations and associations that initiated proceedings (without assignment or mandate) have standing in the interest of others. Notwithstanding this lack of a statutory framework, in a number of cases the Dutch Supreme Court (*Hoge Raad der Nederlanden*) laid down the conditions for such a collective action. As a matter of principle, the Supreme Court acknowledged that foundations and associations had a legitimate interest in bringing actions for injunction¹² and declaratory judgment before civil courts. The Supreme Court was never called upon to consider whether representative organisations could claim compensation in the interest of the injured individuals.

Under the aforementioned case-law, representative foundations and associations were allowed to take legal action in tort on behalf of those persons whose interests were tortiously infringed by third parties. The conditions set by case-law were quite flexible. Firstly, it was for the lower courts to assess, taking all circumstances into account, whether the condition of adequate representation was fulfilled. In this respect, the courts would take into consideration the articles of incorporation and byelaws of the legal person. The foundation or association should aim pursuant to its articles of incorporation at protecting interests identical to those damaged or endangered by the tortious act at hand.

Secondly, it was thought that foundations and associations were allowed to take legal action and claim injunctive relief against the defendant if there was evidence of tortious behaviour of the defendant *vis-à-vis* the interested parties. There was no need

¹¹ Amsterdam Court of Appeal, 16 September 2008, *Jurisprudentie Aansprakelijkheid* (JA) 2009/1, no. 158.

¹² The concept of “injunction” is used here as a generic term encompassing both prohibitory injunction (order to abstain from certain behaviour) and positive mandatory injunction (an order to actively engage in certain behaviour). In principle, both alternatives are generally available in tort law subject to certain exceptions.

for a power of attorney or similar forms of consent of the interested parties in order for the legal person to pursue a claim.

Demands for a declaratory judgment would typically entail that the court declared (on demand of the organisation bringing the collective action) that the defendant had acted unlawfully *vis-à-vis* the individuals whose interests were at stake. The nature of a number of cases – especially in environmental issues – seemed to resemble general interest actions (collective actions in which the individuals whose interests are involved cannot be identified because of the generality of the interest) rather than group actions (where some form of identification or demarcation is still possible). However, the Dutch Supreme Court was never explicitly called to rule on the issue of standing in court in genuine general interest actions.

The remarkable aspect of acknowledging collective action is that on the one hand the action is based on tortious behaviour *vis-à-vis* the individuals whose interests are at stake, when on the other hand the action may create obligations for the tortfeasor with respect to the organisation pursuing the collective claim.¹³ For instance, there is no need for the foundation or association that files the claim to have suffered losses from the tortious act itself. However, if the court sustains the collective action and grants injunctive relief, the organisation that brought the collective action to court can claim compensation for reasonable pre-trial expenses, such as the cost of expert research and legal fees.¹⁴

3. The 1994 Act on Collective Action

In 1994, the developments in case-law as described in the previous section led to codification in the brand new 1992 Civil Code. The Dutch legislature added three ostensibly insignificant articles to the Dutch Civil Code: article 3:305a, 305b, and 305c. These articles seemed insignificant at the time because they merely codified the aforementioned developments in case law during the 1970s and 1980s.¹⁵ What the articles also did, however, was freeze the evolution of case law.

The 1994 Act introduced article 3:305a Civil Code, which authorises incorporated foundations and associations with full legal capacity to file claims pertaining to the protection of common interests of other persons, if and insofar such an organisation represents these interests pursuant to its articles of association. Especially chilling was article 3:305a (3) Civil Code that barred any collective claim for monetary compensation. In essence, the 1994 Act rejected organisations standing the right to claim compensation on behalf of interested parties. At the time, the legislature was not willing to tackle the legal issues involved in the introduction of such a novel class action system.

¹³ Frenk, *Kollektieve akties in het privaatrecht* (PhD thesis. Utrecht) (Deventer 1994), at 352.

¹⁴ *Hoge Raad* (HR) 13 October 2006, C04/279HR (Verzekeringkamer/Stichting Vie d'Or), JA 2006/10, no. 142 (insolvency life insurance company Vie d'Or).

¹⁵ This case law also allowed public authorities to take legal action in tort to defend public interests; this particular strand of case-law will not be considered here.

Summarising, the 1994 Act codified the following with regard to collective action:

- Foundations and associations with full legal capacity are entitled to lodge an action in court against a tortfeasor, requesting either a declaratory judgment, a prohibitory injunction or mandatory positive injunction, or the publication of the court decision;
- If the foundation/association pursuant to its articles of association represents the aligned (i.e. common and comparable if not identical) interests of the individuals involved;
- Efforts of the organisation to reach an out of court settlement with the alleged tortfeasor must have failed.¹⁶

The 1994 Act authorises representative organisations to initiate a collective action with the following objectives:¹⁷

1. Seeking a declaratory judgment to the benefit of interested parties, holding that the defendant has acted unlawfully against the interested parties, and is legally obliged to do something or to abstain from doing something *vis-à-vis* these interested parties;
2. Seeking injunctive relief, holding the defendant to perform a legal duty owed to interested parties (positive mandatory injunction) or to abstain from acting (prohibitory injunction);
3. Seeking performance of a contractual duty owed by the defendant to multiple interested parties;
4. Ordering the termination of contracts between the defendant and multiple interested parties;
5. Ordering the rescission of contracts between the defendant and multiple interested parties.

In practice, however, some of these objectives are difficult to shape into a collective action. For example, a collective action for rescission of multiple contracts seems impossible if the basis for rescission is unconscionability, mistake, or misrepresentation. As mentioned above, nullification (rescission, avoidance) of a contract for misrepresentation is only allowed on the basis of a concrete and subtle weighing of all circumstances of the case at hand. Such a process, in which the focus is on the specificity of the case, seems at odds with the collective action process. Unsurprisingly, there are no examples in case-law of successful collective nullification.

¹⁶ The organisation shall not be heard in court if it has not undertaken a serious effort at consulting the defendant unless such consultation would be impossible or fruitless. See *Kamerstukken II 1991/92* (Parliamentary Proceedings Second Chamber 1991/1992) 22 486, no. 3 (Explanatory Memorandum), at 29; Frenk (op. cit. fn. 13), at 355.

¹⁷ Cf. Frenk (op. cit. fn. 13), at 355.

Moreover, the use of article 3:305a as a stepping-stone towards individual compensation has proved to be difficult as well. A collective action procedure under article 3:305a could be used to provoke a declaratory judgment that the defendant has acted unlawfully *vis-à-vis* the individuals whose interests were at stake. Such a judgment is of limited use. In practice, it has proved to be impossible to obtain a declaratory judgment that also declares that the defendant is legally liable *to compensate* these individuals.¹⁸ It was one thing for a court to assess wrongfulness on an abstract level but quite another to ascribe individual rights of compensation. The legislature considered that assessing the nature and extent of damage and causation¹⁹ was an operation to be carried out on a strictly individual level. Consequently, the Supreme Court ruled that individual rights of compensation were too dependent on individual circumstances to allow organisations in a collective action to obtain even a declaratory judgment, holding that the interested parties each had individual rights to compensation.²⁰ The Court's ruling is in line with the explicit legislative intent to deny representative bodies the power to claim aggregate damage under article 3:305a Civil Code.

In principle the question of causation is not dealt with in the collective action procedure of Article 3:305a Civil Code. The foundation or association cannot claim for damages in this procedure.²¹ Therefore the question what damages are connected to the tort committed usually arise in the follow-up court proceedings in which damages are claimed by individual claimants. However the Dutch Supreme Court ruled in the WorldOnline-judgment on prospectus liability that in principle the claimant has to demonstrate in individual proceedings subsequent to the declaratory judgment the *condicio sine qua non* element that it is plausible that if the litigated act or omission on which the liability is acclaimed had not taken place, he would not have suffered his losses.²²

However the Dutch Supreme Court also upheld that: 'With a view to effective legal protection and the purpose of the prospectus rules to protect (potential) investors against misleading statements in the prospectus, the basic premise is that the *condicio sine qua non*-connection between the misleading statements and the investment decision is present. This means that in principle it is to be accepted that if there had been no misleading statement in the prospectus, the investor would not – or in case of a secondary market purchase: not on the same terms – have acquired the securities. The court may however on the basis of the exchange of arguments and taking into account

¹⁸ Expressly forbidden in Article 3:305a Civil Code.

¹⁹ Note that the Dutch Supreme Court in its November 2009 judgment in the World Online-case ruled in the collective action procedure in general terms about causation.

²⁰ *HR*, JA 2006/10, nr. 142.

²¹ Article 3:305a DCC.

²² World Online judgment, consideration 4.11.1: 'The Articles 6:194–195 leave unaffected the application of the ordinary rules with respect to the substantiation and burden of proof with respect to the question whether the losses are connected to the misleading statement in such way that these can be attributed to the person who published the misleading information. In principle the investor has the duty to claim and bears the burden of substantiating and proving the *condicio sine qua non*-nexus.'

the nature of the misleading statement and the other information available, conclude that the aforementioned basic premise in the factual circumstance of the case before the court is not suitable.²³ It remains to be seen whether the same reasoning can be upheld in other collective actions with a different factual background.

Obviously, the aforementioned restrictions very much took the sting out of the 1994 Act: it can be used for eliciting declaratory judgments on wrongfulness and for obtaining injunctive relief, but strictly speaking it cannot be used to legally *compel* the tortfeasor to compensate. Moreover, individuals that collectively benefit from the court's decision can dissociate themselves from the outcome of the collective action. As they are not party to the litigation, the outcome is not to have any "res judicata effect" in their respect in view of their fundamental right to be heard, or so the legislature decided (both article 6 of the European Convention on Human Rights (ECHR) and article 17 of the Dutch Constitution warrant the right to unprejudiced evaluation of their personal litigation of facts and rights).²⁴

Despite the legal restrictions, in practice the 1994 Act can still be a useful legal tool to pave the road to a *voluntary* mass settlement and thus help to obtain compensation. Whether a mere declaratory judgment on issues of wrongfulness is indeed sufficient to practically force the alleged tortfeasor to the negotiation table is likely to depend on factors such as:

- Is it likely that individual victims will individually prove damage and causation? This depends in part on the rules of evidence and the law of damages;
- Is it likely that individual victims will in fact pursue their individual claims? This depends largely on the cost and expected benefits of initiating proceedings for compensation;
- What are the costs and benefits to the tortfeasor of not negotiating individual settlement (in financial terms, negative media exposure, political pressure, and the like)?

4. The 2005 Collective Settlement of Mass Damage Act (WCAM 2005)

4.1. Introduction

As mentioned in the previous section, the 1994 Act lacked the tools for legally forcing *tortfeasors* to compensate the collective of injured persons. Moreover, the 1994 Act also lacked the possibility of forcing *victims* into settling mass claims with some degree of finality. It was precisely this finality that the pharmaceutical

²³ World Online judgment, consideration 4.11.2.

²⁴ Frenk (op. cit. Fn. 13), at 360. On "due process" in mass claim actions in view of Art. 6 (1) ECHR, see for example Baetge, *Class Actions, Group Litigation and Other Forms of Collective Litigation* (Germany), at 3; published online: http://globalclassactions.stanford.edu/PDF/Germany_National_Report.pdf.

industry strived for in the Diethylstilbestrol (DES) case. In the 1980s, several thousand women whose mothers took the DES hormone during their pregnancy in the 1960s claimed compensation from the pharmaceutical industry for the cervical and breast cancer caused by DES. After a landmark Supreme Court decision in 1992, rendering all manufacturers jointly and severally liable for the injuries, collective negotiations on an all-encompassing compensation scheme were started. The industry was keen to settle with finality, which was actually not possible under Dutch law as long as not all victims came forward, opted-in and settled individually with the industry. This deadlock in the negotiations triggered the Dutch Ministry of Justice to advance a generic solution for such problematic settlement negotiations.

The 2005 Collective Settlement of Mass Damage Act (WCAM 2005)²⁵ that came into effect as a result of the Ministry's enquiries to provide a generic solution is an intricate mechanism that operates on the crossroads of tort law, substantive contract law, and civil procedure. The Act uses a design for collective settlement that is best described as a composite of a voluntary settlement contract sealed with a "judicial trust mark" attached to the contract. The Act leaves much to market forces and it primarily sustains self-help and amiable settlement of conflicts by repeat players in society.

Although the main focus of the legislature was on designing an efficient mechanism for the settlement of events causing mass personal injury (in particular the DES case), it seems that the Act is of more practical relevance for securities litigation.²⁶ It has been applied in the DES case (a personal injury case) and the Dexia case²⁷ (a securities case). The settlements in the Vedior case²⁸, the Vie d'Or case²⁹, and the Shell case (all cases are securities actions) have been endorsed and declared binding by the Amsterdam Court of Appeal.

Far from perfect as the WCAM 2005 may be, the Act is nevertheless broadly considered a meaningful step forward in reaching an efficient level of compensation and redress in mass damage cases.³⁰

²⁵ Wet van 23 juni 2005 tot wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de collectieve afwikkeling van massaschades te vergemakkelijken (Wet collectieve afwikkeling massaschade), Staatsblad 2005, no. 340.

²⁶ Cf. Croiset van Uchelen, "Van corporate litigation naar corporate settlement – het wetsontwerp collectieve afwikkeling massaschade", in: Solinge/Holtzer (ed.), *Geschriften vanwege de Vereniging Corporate Litigation 2003–2004* (Deventer 2004), at 130.

²⁷ Amsterdam Court of Appeal, 25 January 2007, No 1783/05, NJ 2007,247, NJF 2007, 266, JOR 2007, 71.

²⁸ Amsterdam Court of Appeal, 15 July 2007, JOR 2009/325.

²⁹ Amsterdam Court of Appeal, 29 April 2009, NJ 2009/448, NJF 2009/247.

³⁰ See for example *Croiset van Uchelen*, "Handhaven of bijschaven? De effectiviteit van de WCAM", *Weekblad voor Privaatrecht, Notariaat en Registratie* (WPNR) 2008, at 805.

4.2. *General Features of the WCAM 2005*

The legal technique used in the WCAM 2005 is both simple and sophisticated. Briefly described, the Act works as follows:

- An amicable settlement agreement concerning payment of compensation is concluded between the allegedly liable party or parties on the one hand and a foundation / association acting in the aligned common interest of individuals involved (and injured) on the other,
- The parties to the agreement jointly petition the Amsterdam Court of Appeal to declare the settlement binding on all persons to whom damage was caused;³¹ these interested persons are not summoned in this procedure but are given notice by letter or newspaper announcement;³²
- The Amsterdam Court of Appeal hears arguments of all interested parties. It can even allow amendment of the settlement by the original parties;
- The Court will consider several points concerning the substantive and procedural fairness and efficiency of the settlement (e.g. amount of compensation, adequate representation of interested parties);
- If the Court rules in favour of the settlement, it will declare the settlement binding upon all persons to whom damage was caused and that are accommodated by the settlement;
- Individual interested parties are given the opportunity to opt out of the settlement; original parties have limited possibilities to appeal; nullification of the settlement for misrepresentation is not allowed.

As can be derived from this overview, the foundation of the WCAM 2005 is a *contract* between the alleged tortfeasor and an organisation representing the interests of the injured individuals. In practice, there are at least three original parties to the settlement contract:³³

1. The alleged tortfeasor(s);
2. The foundation or association that negotiated the settlement in the interest of injured individuals (note that “injured” here does not necessarily denote death

³¹ See art. 1013 (3) Dutch Code of Civil Procedure for the exclusive competence of the Amsterdam Court in WCAM cases.

³² In normal petition procedures, the interested parties are given notice by registered letter (art. 272 Dutch Code of Civil Procedure). This was considered too burdensome a requirement in WCAM petitions.

³³ If there is an administrator appointed in the settlement, it is the “legal entity” referred to in art. 7:907 (3) (h) Civil Code and it therefore needs to be party to the settlement for the Amsterdam Court to declare the settlement binding upon the injured individuals.

- or personal injury but rather refers to any mass damage event, ranging from disaster to securities fraud);
3. The administrator – usually a foundation that was incorporated especially for the purpose of distributing the settlement sum or fund – that will execute the settlement and act as trustee of the settlement fund.

Theoretically, the settlement contract can be concluded at any stage of the conflict. Strictly speaking there is no need for a preliminary court procedure in which the tortfeasor is considered liable in tort. He may well enter the settlement precisely with the purpose to avoid being held liable. The settlement contract can thus serve the purpose of avoiding court procedure on the liability issue. Indeed, the very nature of a settlement is that it aims at ending or preventing uncertainty or dispute regarding the legal relationship between the alleged tortfeasor and the injured individuals (see art. 7:900 Civil Code).

The contractual nature of the settlement is emphasised by the fact that the WCAM 2005 is part of Book 7 (special contracts) of the Dutch Civil Code. The contractual form of the settlement allows the parties to include specific clauses in the settlement that are not covered by the Act. These clauses can range from clauses on choice of law and forum, on board approval condition, on confidentiality issues, and on dispute settlement, to clauses on modification or termination (e.g. if the Amsterdam Court of Appeal denies to declare the settlement binding or the Dutch Supreme Court voids the binding declaration).

Furthermore, the fact that the declaration procedure before the Amsterdam Court starts out with a voluntary settlement by a foundation or association with the alleged tortfeasor obviously implies that the tortfeasor first has to *agree* to a settlement. This requires the parties to negotiate “in the shadow of the alternative”: namely, the alternative of not settling, given the fact that there are no legal levers to force any of the parties into settling.³⁴ One might ask what factors contribute to a settlement in fact being reached. The few cases that have proceeded to the Amsterdam Court so far give us some impression of the dynamics of settlement. If the best alternative to a negotiated collective settlement is advancing with all individual claims in individual court cases, the willingness to settle may depend on the alleged tortfeasor’s assessment of the number of claims, the likelihood of success of such claims, the legal cost, and the expected losses involved. Moreover, it seems that less easily observable factors can come into play as well, such as political pressure and risks to reputation.

The contractual basis of the settlement is also evidenced by the fact that the WCAM 2005 does not provide for strict rules on the settlement fund, the distribution of the proceeds, and so on. From the outset, it is clear that the settlement aims primarily at financial compensation for injured individuals – be it in the event of personal injury disasters or securities fraud – but the method and procedure for calculating damages, the amounts, the forms, standards, protocols and so forth are deliberately

³⁴ Cf. Kamerstukken II 2008/09 (Parliamentary Proceedings Secondary Chamber 2008/09), 31 762, no. 1, 4 ff (evaluation of the WCAM 2005).

not provided for in the Act. Parties can and will agree on some form of abstract damage scheduling that diverges from the “restitutio in integrum” ideals of the law of damages.

Parties may want to appoint a separate administrator and set aside limited funds to distribute in order to attain finality of the arrangement, but no obstacle in law precludes them from shaping the compensation scheme in any other fashion.

4.3. *The Procedure before the Amsterdam Court of Appeal*

The contractual nature of the settlement does not imply that parties to the settlement enjoy total freedom of contract. The Amsterdam Court is bound by strict rules to evaluate the substantive and procedural fairness of the settlement in view of the interests involved in the settlement. In a sense, the WCAM 2005 calls for an active court with considerable case management skills. The Court is to take an active role when petitioned to declare the settlement binding upon all injured individuals involved. The petitioners are not *domines litis* of the procedure.³⁵ Indeed, when the draft bill was introduced this active role was not one that civil court judges in commercial cases felt most comfortable with. Certainly, their professional habit seemed at odds with the entire idea of judicial case management that underlies the WCAM 2005.

Moreover, the role of the judiciary within the WCAM 2005 framework is not the traditional one of settling disputes between parties present. Figuratively speaking, the Amsterdam Court is the “negotiorum gestor” of the absent individuals that will be affected when the settlement is declared binding upon them. This novel task for the judiciary was not welcomed by the Dutch Association of the Judiciary (Nederlandse Vereniging voor Rechtspraak). In fact, the Association objected to the enactment of the WCAM 2005 by arguing, *inter alia*, that the Amsterdam Court would not be adapted to the task of weighing factors that might to a large extent be unknown, such as the number of victims and the nature and extent of their injuries and damages.³⁶ The Association was also of the opinion that the open texture of the fairness criteria would put the judiciary in a position of substitute legislature, as it would be forced to make general pecuniary distributions on the basis of a vague general clause. This argument was dismissed by the legislator on the basis of the contention that it was in fact not uncommon for courts to have such a task assigned to them.³⁷ In any event, the position of the Amsterdam Court is unmistakably crucial for the credibility of the WCAM 2005 as an instrument for the efficient and fair settlement of mass damage claims.

³⁵ See for example art. 1016 Code of Civil Procedure: the Amsterdam Court decides on the number and nature of expert witnesses called to appear. Cf. Croiset van Uchelen (op. cit. fn. 26), at 135.

³⁶ Kamerstukken II 2003/04 (Parliamentary Proceedings Secondary Chamber 2003/04), 29 414, no. 3, (Explanatory Memorandum) 9.

³⁷ On this discussion, see Henkemans, “De wetgevende taak van de rechter bij massaschade”, in Van den Berg et al. (ed.), *Massaclaims: Class Actions op z'n Nederlands* (Nijmegen 2007), at 29 ff.

The procedure before the Amsterdam Court of Appeals commences with a joint petition by the parties that reached the settlement.³⁸ This tailor-made petition procedure departs from the normal civil procedure in which the defendant is served a summons. The petition is a request submitted to the court rather than a claim made to a defendant. In the petition procedure, interested third parties will be given notice to appear at the hearing. Interested parties are the individuals that were injured by the alleged tortious act and any foundation or association that was not party to the settlement but does represent the interests of the injured individuals involved. Such organisations are invited by the Court to join the procedure, to give their opinion on the petition, and to file a defence against it.³⁹ The Court will decide on the method of communication with interested parties and how they should be addressed (if possible by mail or if necessary, by newspaper advertisements, and so on).⁴⁰

Central to the procedure is the hearing. The Amsterdam Court will set dates for an extensive hearing of the contracting parties and the interested parties that have applied to be heard, as well as any expert witnesses that the court feels it should consult. Other lower courts that are concurrently hearing individual claims concerning issues common to the settlement have the power to defer the individual procedure on request, pending the WCAM 2005 procedure.⁴¹

Generally speaking, the procedure will end with one of two possible outcomes: the requested declaration is either denied or granted.⁴² If it is denied, the contractual settlement itself may still be valid and binding upon the parties. They will, however, have inserted a clause in the settlement dealing with the eventuality of denial. If the requested declaration is granted, all injured individuals are bound to the settlement unless they use their right to opt out of the settlement. The declaration by the Court that the settlement is binding upon all interested victims will be made public and will be published as soon as it is irrevocable.⁴³

4.4. *Framework for Evaluating the Settlement by the Amsterdam Court*

The framework for evaluating the settlement consists of a number of items, some of which are detailed while others are more abstract by nature. According to article 7:907 Civil Code, the submitted settlement shall include, *inter alia*:

1. a description of the group (or groups) of persons on whose behalf the agreement was concluded, according to the nature and the seriousness of their loss;
2. an indication of the number of persons belonging to the group (or groups) as accurate as possible;
3. the compensation that will be awarded to these persons;

³⁸ See art. 1013 ff. of the Code of Civil Procedure.

³⁹ See art. 1014 Code of Civil Procedure.

⁴⁰ See art. 1013 Code of Civil Procedure.

⁴¹ See art. 1015 Code of Civil Procedure.

⁴² For procedural remedies in either cases, see *infra*, Section 4.7.

⁴³ Art. 1018 Code of Civil Procedure.

4. the conditions these persons must meet to qualify for the compensation;
5. the procedure by which the compensation will be established and can be obtained;
6. the name and place of residence of the person to whom the written notification referred to in Article 908 (2) and (3) can be sent.

As in any case where a court is to balance various interests, the Amsterdam Court is required to make a well-balanced judgment on the basis of flexible and transparent standards. Deciding whether the settlement is a “fair deal” for all parties concerned, especially for the victims, will depend on a number of factors. The petition for declaration of the settlement as binding on all interested parties shall be rejected in any of the following cases (art. 7:907 Civil Code):

1. the amount of the compensation awarded is not reasonable, having regard to, *inter alia*, the extent of the damage, the ease and speed with which the compensation can be obtained, and the possible causes of the damage;⁴⁴
2. insufficient security is provided for the payment of the claims of persons on whose behalf the agreement was concluded;
3. the agreement does not provide for the independent determination of the compensation awarded pursuant to the agreement;
4. the interests of the persons on whose behalf the agreement was concluded are otherwise not adequately safeguarded;
5. the foundation or association does not sufficiently represent the interests of persons on whose behalf the agreement was concluded;
6. the group of persons on whose behalf the agreement was concluded is not large enough to justify a declaration that the agreement is binding.

Before giving a final decision on the petition, the Court may give the parties the opportunity to make amendments or additions to the agreement (art. 7:907 (4) Civil Code). Strictly speaking, the Amsterdam Court is not allowed to amend the settlement unilaterally but, in actual practice, it can do so by letting the parties know that some changes are essential to granting the requested declaration.⁴⁵ It is unclear whether all interested parties must be given the opportunity to react to the thus amended settlement but it does seem that procedural fairness demands this.⁴⁶

4.5. *After the Declaration by the Amsterdam Court*

Interested parties are bound as if they were parties to the contract. As soon as the request for a declaration has been granted irrevocably, the agreement shall, as between the parties and the persons entitled to compensation, have the consequences

⁴⁴ Note that the Court should also prevent that the compensation scheme forwarded by the settlement overcompensates the injured individuals; see art. 7:909 (4) Civil Code.

⁴⁵ Cf. Kamerstukken II 2003/04 (Parliamentary Proceedings, Secondary Chamber 2003/04), 29 414, no. 3, 16.

⁴⁶ Cf. Croiset van Uchelen (op. cit. fn. 26), 135.

of a settlement agreement to which each of the persons entitled to compensation shall be considered as a party (art. 7:908 Civil Code). In legal terms, the interested persons entitled to compensation under the settlement automatically become party to a contract without their explicit consent (art. 7:908 (1) Civil Code). Instead, the initiative is on them to opt out of the contract if they deem it unfavourable.

The binding nature of the settlement is reinforced by the Amsterdam Court's declaration that the settlement is binding upon the group of injured individuals identified in the settlement. To warrant this binding nature and to increase legal certainty after the declaration, the original parties to the agreement cannot nullify the settlement for misrepresentation or fraud. Moreover, the interested injured parties entitled to compensation cannot nullify the settlement on the basis that its binding nature is unacceptable according to reasonableness and fairness (i.e. good faith). Instead, the only remedy available to injured individuals is to opt out of the settlement if they feel it is unfair.

Naturally, it is vital for individuals bound by the settlement to be aware of their right to opt out of the settlement. In article 1017 Code of Civil Procedure tools are made available to the Amsterdam Court to demand an intensive communication plan. The individuals have to be reached whenever possible by mail, but other means of communication are conceivable as well. Additionally, newspaper advertisements are used to ensure an optimal dissemination of the information on the settlement and the opt-out right.

The injured individuals that have neither opted out nor come forward to collect their compensation may experience a lapse of rights. The settlement agreement may provide that a right to compensation pursuant to the agreement shall lapse if a person entitled to compensation has not claimed the compensation within a period of at least one year from the start of the day following the day on which he became aware of his right to demand immediate payment of the compensation (art. 7: 907 (6) Civil Code).

4.6. *Opting Out*

Article 7:908 (2) DCC provides for a right to opt out of the settlement. As a result of the declaration by the Amsterdam Court, the injured individuals have automatically become party to a contract.⁴⁷ In view of the constitutional right of individuals to have their individual case heard by a court,⁴⁸ the injured are entitled to withdraw

⁴⁷ On the dogmatic structure of the WCAM on this point, see Parliamentary Proceedings II 2003/04, 29 414, no. 3, p. 18. The legislator refers to art. 6:254 Civil Code (accession to a contract by a third party as a result of acceptance of the offer implied in a contractual clause stipulated to the benefit of a third party). The upshot of accession is that the interested party is considered to be in a contractual relationship (the settlement contract) with the promisor.

⁴⁸ The legislature considered both art. 17, Dutch Constitution, art. 6 ECHR, and art. 1, 1st protocol ECHR (right to property) to be taken sufficiently into account with the opt-out possibility. See Parliamentary Proceedings II 2003/04, 29 414, no. 7, p. 14 ff. For an overview of the criticisms against this position, see Falkena/Haak, *De nieuwe wettelijke regeling afwikkeling massaschade*, (Aansprakelijkheid Verzekering & Schade (AV&S) 2004), at 198 ff.

from the settlement contract by invoking their right to opt out. They must do so individually and in writing.⁴⁹ A peculiarity of the WCAM 2005 is that the power to opt out accrues only after the settlement has been declared binding upon the injured individuals. As a result, there is no formal way of knowing the number of individuals that will opt out beforehand. Informally, prior consultation of the members of the association(s) and the backing of the foundation(s) is possible.

The opt-out period is set by the Court and shall be at least three months running from the date of public announcement of the declaration. The legislature has also made arrangements for cases in which the group of injured persons bound by the declaration is unspecified and difficult to identify or locate. In article 7:908 (3) Civil Code it is provided that the Court's declaration that the agreement is binding shall have no consequences for an injured individual who could not have known of his loss at the time of the public announcement if, after becoming aware of the loss, he has notified the administrator of his wish not to be bound. This allows for an extension of the opt out-period. However, although the administrator of the fund has the power to provoke a decision of the injured individual by giving notice in writing of a period of at least six months, during which that person can state he does not wish to be bound. After the lapse of this period, the right to opt out has expired.

There is an additional important aspect of the opt-out possibility that needs some explanation here. Naturally, if the settlement is unfavourable for the injured individuals they may choose to opt out. This may affect the alleged tortfeasor in the sense that he experiences that too few individuals are still "on board". To cater for this eventuality, the joint power to cancel the settlement was conferred on the parties to the contract. Under specific circumstances set in article 7:904 (4) Civil Code, the parties to the settlement have the power to cancel the contract for lack of a substantial numbers of participants.

4.7. *Procedural Remedies*

The procedural remedies against the decision by the Amsterdam Court are limited. The joint petitioners can appeal in cassation (article 1018 (1) Dutch Code of Civil Procedure). The Supreme Court may then quash or affirm the Amsterdam Court decision on points of law. Injured individuals affected by the settlement do not have a right to appeal, because they have the right to opt out.

"Revocation" as referred to in article 1018 (2) of the Dutch Code of Civil Procedure is only possible in extraordinary circumstances such as fraudulently withholding, falsifying, or concocting evidence before the court.⁵⁰ Therefore, it is insufficient for evidence to suffice after irrevocability of the settlement that the tortfeasor had acted negligently, rather than knowingly and fraudulently. It must be proven that one of the petitioners knowingly withheld such information from the Amsterdam Court.

⁴⁹ The parties to the settlement shall specify in their petition and the Amsterdam Court will confirm in its decision the addressee of the opt-out notification (art. 7:907 (2) (f); art. 7:908 (2) Civil Code).

⁵⁰ Cf. art. 382 Code of Civil Procedure.

In principle, the right to revocation is only open to the original foundation or association representing the injured individuals in the settlement. If the Amsterdam Court indeed allows the motion for revocation, the settlement is effectively nullified. This far-reaching consequence can be mitigated by injured individuals who wish to object to the revocation. In their regard the settlement will then remain effective.

4.8. *The Execution Phase: Distribution of Settlement Proceeds*

The WCAM 2005 is largely neutral as regards the compensation of injured individuals: they may or may not receive compensation that reflects the principle of full compensation underlying the law of damages.⁵¹ The method and procedure for calculating damages, the amounts, forms, standards, protocols and so forth are deliberately left to the contracting parties. The need for damage scheduling and categorising the injured individuals obviously depends on the nature of the mass damage event. The Amsterdam Court evaluates the fairness of the scheduling as well as the levels and conditions of compensation.

The settlement will contain or refer to a plan of allocation of the proceeds of the settlement. Parties to the settlement have considerable room to negotiate the most appropriate method of distribution. In the Shell case, for example, a transfer of the settlement sum to an escrow account was initially arranged. When the Amsterdam Court has approved the settlement with finality, the appointed administrator will distribute the fund.

It is possible that a separate administrator – usually a foundation incorporated especially for the occasion – is entrusted with the task of distributing the settlement fund among the injured individuals in an orderly manner. In practice, parties tend to appoint a separate administrator and to set aside limited funds to distribute in order to attain finality of the arrangement.

The administrator will have to decide on applications for compensations made by injured individuals. Obviously, such individual decisions may in turn cause conflicts that need to be settled individually. The parties to the settlement are well advised to devote considerable attention to the design of the settlement regarding the institution of an independent dispute resolution committee that is competent to deal with such issues that may arise in the execution phase. The WCAM 2005 itself suffers from a design flaw in this respect. Article 7:909 (1) provides that the administrator is entitled to take *binding decisions* on the right to compensation under the settlement. According to this article, the nature of such a binding decision is that, in principle, recourse to judicial review of the decision is blocked. The consequence would be that an individual who has not opted out of the settlement and is then denied compensation can

⁵¹ Art. 7:909 (4) Civil Code indicates that the injured individuals may not be evidently overcompensated, but undercompensation as such seems possible, especially in light of the uncertainty that the tortfeasor is actually liable.

hardly ever redress his predicament. It has been rightly argued that this may be contrary to the fundamental right to access to justice.⁵²

The foundation or association that is originally party to the settlement can act as a watchdog in the execution phase. It can act in the interest of injured individuals and demand performance of the settlement (see Article 7:909 (3) Civil Code). Furthermore, it will typically have negotiated the institution of a dispute resolution committee that is competent to deal with issues that may arise in the execution phase.

What if the settlement sum is not collected in full? As mentioned, Article 7:907 (6) Civil Code provides that the settlement may provide that the right to compensation shall lapse if the injured individual has failed to claim compensation within one year running from the moment the individual became aware – or could have been aware⁵³ – of his right. Additionally, the settlement may contain a clause authorising the administrator to redistribute the remainder of the fund among the known participants. Conversely, if funds dry up before all individuals are compensated – for instance, because it was not possible to precisely calculate in advance the number of eligible injured individuals – Article 7:909 (5) Civil Code provides for a *pro rata* reduction of the outstanding claims. This method of redistribution seems particularly unfair if the number of claims thus reduced is outnumbered by far by the claims that were compensated without reduction. Therefore, both the contracting parties and the Amsterdam Court are under a duty to assess as accurately as possible the number and identity of those affected by the settlement and the rationing process.⁵⁴

5. Export Value of the WCAM 2005

5.1. General

Experience so far shows that the WCAM 2005 is especially promising for attaining relatively swift settlement of mass securities claims in the Dutch context. Since, however, securities traded on the Amsterdam Stock Exchange are not exclusively owned by shareholders resident in the Netherlands, the obvious question is to what extent settlements under the WCAM 2005 have cross-border effect for European shareholders residing elsewhere in Europe.⁵⁵ Here, issues of international

⁵² Croiset van Uchelen (op. cit. fn. 26), at 138–139. Moreover, as the settlement is a *contract* it is also subject to the rules on unfair general contract terms. Therefore, the question even arises as to whether a settlement clause referring to an independent claims resolution committee is an unfair contract term. According to art. 6:236 (n) Civil Code general contract terms in consumer contracts shall not restrict access to the competent civil court (unless by means of an *arbitration* clause).

⁵³ Croiset van Uchelen (op. cit. fn. 26), at 139.

⁵⁴ The risk of unknown individuals claiming compensation after the proceeds have already been distributed can be minimised by inserting a waiting period in the settlement of one year running from the date of publication.

⁵⁵ We will not deal with involved parties domiciled outside the EU. Concerning defendants domiciled outside the EU, art. 3 Civil Code applies, stating that Dutch courts have jurisdiction if one of the

jurisdiction, cross-border recognition, *res judicata* and enforcement of opt-out securities settlements under the WCAM 2005 need analysis before we can appraise the export value of the WCAM 2005. The main question is whether the declaratory judgment of the Amsterdam Court of Appeal given in a WCAM procedure falls under the recognition requirement as laid down in the Brussels I Regulation.⁵⁶ In order to answer that particular question, issues of competence and applicable law need looking into first. In the following, we mainly focus by way of example on the case of mass securities litigation of shareholders against a company listed on the Amsterdam Stock Exchange. We will deal with the main questions of European private international law and therefore more complex global issues of jurisdiction and recognition are left unaddressed.

5.2. *Competence of the Amsterdam Court of Appeal*

Jurisdiction in personam is assigned by the Brussels I Regulation. The material scope of the Brussels I Regulation concerns civil and commercial matters. The agreement concerning the payment of compensation for damage caused by an event or similar events between a foundation or association with full legal competence and one or more other parties which have committed themselves by this agreement to pay compensation for this damage (Article 7:907 Civil Code) as such seem to us to constitute a civil or commercial matter in the sense of the Brussels I Regulation.⁵⁷ The next question is which parties fall under the formal scope of the Regulation. Article 2 states that persons domiciled in a Member State can be sued in the courts of that Member State. If the defendant is domiciled in a Member State, then the courts of this Member State have jurisdiction based on the Brussels I Regulation.

However, the WCAM procedure is not an adversarial court proceeding in which a defendant is truly 'sued' in the sense of Article 2. The representative organisation and the company are *petitioners* that jointly request the Amsterdam Court of Appeal to declare the agreement binding upon the parties to the agreement and the persons

petitioners or interested parties is domiciled in the Netherlands or the procedure is otherwise adequately connected to the Dutch sphere. Invoking the *forum non conveniens* exception is not allowed. See, e.g., MV Polak, "Iedereen en overal? Internationaal Privaatrecht rond 'massaclaims'" NJB 2006, 41 p 2346 ff.

⁵⁶ Council Regulation (EC) No. 44/2001, OJ 2001, L12/1. Cf. European Court of Justice 1 October 2002, C-167/00 *VKI/Henkel*, OJ I-8111. This case concerned an action for injunctive relief initiated by an Austrian consumer association against a trader domiciled in Germany who availed himself of onerous contract clauses in consumer contracts. The ECJ decided that the aim of the injunctive relief sought was to obtain a judicial decision on private law relationships and that the action thus related to 'civil and commercial matters'. Although decided under the predecessor of the Brussels I Regulation, the Brussels 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, it seems this case is still of value under the Brussels I Regulation in assessing its scope. (see recital 19 Brussels I Regulation).

⁵⁷ Cf. ARJ Croiset van Uchelen (op. cit. fn. 26) at 154.

on whose behalf the agreement was concluded. The WCAM procedure therefore does not identify defendants in the strict sense of the word. Hence, it remains to be seen whether any of the persons affected by the WCAM settlement can be considered defendant in the sense of Article 2 (1) Brussels I Regulation.

In legal writing, it has indeed been argued that the parties on whose behalf the agreement was concluded are to be considered defendants in the sense of Article 2 (1) Brussels I Regulation.⁵⁸ The Amsterdam Court of Appeal reasoned along similar lines in the Shell case. With respect to the interested parties domiciled in the Netherlands, it held that its jurisdiction was based on Article 2 (1).⁵⁹ With respect to the other ‘defendants’ domiciled in other Member States, the Amsterdam Court of Appeal in the Shell-judgment declared jurisdiction on the basis of Article 6 (1) of the Brussels I Regulation. This article allows a person to be sued, in case he is one of a number of defendants, in the courts of the place where any one of them is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.⁶⁰ The Amsterdam Court of Appeal noted that it was self-evident that in case separate court proceedings are initiated in different countries or even before different courts in the Netherlands, conflicting and irreconcilable judgments were likely to occur. For this reason, the Court held that it had jurisdiction to evaluate the settlement in regard of all interested parties concerned since all individual cases had an identical factual and legal basis.⁶¹

In order to qualify as defendants, the persons have to be properly served with the document which instituted the proceedings in sufficient time and in such a way as to enable them to arrange their probable opinions against the agreement. Article 1013 (5) Dutch Civil Procedure Code requires that a notice⁶² to appear will be sent to the persons known to the petitioners on whose behalf the agreement was concluded by ordinary post, unless the court determines otherwise. Notice shall also be given by an announcement in one or more newspapers designated by the court. It can be argued that the parties who were reached by this notice had the opportunity to a fair and public hearing as required by Article 6 ECHR and hence qualify as defendants under Article 2 (1) Brussels I Regulation. In any event, if the Amsterdam Court decides to

⁵⁸ Cf. A Stadler, “Die grenzüberschreitende Durchsetzbarkeit von Sammelklagen” in Casper, Jansen, Pohlmann and Schulze (ed.) *Auf dem Weg zu einer europäischen Sammelklage?* (Sellier 2009)149–168 at 158–159.

⁵⁹ Amsterdam Court of Appeal, 29 May 2009, consideration 5.17. An English translation of the Court’s decision can be found at <https://www.royaldutchshellsettlement.com/Documents/English-JudgmentTranslation29May09.pdf>.

⁶⁰ Consideration 5.19.

⁶¹ Consideration 5.21.

⁶² This notice has to contain information on the place, the date and the time of the hearing. Furthermore, it must include a brief description of the agreement and the consequences of granting the request, all presented in a manner prescribed by the court. Moreover, the notice has to refer to the right to file a defence. The petitioners are responsible for giving the notice pursuant to this paragraph unless the court decides otherwise. See Article 1013 (5) Dutch Civil Procedure Code.

declare a settlement binding upon persons domiciled outside the Netherlands, it is vital that the petitioners and the court pay special attention to the methods used for serving notice on foreign victims both at the beginning of the proceedings and at the stage of the declaratory decision.⁶³ A local Dutch newspaper may not reach French shareholders.

The consequence of the qualification of interested parties as ‘defendants’ is that if these persons, after having received the notice, instigate individual proceedings against the company involved in the settlement before the courts of another Member State, these courts may stay proceedings if the actions are related (Art. 28 (1) Brussels I Regulation). Possibly, the latter court’s jurisdiction is based on Article 5 (3) of the Brussels I Regulation in case of a tort claim.⁶⁴ Alternatively, if the claimant is a consumer and he makes a claim on the basis of a contract with the company, jurisdiction is established on the basis of Article 15 – 17 of the Brussels I Regulation.⁶⁵ In any event, it seems plausible that even though the request to declare the agreement’s compensation regime binding is not the same action as the proceedings in which individual compensation is sought, the actions may be so closely connected that it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from the separate proceedings. So, if the Amsterdam Court of Appeal establishes that it has jurisdiction and that Dutch law permits the consolidation of the cases, the court seised by the individual shareholder in another Member State may decline jurisdiction on motion of the defendant company (Art. 28 (2) Brussels I Regulation).

5.3. *Divergence between Lex Fori Originis and Law Applicable to Individual Claims*

The next question to be answered is whether the law applicable to the separate claims of individual shareholders against the company could be an obstacle for the mass settlement to be declared binding on the shareholders and be recognized in the courts of the other Member States. Obviously, this depends on the nature of the claims against the company. Usually, the settlement contract itself will contain a

⁶³ For the rules on service of the notice to appear article 1013 (5) Civil Procedure Code; for the rules on communication of the decision see article 1017 (3) Civil Procedure Code.

⁶⁴ This article states that a person domiciled in a Member State may be sued in matters relating to tort in the courts of the place where the harmful event occurred. Since the *Bier/Mines de Potasse*-case the ECJ has consistently ruled that the place where the harmful event occurred is both the place where the harmful act was committed as well as the place where the direct damages were incurred as a result of this act. In case of publication of misleading information by the company, the place where the direct damages occurred in case of a financial loss on an investment is the place where the claimant’s investment account is located. See, e.g., ECJ Case C-168/02 (*Kronhofer/Maier*) [2004] ECR I-6009, TMC Arons, ‘*All Roads Lead to Rome*’: *Beware of the consequences! The law applicable to prospectus liability claims under the Rome II Regulation*, NIPR 2008 No 4 at 481 ff.

⁶⁵ Article 16 states that the consumer may bring proceedings against the other party to a contract in the courts for the place where he is domiciled.

choice of law clause. For instance, in the Shell settlement it was provided that “this settlement agreement and any ancillary agreements shall be governed by and interpreted according to the laws of The Netherlands, excluding its conflict of laws provisions” (art. XII-H). How does this fare with the law applicable to the underlying individual claims?

If the underlying securities claims involve consumers and the nature of the dispute is contractual, then the law applicable to claims based on (consumer) contracts is determined by article 3 and 6 of the Rome I Regulation.⁶⁶ On the basis of Article 3 the parties are free to determine the law applicable to the contract. However, consumers that enter into a contract with a professional cannot be deprived from the protection afforded to him by the law of their habitual residence (Article 6 (1) and (2) Rome I Regulation). So, even if one would want to accept that the individual consumer is deemed to have entered into the collective settlement contract after the harm-inducing event (unless he exercises the right to opt-out), there still is the residual protection granted by the law of the consumer’s domestic legal system that serves as a minimum requirement. Again, this consideration should be reflected in the settlement itself and in the evaluation by the Amsterdam Court.

If the nature of the claim is non-contractual, then the Rome II Regulation may determine the applicable law. In case of misleading statements in annual reports or stock emission prospectus, the individual claims for compensation (e.g., on the basis of some domestic tort system and/or the domestic implementation of the Unfair Commercial Practices Directive) will be governed by ‘the law of the country in which the damage occurs’ (Article 4(1) Rome II Regulation).⁶⁷ As a consequence, if a Dutch company listed on the Amsterdam Stock Exchange causes private shareholders damage by issuing a misleading prospectus or annual report in The Netherlands, Article 4 may nevertheless imply the involvement of as many legal systems as there are countries in which shareholders reside.⁶⁸ That is unless one would accept that The Netherlands is the country in which both the event giving rise to the damage occurred

⁶⁶ Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).

⁶⁷ A further complication may be posed by Article 12 (1) of the Rome II Regulation, which states that the law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into. Consequently, the information duties that a professional owes towards a consumer before he enters into a contract with a consumer are governed by the law of the country of the habitual residence of the consumer. (See Article 6 Rome I Regulation).

⁶⁸ Cf. There seems to be some authority in favour of this argument. From ECJ Case C-168/02 (*Kronhofer/Maier*) [2004] ECR I-6009, *Arons* (2008), NIPR No 4 one might conclude that in case of publication of misleading information by the company, the place where the direct damages occurred in case of a financial loss on an investment is the place where the claimant’s investment account is located. Also A Stadler, ‘Die grenzüberschreitende Durchsetzbarkeit von Sammelklage’ in Casper, Janssen, Pohlmann and Schulze (ed.), *Auf dem Weg zu einer europäischen Sammelklage?* (Sellier, 2009) 149–168 at 161. Generally critical of article 4 Rome II Regulation: H Koziol, and T Thiede, ‘Kritische Bemerkungen zum derzeitigen Stand des Entwurfs einer Rom II-Verordnung’ (2007) 106 *ZVglRWiss* 235 at 241 ff.

and in which the damage occurs. One would then have to accept that the ultimate financial losses suffered by shareholders across Europe in their home countries are indirect consequences for the application of article 4.⁶⁹

The result of these conflict of law rules may be that the agreement declared binding upon the consumers by the Amsterdam Court of Appeal deprives shareholders of their rights under the otherwise applicable law and may deprive consumers of the protection afforded to them by the country of their habitual residence. Obviously, article 14 allows parties to a non-contractual obligation to agree on a different legal system as the applicable law after the event giving rise to the damage occurs. This may be relevant for WCAM settlements in the sense that the settlement may express a choice for Dutch law, but at first blush it would seem to stretch article 14 a bit far to presume shareholders who have not opted out to have agreed to relinquish their residual rights under the otherwise applicable law. However, the structure of the WCAM is indeed such that representative organisations negotiate and enter into the settlement on behalf of harmed individual shareholders and by doing so they subject the claims of the consumers on behalf of them to the law applicable to the settlement. The evaluation of the settlement by the Amsterdam Court and the individuals' discretion to opt-out from the settlement may serve as a counterweight to this conversion in applicable law. The potential detriment thus caused surely is an important element for the Court to explicitly address as it did in the Shell-case in its evaluation of the petitioned settlement.

5.4. *Recognition and Enforcement of the Binding Declaration*

The next question is whether the declaratory judgment of the Amsterdam Court of Appeal is a judgment in the sense of Article 32 Brussels I Regulation that is to be recognised and enforced in the other Member States.⁷⁰ Decisions by the court that lay down the rights and duties of the parties and which the parties can execute independently without a court's interference are judgments in the sense of Article 32 Brussels I regulation.⁷¹ In order to be qualified as a judgment, the decision must emanate from a judicial body of a Member State deciding on its own authority on the issues between the parties.⁷² We are confident that the Amsterdam Court decision can be categorised under 'judgment' even though the parties have settled the

⁶⁹ In any event, the ECJ decided in *Kronhofer/Maier* that 'place where the harmful event occurred' in the sense of Article 5(3) of the 1968 Brussels Convention does not refer to the place where the claimant is domiciled or where 'his assets are concentrated' *by reason only* of the fact that the claimant has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Contracting State.

⁷⁰ Article 32 Brussels I Regulation defines 'judgment' as 'any judgment given by a court or a tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution'.

⁷¹ Geimer, in Geimer/Schütze, *Europäisches Zivilverfahrensrecht* (2e, 2004), Art. 32 Rdn. 16ff.

⁷² Consideration 17 Case C-414/92 (*Solo Kleinmotoren GmbH v. Emilio Boch*), ECR 1994, p. I-02237.

issue themselves. The Court is requested to endorse this settlement agreement and declare it binding. By doing so, it renders a judgment.

This brings us to the next issue: what is the subjective scope of the declaratory judgment? Is it binding on the persons on whose behalf the agreement was concluded? A decision in the sense of Article 32 is in principle only binding upon the formal parties to the proceedings.⁷³ This follows among others from the *lis pendens* rule as laid down in Article 27 (1) of the Brussels I regulation. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. The question is what persons qualify as parties in the sense of Article 27 and 32 Brussels I regulation. The persons whose rights and interests are directly affected by the decision are party in the sense of Articles 27 and 32, i.e. the material parties to the proceedings. In this case that includes the rights and interests of the parties to the contract *and* the persons to whom the damage was caused and whose interests were represented by the organisation party to the settlement. Article 7:908 (1) states that as soon as the request for a declaration that the agreement is binding has been granted irrevocably, the agreement as between the parties and the persons entitled to compensation, have the consequences of a settlement agreement to which each of the persons entitled to compensation shall be regarded as a party and they are entitled to bring forward their individual defences before the Amsterdam Court of Appeal against the agreement concluded.

The next question to be answered is whether the other European courts are bound to recognise this declaratory judgment of the Amsterdam Court on the basis of Article 33 (1) of the Brussels I Regulation. Concluding from the abovementioned arguments a judgment by the Amsterdam Court of Appeals declaring the settlement binding is to be recognised by other European courts on their own motion (Article 33 Brussels I Regulation). The extent of the *res judicata* effect is in principle governed by Dutch law being the *lex fori originis*.⁷⁴

There is, however, an important exception that needs to be reckoned with. Article 34 of the Brussels I Regulation provides that a judgment shall not be recognised if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought or, where it was given in default of appearance, if the defendant was not *served with the document* which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence. This exception is in line with Article 6 ECHR that ensures that in the process of determining civil rights and obligations, the parties to the settlement are entitled to a fair and public hearing. If these parties were denied such opportunity,

⁷³ In this case the formal parties are the petitioners that file the petition whereby they request the Amsterdam Court of Appeal to endorse the agreement concluded between the petitioners and declare it binding upon the parties and the persons on whose behalf the foundation or the association has acted. (Art. 1013 Dutch Civil Procedure Code).

⁷⁴ ECJ 4 February 1988, 145/86 (*Hoffmann/Krieg*) considerations 11 and 18, ECR, 1988, p. 645.

there is no *res judicata* effect of the settlement in their regard. This is a relevant consideration for the petitioners and the Amsterdam Court to take at heart. Obviously, the WCAM 2005 has a number of safety precautions installed to ensure proper service. Article 1013 (5) Dutch Civil Procedure Code requires that a notice to appear will be sent to the persons known to the petitioners on whose behalf the agreement was concluded by ordinary post, unless the court determines otherwise. Notice shall also be given by an announcement in one or more newspapers designated by the court. It can be argued that the parties who were reached by this notice had the opportunity to a fair and public hearing as required by Article 6 ECHR. Moreover, the parties that do not wish to be bound by the settlement agreement have a right to opt-out, as granted under Article 7:908 (2) DCC.⁷⁵ Conversely, it seems plausible that parties not residing in The Netherlands to whom the initiation of the proceedings was not properly communicated, are in principle unaware of their right to opt-out. As far as service of documents is concerned, Article 34 states that a judgment shall not be recognised if it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence. The upshot is that for *unknown* foreign EU defendants, the publication rules of the Dutch law (*lex fori originis*) have to be fulfilled. If their identity is *known*, article 14 (2) of Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters would have to be taken into account.⁷⁶ This implies that the petitioners and the Amsterdam Court have to check, *inter alia*, the conditions under which the other Member States involved will accept service of judicial documents by post.⁷⁷

6. Conclusions

As is the case with tulips and cheese, the WCAM 2005 represents a product that is typically associated with The Netherlands. The WCAM 2005 tries to balance the fundamental legal principle of civil procedure holding that individual claimants must be given a proper opportunity to present their case before a court, on the one

⁷⁵ Art. 7:908 (2) Civil Code: ‘The declaration that the agreement is binding shall have no consequences for a person entitled to compensation who has notified the person referred to in Article 907 (2) (f) Civil Code 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.’

⁷⁶ Article 14 (2) of Council Regulation (EC) No 1348/2000 of 29 May 2000 reads: “Service by post – 1. Each Member State shall be free to effect service of judicial documents directly by post to persons residing in another Member State. 2. Any Member State may specify, in accordance with Article 23(1), the conditions under which it will accept service of judicial documents by post.”

⁷⁷ J Stuyck, et al., *An Analysis and Evaluation of Alternative Means of Consumer Redress other than Redress through Ordinary Judicial Proceedings – Final Report* (Katholieke Universiteit Leuven 2007) at 312.

hand, and the need for modern society for more efficient methods of dealing with mass litigation issues, on the other. By allowing representative organisations to broker a settlement with mass tortfeasors, which is subsequently evaluated and, as the case may be, declared binding by the Amsterdam Court of Appeal, the WCAM 2005 caters for the need for relatively expedient claims settlement. Given the voluntary nature of the procedure, the right preconditions need to be met for this mechanism to work. Moreover, individuals are given the right to opt-out from the settlement and to make their own individual decision on whether to claim compensation in individual court proceedings. Therefore, the WCAM 2005 is not comparable to the USA-style class action.

More than anything else, the WCAM 2005 seems to reflect Dutch conciliatory legal culture. This raises the question what the potential ‘export value’ of the Dutch WCAM 2005 is. Confining ourselves to European cross-border litigation, we find that there is much uncertainty on the status of the WCAM 2005 and the applicable rules of private international law. Indeed, the current European rules on private international law are not fitted at all for mass claim litigation.⁷⁸ In all probability, the Amsterdam Court of Appeal will usually have jurisdiction provided the settlement has some relevant connection with the Dutch legal sphere (*e.g.*, because some of the petitioners and interested parties are domiciled in The Netherlands). Interested injured parties can probably be considered ‘defendants’ for the application of the Brussels I Regulation and therefore they need proper service of documents whenever possible. In assessing the fairness of the settlement, the Amsterdam Court will have to reckon with the rights accrued to foreign interested parties under the laws applicable to their individual claims. By doing so, it will minimize both the number of defendants opting out from the settlement and the probability that the binding declaration will be withheld recognition in the various European legal systems on grounds of contravention of public policy or inadequate service. Therefore, the overall conclusion is that the Dutch may have manufactured an interesting new product for the settlement of mass securities claims but it remains to be seen if there is a demand for it in other European countries. Exporting tulips and cheese may be considerably less complicated.

⁷⁸ A Stadler, ‘Die grenzüberschreitende Durchsetzbarkeit von Sammelklagen’ in Casper, Janssen, Pohlmann and Schulze (ed.), *Auf dem Weg zu einer europäischen Sammelklage?* (Sellier 2009) 149–168 at 164–165.