The Netherlands

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Abstract:

In addition to the standard EU procedures, the Netherlands has an innovative 2005 Act on collective settlements, under which settlements of mass damage claims may be certified by a court and so become binding on all in the group, unless they opt out.

Keywords:

collective/class settlement, collective/class action, collective redress, opt out, civil law, law of civil procedure, representative organisations, loser pays-rule

1. Introduction

The Netherlands has two main collective redress regimes: the Dutch Act on collective settlements in 2005 (WCAM)[i] and the collective action of Rule 3:305a-c of the Dutch Civil Code (DCC). Under the WCAM Act, parties that have agreed to settle a mass damage claim may request the Amsterdam Court of Appeal to certify the settlement, as a result of which it becomes binding on the group of similarly situated claimants described in the agreement, unless they opt out. This Act places the Netherlands in the forefront of developments on mass disputes, since it is so far the only European country with such legislation.

The WCAM-Act has already delivered two court approved collective settlements: the DES-hormone settlement was approved in June 2006[ii] and the Dexia-settlement in January 2007 with regard to investment products, where over 300,000 claimants[iii] were involved. The submission for certification of a third settlement with regards to the Shell re-categorisation case, involving approximately 500,000 shareholders, was made in April 2007. This settlement has potentially groundbreaking cross-border ramifications. It aims at achieving a world-wide settlement with exception of US-shareholders.[iv] Finally,

on 1 February 2008 Vedior announced its intention to file a request for the certification of a collective settlement with the Dutch Shareholders Association (VEB)[v], and there are expectations that at least some mass disputes with regard to unit linked insurances, involving 6 million Dutch households and several insurers and banks will ultimately be resolved under the WCAM-Act in the years to come.

2. Background information Dutch legal system

The Dutch civil litigation system belongs to the 'civil law' family. Historically and as regards its content, Dutch procedural law belongs to the French subfamily.[vi] From the introduction in 1838 of its own legislation, including the current Dutch Code of Civil Procedure (DCCP), Dutch procedural law has, however, undergone further independent development and so has gradually taken on a character of its own.[vii] Judges are appointed and not elected (no jury) and there are no punitive damages. Parties are, however, entitled to statutory interest on damages, on late payment of a principal amount, from the date on which the wrongdoing took place. This provides an incentive for parties to settle a claim.[viii]

There is no US or English style discovery in the Netherlands, so there are limited possibilities to obtain documents, but there are other means to obtain information through various court orders. The parties may voluntarily produce any documents on which they rely in their briefs. At any stage, the court can order the parties to provide information or to produce documents. If a party refuses to comply with such an order, the court may "draw any conclusions it deems appropriate", taking into account that such a refusal is justified provided it is based on a valid reason. "Contempt of court" is not known under Dutch civil law. Pursuant to Section 162 DCCP, the court can order any party at any stage of the proceedings to provide access to any records or documents that party is obliged to draw up and keep. If a party fails to comply with such an order, the court is free to reverse the burden of proof. Where either party shows a legitimate interest, the court can also order the other party to produce specific documents pertaining to the parties' legal relationship under Section 843a DCCP. The courts have not been generous in issuing such orders.

Witnesses are heard before a single judge. Although the lawyers are allowed to ask questions, the overall "direction" is with the judge: there is no US-style cross-examination. They may be heard on the initiative of either party before or after the proceedings are commenced. They may also be heard to comply with an obligation under an interim judgment to substantiate certain allegations.

3. Fees and other costs issues

The costs of a Dutch civil action, including a collective action, are primarily lawyers' and experts' fees. The prevailing party will usually be entitled to compensation for such fees based on a schedule reflecting the amount of the claim and the actions required to arrive at a judgment (i.e. number of briefs, court appearances). The compensation will not cover the total lawyers' fees incurred, but only a very small portion of them: "the loser pays", but not much. Court fees will also be awarded and depend on the amount involved. They are capped at EUR 5,916 (court of appeal). The winning party is entitled to recover legal expenses incurred in the pre-trial phase if they are reasonable.[ix] In the Netherlands there is no requirement that attorneys' fees in collective actions be approved by the court.

It is becoming increasingly common for collective actions to be financed by organisations or special purpose vehicles, which collect an advance financial contribution from the individual group members and/or may be entitled to a contingency fee depending on the result. In the Dexia case about 100,000 claimants who supported the action paid €45 to a foundation and this funding was used to start collective actions[x]. However, this method obviously causes logistical problems connected with collecting the contributions and making initial contact with the group members. Also, the donation is voluntary, which leaves open the possibility for free riders. A clear trend is that the media, particularly consumer-oriented television programmes,[xi] are playing an increasing role in the initial phase in which contact is made between group members and lawyers and other legal service providers. The Dutch Consumers' Association and the Dutch Shareholders' Association (VEB) can be seen as "professional funders" of collective actions but their possibilities are limited as they have to finance actions from membership fees and donations.

Although there have been some mass disaster accident claims in the Netherlands funded largely through legal aid and legal insurance, this involvement was on an ad hoc basis. It is not possible to speak of a conscious policy development in this field. Some authors propose a more structured and centralised way of financing collective actions through legal aid and legal insurance, as the latter is increasing in popularity in the Netherlands in combination with some sort of contingency fees.[xii] To date, contingency fee arrangements are prohibited for members of the Dutch Bar,[xiii] since they are considered "unethical". Accordingly, entrepreneurs fill the gap, for example where a company or a foundation makes a contingency fee arrangement with individual plaintiffs and instructs lawyers on a lodestar basis.

The above-mentioned funding solutions are not optimal from a plaintiff's point of view but there is still resistance to introducing "no cure, no pay" funding arrangements, as the public and thus the political perception is that this would encourage a US-style litigation culture. Interestingly enough, recent empirical research on the Dutch litigation culture shows that such a development is absent.[xiv]

With respect to the costs of the judiciary, the impression is that dealing with numerous individual cases, as was the case with Dexia in its initial phase, places much greater burden on the courts than when collective devices are being used.[xv] There is little exemplary evidence available about the length of civil procedures. In the Vie d'Or litigation[xvi] for example, the collective action procedure, including Supreme Court judgement, lasted 13 years and in April 2008 had not been resolved: the parties are still negotiating a settlement. However, the Vie d'Or litigation involved many complex questions of fact and law.[xvii] The DES and Dexia collective settlements were handled relatively expeditiously: the settlements were approved within 1-1.5 years starting from the filing of the petition seeking for court approval and granting the approval. But the litigation that made those settlements possible lasted for many years.

4. Collective redress: Collective actions

There are *two set of rules* in the Netherlands that govern the resolution of mass disputes.[xviii] The first set of rules came into force in 1994[xix] and are laid down in the DCC (art. 3:305a-c CC). They cover so-called public interest and group interest collective actions. They are "representative" proceedings that must be commenced by representative organisations, such as a generic investors' or consumers' organisation or a special purpose vehicle. A test case where institutional investors like pension funds are seeking a declaration that they are such a representative organisation is now pending under the WCAM-Act.[xx] If there is no existing representative organisation that defends the group interests in question, then one must be established on an ad hoc basis. Whether ad hoc or not, particular importance is given to the objects described in the articles of association of the respective organisation. The interest of the group that the organisation is seeking to protect must be covered by its articles of association. If that is not the case, "certification" will not be granted. This is a rather formal approach of the rules on standing and also means that two or more organisations can bring separate collective actions in respect of the same issue if they are both found by the court to protect the interest of the group in accordance with the objects described in their articles of association.[xxi]

All causes of action and forms of relief can be pursued in a collective action with the one important exception, that it is not possible to obtain monetary relief, including a declaratory judgment on liability for sustained damages. This was confirmed once again in 2006 in the Supreme Court decision in the Vie d'Or litigation. The grounds for the restriction are that actions for damages require individual assessment of the claims. The legislature did not take into account that the claim assessment problems could to some extent be addressed through various case management techniques, since case management is a more recent phenomenon in the practice of civil procedure. However, in practice, the relief most commonly sought is either injunctive or declaratory in nature. Typically, the representative organisation asks the court to render a declaratory judgment confirming that the defendant acted unlawfully vis-à-vis all the unnamed injured parties and that the defendant is in principle liable for the injury caused. The representative action creates a precedent which, at best, facilitates the individual cases that follow. Obviously, such a declaratory judgment will often induce the parties to enter or re-enter into settlement

negotiations and an amicable settlement may result.

The Dutch collective action regime has some disadvantages for group members as, following the collective action, they have to start subsequent individual actions to establish causation, liability and damages, but obviously also has some disadvantages for defendants, as they can "only prevent losing" a collective action. When representative organisations start a collective action, they do so in their own name and the judgment binds only the organisation and the defendant, but not the individual class members. Hence, the representative action will not prevent injured parties from bringing individual actions on the same or on different grounds. The law requires that the interest of the group members must be similar enough (a kind of a commonality test) to be handled in a collective action. The court's practice is that standing can be obtained by representative organisations relatively easily, because the collective action is not for monetary damages. The WCAM-Act is meant to overcome the above problem for defendants.

5. Collective redress: Collective settlements

The WCAM-Act is laid down in art. 7:907-910 DCC and in art. 1013-1018 DCCP. It covers the court approval of an opt-out collective settlement. The Act was originally intended to apply only to the resolution of mass exposure and mass disaster personal injury claims. This was indeed true of the first collective settlement under the Act (DES-hormone), but not of the Dexia, Shell and Vedior cases.

The main features of the Dutch Act on Collective Settlements, which was inspired by the US class settlements approach, can be summarised as follows. Defendants and representative organisations as described above can try to reach a settlement out of court. It is not possible to put pressure on a defendant who is unwilling to settle through the commencement of a collective action for damages. The recent cases show that there can be other incentives for defendants to try to reach such a settlement, although these might be improved.[xxii] If and when the parties succeed in reaching an out-of-court settlement, they can jointly petition the court to approve it. The Amsterdam Court of Appeal has

exclusive jurisdiction in first and final factual instance over collective settlement cases, and in this way can develop case management expertise in this field. The Act introduces the "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.

The agreement should describe the class and the various sub-classes and give information about (i) the number of class members (by estimation), (ii) the amounts of compensation, (iii) eligibility for compensation, (iv) the method of determining of the compensation amount and finally (v) the method of obtaining payment. The collective settlement must be published in a newspaper and everyone who is included within one of the categories of the settlement has the opportunity to opt-out within a certain period of time. The notice requirement, which applies twice, has to be met on an individual basis for the known class members, which is a significant difference from North American style class action regimes and has cost consequences for defendants. It is, however, important to mention that notice to known group members can be given by ordinary mail. The first announcement may be by advertisement only, if the court approves this. In the Shell case, individual notice to the known shareholders has been given in accordance with the provisions of the Treaties that apply for the service of court documents in various countries.

The requirements that must be met in order to obtain court approval are, among others: (i) the compensation amount may not be unreasonable, (ii) the defendant's performance must be sufficiently guaranteed, (iii) the representative organisation must sufficiently represent the class and (iv) the number of class members must be sufficient to warrant certification (numerosity). It is possible to see the sufficient representation test as a Dutch-style 'adequacy of representation test', although it must be stressed that under the Dutch "test", the counsel to the representative organisation is not court-appointed.

When considering whether or not to approve a settlement, the court has to take into account the nature,

cause and amount of loss, the simplicity and expediency of the payment method, the defendant's asset base, the nature of the legal relationship between the defendant and the class members and the availability of insurance. The opt-out period for class members must be at least 3 months. If a settlement is approved, it will be deposited at the court registry, where it will be available for inspection and where copies may be obtained by interested parties.[xxiii] The court may also order that the decision be published or communicated by other means, which allows for flexibility and case-tailored approaches.

If the court decides to approve the settlement, everyone who is included in one of the categories of the settlement and does not opt out on time is bound by that settlement, even if he or she does not know about it. In other words, class members become parties to the settlement agreement and are entitled to receive payment of the stipulated compensation amount but they are also not entitled to bring their own individual action any more. There is no possibility for appeal and only the petitioning parties can jointly and under restricted conditions present their case to the Supreme Court.

The court's power to interfere with the content of the settlement is limited: it can only do so if the amount of compensation awarded under the agreement or the process of determining the compensation is unfair. However, the Dexia settlement illustrated that the court can exercise certain discretionary powers. In that case the court requested on its own initiative an expert opinion with regard to an issue that was brought up by some objectors. The ruling of the Court has to deal with all objections. The review of the settlement by the court turns out to be less marginal then one expected when the WCAM-Act was introduced.[xxiv]

6. Policy debate and political context

The arguments for introducing collective action were the traditional ones: enabling people with individually non-recoverable claims to bring actions and to enhance access to justice.[xxv] The WCAM-Act however has a very different background that might explain why the Netherlands is the only

European country that introduced a collective settlement-device on opt out basis and why it had the support of the industry lobby.

That background was the DES litigation that was initiated in 1986 by 6 'DES daughters' against 13 DES manufacturers.[xxvi] The crucial question in the DES litigation was whether the rule on "alternative causation" could be applied in the litigated period.[xxvii] The Dutch Supreme Court held that it could.[xxviii] Shortly after publication of the Supreme Court's ruling, the DES register centre was established. Within 6 weeks it counted over 18,000 members.

The pharmaceutical industry and insurers took the initiative and started negotiations for a final settlement. At the end of 1999, a settlement was reached and the DES fund was established. Half of the fund came from the industry itself and half from the insurers. There was one very important condition on the defendants' side: that the settlement was final for all Dutch victims. However, in order to achieve this, new legislation was needed because, as stated above, it is not possible to obtain monetary relief, including a declaratory judgment on liability for sustained damages, in a collective action, so a final settlement option would require active adherence by each and every individual class member. The industry believed that this was not a workable alternative that could grant finality, and so they insisted on an opt-out collective settlement solution that could only be achieved through legislation.

Although an attractive possibility for the legislature was the enactment of *ad hoc* legislation providing for court-approved collective settlements specifically in the DES case, the legislature had been heavily criticised for enacting such legislation in the past. Furthermore, it was expected that mass tort cases would occur more often in the future, so legislation on the subject was very much needed and justified. The implication of all this was that a whole new law on court-approved collective settlements in general had to be prepared on short notice, driven by political pressure for the resolution of the DES matter. There was no time for lengthy public debate on the need for or content of the legislation. The reactions of the various parties that have been consulted give a mixed picture.

The reaction of the judiciary can be described as resistant. A general comment was that the proposal placed too heavy a burden on judges, jeopardising their impartiality. They claimed that a task which should be performed by the legislature, namely to solve a problem caused by a particular event and adversely affecting a huge group of people, had been assigned to them. They also argued that they would find it very difficult to assess the fairness and adequacy of the settlement. The fact that civil law judges are traditionally less familiar and comfortable with case management and had to get used to the dynamics of mass litigation might have played an important role in their reaction.[xxix] The judiciary seems nowadays more and more comfortable with her new, more active, role. Some practitioners, mainly the defendants' bar, were quite positive about the proposal. They saw the legislation as giving them more possibilities to handle delicate situations without really having "the trouble" of coerced settlements. Others, mainly the plaintiffs' bar, were less excited about the new possibilities, pointing out that the proposed collective action was probably only meaningful in connection with "long-term" mass torts.[xxx] Other plaintiff lawyers and the Dutch Consumers' Organisation described the collective settlement proposal as "nice but useless".

7. Temporary concerns and issues

It is hard and far too early to know whether the collective redress devices achieve major changes in behaviour. An (underestimated) barrier in representative litigation seems to be funding. Another obstacle, that sometimes turns out to be negative for defendants and sometimes for plaintiffs, seems to be the absence of experience among lawyers and judiciary with case management. The impression is that within the existing collective action regime more can be achieved if lawyers and judiciary are better trained in this respect.

The experiences with the new collective settlement device are however mainly positive if one evaluates them in terms of achieving fast and reasonable compensation for claimants and offering final resolution to defendants. Nevertheless, many things can be improved. The current debates are framed by the

interim and final reports of a commission that reviewed the DCCP and the spin-off of those reports (Asser, Groen, Vranken and Tzankova (2003, 2005) and Tzankova (2007b)).[xxxi] The current debates concern mainly: (i) funding[xxxii], (ii) the question whether collective actions for damages should be allowed under certain conditions, (iii) the need for an "adequacy of representation" test for the class lawyers, (iv) the question of how to handle individually non viable claims (Tzankova 2005) and (v) the recent developments at EU-level (consumer and antitrust). Much thought is also given to the question of how to ensure and enhance fair and reasonable collective settlements under the WCAM-Act. The Dutch Ministry of Justice gives a priority to the topic of collective redress and the improvement of the WCAM-Act.

The potential of devices like the one provided under the WCAM-Act in achieving pan-European solutions is promising and noteworthy keeping the Shell settlement in mind. It requires further exploration. The resolution of mass disputes is an emerging topic in the Netherlands: the last word has not been said yet.

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[i] Wet collectieve afwikkeling massaschade (WCAM): Wet van 27 juli 2005, Stb. 2005 340 jo 380). For comments on the WCAM see: Croiset van Uchelen (2007), Tzankova (2007c: 135-172), Krans (2006), Leijten (2005), Van Regteren Altena & Ten Cate (2005), Van Duyneveldt-Franken & Van Oosten (2004). Another main development in this regard has been a further increase in collective litigation, particularly as a result of both shareholder activism and a heightened willingness on the part of consumers to enforce their rights. The merger of ABN AMRO that got a lot of attention in the international media is a clear example of those.

[ii] Approximate 34,000 claimants could obtain payment from the Fund that consists of 35 million Euro. In April 2008 approximate 6000 DES-users filled a request for payment out of the Fund. There were 22 objectors mainly because the settlement excludes some groups. The opt out rates in this case are not publicly available but there are estimations that only a handful opted out: Van Bochove & Van Doorn, (2007: 22). For comments on this settlement see: Krans (2007), Frenk (2006), Leijten (2005).

[iii] Of whom less than 10% opted out. Objections were filled on behalf of 1496 objectors. The "settlement amounts" were perceived by some to be too low, whereas others claimed that the settlement differentiation scheme didn't differentiate enough. Some of those who opted out are litigating their case individually (those cases are still pending), but this is just a small portion of the group. A Supreme Court decision from 28 March 2008 made it easier to resolve another part of the cases out of court but the biggest part of those who opted out are represented, more or less collectively. by entities who work on a 'no cure no pay' basis. The idea of those entities is that the cases are dealt with individually but in a standard way. As at 30 April 2008, almost one year after the opt out period expired (1 August 2007), the vast majority of the people who exercised their opt-out right had not initiated legal proceedings. The settlement fund consisted of 1 billion Euro. For comments on this settlement see: Barendrecht & Van Doorn (2007), Huls & Van Doorn (2007), Tzankova (2007), Leijten (2006), Frenk (2005), Frenk (2005a).

[iv] Information about this settlement, including court documents, can be found on the courts website (only in Dutch: http://dossier.rechtspraak.nl/ResultPage.aspx) and on the website of Shell (also in English):http://www.shell.com/home/content2/investor-en/reserves_settlement/downloads_reserves_settlement_13042007.html The settlement fund consists of approximately $ 352.6 million. For comments on the settlement and its cross border ramifications see: De Jong 2007, Tzankova 2007b.

[v] The settlement amount is 4.25 million Euro.

[vi] From the end of the eighteenth century until 1813 the Netherlands was a French vassal state (from 1811 actually a group of departments in the French empire) and French legislation was introduced.

[vii] WDH Asser, H.A. Groen, J.B.M. Vranken, I.N. Tzankova, A New Balance, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894841 where you can also find information about various initiatives that were undertaken for the modernisation of the Dutch law of civil procedure between 1865-2002. See also Asser, Groen, Vranken and Tzankova (2003: 161-189 and 2006: 116-125) for the proposals with regard to the issue of collective redress of the commission that conducted a Fundamental review of the Dutch Code of Civil Procedure for the Ministry of Justice. For general information about the Dutch judiciary and legal system see also: <http://www.rechtspraak.nl/Gerechten/RvdR/Information+in+English/ >.

[viii] As from 1 January 2008, the interest rate is 6%. In a category of cases (business transactions), based on the violation of an agreement between professional parties, the statutory interest rate as from 1 January 2008 is 11.2 %.

[ix] The "double fairness test": art: 6:96 lid 2 b and c CC. This test has been further developed in case law.

[x] Huls & Van Doorn (2007: 58).

[xi] Like Radar (http://www.trosradar.nl/) and Kassa! (http://kassa.vara.nl/portal).

[xii] Tzankova (2007a), Van den Biggelaar & Loos (2007).

[xiii] The new Dutch Minister of Justice and former Professor of Administrative Law E. Hirsch Balin announced in May 2007 that he is considering a new pilot with contingency fees but not in the area of personal injury claims. His predecessor put a ban on a pilot of the Bar in the field of personal injury claims. The pilot looks more like the UK-style conditional fee agreement than the US-style 'no cure, no pay' (whereby the fee is a percentage of the award).

[xiv] The number of lawsuits is not increasing, although higher damages are being claimed, such as for pain and suffering: Eshuis (2003). The highest award ever awarded for pain and suffering in the Netherlands is 40,000 Euro.

the individual claims, the foundation will distribute any proceeds from the court case pro-rata parte, after the deduction of legal fees and court fees. This circumvents the ban on money damages in a representative action.

[xix] Stb. 269 en 391.

[xx] For comments on the fiduciary duty of pension funds and how that duty relates to their involvement in class actions see: Maatman & Coemans (2007).

[xxi] Recent experiences show that this may happen especially in so-called "two stage" collective actions, where the representative organisation seeks 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.

[xxii] Like pressure from politics, Ombudsman, media etc.

[xxiii] All known group members will be sent a copy of the decision by ordinary mail if they reside in the Netherlands. If they reside abroad the notice will be served on them according to the Treaty and regulations that apply to them with regard to the service of court documents. In addition, the decision and such other information as the court sees fit will be published in at least one national newspaper, to be determined by the court.

[xxiv] Court practises that seem to emerge with respect to the resolution of mass disputes in the Dexia matter, like setting case management conferences where logistics are being dealt with (Dexia and Shell), appointing an expert witness with respect to issues in controversy and brought up by objectors (Dexia).

[xxv] And to some extent, prevention: Kamerstukken II, 22 486, nr. 3, p. 2.

[xxvi] The DES daughters alleged that the use of the drug DES by their mothers during pregnancy had caused them medical damage. Of particular importance in this case was the fact that none of the claimants could prove exactly which of the DES manufacturers during the relevant period was responsible for the production and distribution of the specific medicine that was taken by their mothers.

[xxvii] The rule on alternative causation holds that in the case of multiple activities, where each one of them alone would be sufficient to cause the damage, but it remains uncertain as to which one in fact caused it, each activity is regarded as a cause. The victim is entitled to claim the whole amount of damages from any one of the tortfeasors.

[xxviii] HR 9 oktober 1992, NJ 1994/535.

[xxix] For comments on the role of the judiciary see: Giesen (2007) and Valk (2005).

[xxx] Called by others "mass exposure cases": claims involving pharmaceutical products, asbestos etc., where the number of present and future victims and the impact of the disputed activity are unknown. See Van Regteren Altena (2005a).

[xxxi] See also Frenk (2007).

[xxxii] Schonewille (2007), Tzankova (2007a), Van den Biggelaar and Loos (2007), Tzankova (2007c: 163-166).