Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries

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I. INTRODUCTION

Europe has witnessed an intensive debate on collective redress over the course of the last decade. Unlike in the United States and other *common law* oriented countries, class actions and settlements do not yet have a firm grounding in most European jurisdictions. However, the tide is changing with more than half of all EU Member States now having established some sort of compensatory collective redress procedure.[1] The European Union has undertaken several initiatives to regulate collective redress. Current E.U. legislation falls short when enforcing substantive E.U. law, particularly consumer law and competition law. At the same time, the great variation between the domestic systems of the Member States may disturb the desired level playing-field and thus hamper cross-border litigation. Discussions in the European Union are characterized by opposing views in the Member States and fear for abusive litigation.[2] In June 2013, the European Commission released its long-awaited policy in the form of a non-binding Recommendation, setting out common principles for collective redress.[3] Establishing a genuine pan-European procedure on collective redress appeared unfeasible. Nevertheless, this Recommendation marks an important step for the future of E.U. collective redress.

In the ongoing European debate, the Dutch procedure on the basis of the Dutch Collective Settlements Act (*Wet Collectieve Afwikkeling Massachade,* abbreviated as "WCAM") plays an important role.[4] The WCAM entered into

1. *See, e.g.*, Stefaan Voet, *European Collective Redress Developments*, SSRN (Aug. 31, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318809 (describing collective redress developments on the European level and within the jurisdictions of the Netherlands, Germany, France, and Belgium).

2. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a European Horizontal Framework for Collective Redress*, at 3, COM (2013) 401/2 final (Nov. 6, 2013) [hereinafter *Communication from the Commission*].

3. *Id.* at 4; *Commission Recommendation of XXX on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law*, at 5, COM (2013) 3539/3 final (June 11, 2013).

4. The Dutch government has provided an English summary of the Act and its features. *See generally The Dutch 'Class Action (Financial Settlement) Act' ('WCAM')*, RIJKSOVERHEID (June 24, 2008), http://www.rijksoverheid.nl/documenten-en-publicaties/circulaires/2008/06/24/the-dutch-class-action-financial-settlement-act-wcam.html.

force in 2005,[5] and since that time has attracted several influential transnational cases.[6] These include the *Shell*[7] and *Converium*[8] securities cases, in which Dutch settlements were reached, partially complementary to actions and settlements in the United States. Recently, *The Economist* mentioned the Netherlands as a favourable venue for class settlements in an article on class actions in Europe.[9] Furthermore, a quality Dutch Financial Newspaper addressed the issue of the Netherlands 'hoping to take over U.S. business' when the *Converium* interim decision was rendered in 2010.[10] The rise of the Dutch settlement is in part a result of the landmark case of *Morrison v. Nat'l Australian Bank* in which the U.S. Supreme Court limited securities class actions to U.S. litigants or shares bought on the U.S. stock exchange.[11]

The transnational expansion of the Dutch WCAM procedure is, however, not without its problems. Its distinct features, notably the 'settlement without action' and the opt-out mechanism coupled with the wide jurisdictional reach, have raised criticism in Europe and beyond.[12] It is also questionable if the exclusive settlement system and opt-out feature are in compliance with the European Commission's Recommendation. This makes the wide jurisdiction as adopted by the Amsterdam Court of Appeal all the more problematic. Additionally, existing rules on international jurisdiction, particularly those of the Brussels I Regulation,[13] are not well-suited to accommodate the specific design of the Dutch WCAM. This also raises a second issue, namely whether the court decision to declare the settlement binding will be recognized and declared enforceable both inside and outside the European Union. Naturally, businesses willing to settle

5. *Id.* at 1.

6. *See* Xandra E. Kramer, *Enforcing Mass Settlements in the European Judicial Area: EU Policy and the Strange Case of Dutch Collective Settlements (WCAM)*, *in* RESOLVING MASS DISPUTES: ADR AND SETTLEMENT OF MASS CLAIMS 63, 78 (Christopher Hodges & Astrid Stadler eds., 2013) (addressing a table listing these cases).

7. Hof's-Amsterdam 29 mei 2009, JOR 2009, 197 m.nt. AFJA Leijten [ECLI:NL:GHAMS:2009:BI5744] (Shell Petroleum NV/Dexia Bank NV Netherlands) (Neth.) [hereinafter Shell Petroleum NV].

8. Hof's-Amsterdam 17 januari 2012, JOR 2012, 51 m.nt. BJ de Jong [ECLI:NL:GHAMS:2010:BO3908] (Scor Holding) (Neth.) [hereinafter Converium].

9. *Chasseurs d'ambulances: Class-Action Suits are Coming to Europe*, ECONOMIST (Paris) (May 11, 2013) http://www.economist.com/news/business/21577426-class-action-suits-are-coming-europe-chasseurs-dambulances.

10. Anne de Groot, *Nederland Hoopt Stokje VS Over te Nemen als Land van Class Actions*, HET FINANCIEELE DAGBLAD (Nov. 17, 2010) (The Netherlands hopes to take over from the US as the country of class actions).

11. Morrison v. Nat'l Australian Bank Ltd.,130 S. Ct 2869, 2883 (2010); *see* Linda J. Silberman, Morrison v. National Australia Bank: *Implications for Global Securities Class Actions*, *in* EXTRATERRITORIALITY AND COLLECTIVE REDRESS 363 (Duncan Fairgrieve & Eva Lein eds., 2012); *see Ahold Decisions*, INTERNATIONAL COMPARATIVE LEGAL GUIDE TO CLASS & GROUP ACTIONS 2011; *see* Wulf A. Kaal & Richard W. Painter, *Forum Competition and Choice of Law Competition in Securities Law After* Morrison v. National Australia Bank, 97 MINN. L. REV. 132, 165-85 (2012).

12. *Communication from the Commission*, *supra* note 2, at 11, 14.

13. As of January 10, 2015, a new Regulation as a result of the recast of the current Regulation will be applicable. European Parliament and Council Regulation 1215/2012, art. 66, 2012 O.J. (L 351) 1 (EU).

aim for the preclusive effect of such settlements. Similar doubts have been expressed in relation to the recognition and enforcement of the United States opt-out class action and class settlement.[14] A third question relates to the applicable law in those transnational cases, although this issue has triggered less debate, and is not regarded as problematic in Dutch practice. Traditional choice of law rules in the European Union, notably the Rome I Regulation (with reference to contractual disputes) and the Rome II Regulation (with respect to non-contractual actions), are not well adapted to claims related to mass harm.[15]

This article explores the issues of international jurisdiction, recognition and enforcement and the applicable law in relation to transnational WCAM settlements, particularly in securities cases. It questions whether these matters are adequately addressed in Dutch practice, against the background of the existing (E.U.) legislation, and whether the current legislative framework is able to facilitate class actions and settlements. Part II discusses the WCAM against the background of its use in transnational cases and E.U. policy initiatives.[16] The article will not address the general features and practice of this procedure in detail, since these are discussed in other contributions in this journal and elsewhere.[17] Part III will focus on the international jurisdiction of the Dutch courts to declare a collective settlement under the WCAM binding.[18] Part IV will elaborate on the recognition and enforcement of collective settlements in the E.U. Member States and in other countries.[19] In Part V several questions regarding the applicable law to collective settlements will be discussed.[20] Part VI will draw some conclusions on the use of the Dutch WCAM in transnational securities

14. *See generally* Andrea Pinna, *Recognition and* Res Judicata *of US Class Action Judgments in European Legal Systems*, 1 ERASMUS L. REV. 31 (2008); *see generally* Mark Stiggelbout, *The Recognition in England and Wales of United States Judgments in Class Actions*, 52 HARV. INT'L L.J. 433 (2011); *see generally* Rachael Mulheron, *The Recognition, and* Res Judicata *Effect, of a United States Class Actions Judgment in England: A Rebuttal of* Vivendi, 75 MODERN L. REV. 180 (2012); *see generally* Stefania Bariatti, *Recognition and Enforcement in the EU of Judicial Decisions Rendered Upon Class Actions: The Case of U.S. and Dutch Judgments and Settlements*, *in* RECASTING BRUSSELS I 319 (Fausto Pocar et al. eds., 2012); *see generally* Antonio Gidi, *The Recognition of U.S. Class Action Judgments Abroad: The Case of Latin America*, 37 BROOK. J. INT'L L. 893 (2012).

15. European Parliament and Council Regulation 593/2008, 2008 O.J. (L 177) 6, 6 (EC) [hereinafter Rome I]; European Parliament and Council Regulation 864/2007, 2007 O.J. (L 199) 40, 42 (EC) [hereinafter Rome II].

16. *See infra* Part II.

17. *See generally* Willem H. Van Boom, *Collective Settlement of Mass Claims in the Netherlands*, *in* AUF DEM WEG ZU EINER EUROPÄISCHEN SAMMELKLAGE 171 (Matthias Casper et al. eds., 2009); *see generally* Tomas Arons & Willem H. Van Boom, *Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from The Netherlands*, 22 EUR. BUS. L. REV. 857 (2010); *see generally* Ianika Tzankova & Hélène van Lith, *Class Actions and Class Settlements Going Global: An Update from the Netherlands*, *in* EXTRATERRITORIALITY AND COLLECTIVE REDRESS 67 (2012). *See also The Dutch 'Class Action (Financial Settlement) Act' ('WCAM')*, *supra* note 4.

18. *See infra* Part III.

19. *See infra* Part IV.

20. *See infra* Part V.

cases while considering the background of the European Commission's Recommendation.[21]

II. DUTCH COLLECTIVE SETTLEMENTS IN A GLOBAL AND EUROPEAN CONTEXT

A. Dutch WCAM Settlements: National Icon with Global Aspirations

Intended to operate as an addition to the possibility for foundations and associations to file for injunctive relief on behalf of interested persons in order to protect their rights,[22] the Dutch legislature passed the WCAM in 2005.[23] This Act was originally not intended to handle transnational securities cases.[24] Its introduction was triggered by a pharmaceutical product liability case, the DES affair, which only involved Dutch litigants.[25] In this case, the Dutch Supreme Court had already established liability.[26] The industry involved was keen to reach a damages settlement, but a proper legal mechanism for collective settlement was absent.[27] The WCAM was established to fill this gap.[28] The Act consists of four provisions in the Dutch Civil Code dealing with the settlement as such,[29] and six provisions in the Dutch Code of Civil Procedure concerning the court procedure at the Amsterdam Court of Appeal (which is exclusively competent in these matters).[30]

The Dutch mass settlement regime is rather unique in Europe. Outside Europe—and especially in the United States, Australia and Canada—mass settlements also play an important role, since many class actions are ultimately settled. However, as opposed to these systems, the Netherlands does not have a collective action for the compensation of damages; it relies solely on settlements. Representative association(s) or foundation(s) conclude, on behalf of the victims (designated as "interested parties" or "beneficiaries"), a settlement agreement with the allegedly responsible party.[31] Upon joint request, the Amsterdam Court

21. *See infra* Part VI.

22. *See* BURGERLIJK WETBOEK [BW] art. 3:305a (Neth.). This provision does not enable claims for compensatory relief.

23. *The Dutch 'Class Action (Financial Settlement) Act' ('WCAM')*, *supra* note 4.

24. *See generally* Hof's-Amsterdam 1 juni 2006, NJ 2006, 461 m.nt. [ECLI:NL:GHAMS:2006: AAX6440] (Bayer AG/Ace European Group Ltd.) (Neth.) [hereinafter Bayer AG].

25. *Id.*

26. *Id.* at 2.3.

27. *Id.* at 3.1.

28. *The Dutch 'Class Action (Financial Settlement) Act' ('WCAM')*, *supra* note 4.

29. BW art. 7:907-10 (Neth.).

30. *See* WETBOEK VAN BURGERLIJKE RECHTSVORDERING [RV] art. 1013-18a (Neth.).

31. BW art. 7:907 (Neth.). It provides that "[a]n agreement for the purpose of compensating damage caused by an event or similar events, concluded between a foundation or association with full legal capacity and one or more other parties who have engaged themselves under this agreement to pay compensation for this damage may, upon the joint request of the parties, . . . be declared binding by the court for other persons to

of Appeal declares the settlement binding.[32] Unlike, for example, in the U.S. class action and settlement system, no 'class member' represents a group.[33] If the interested parties do not wish to be bound, they should make use of the opt-out possibility.[34] To safeguard fairness of the settlement, the law imposes rules on the representativeness of the foundation or association as well as a reasonableness test as to the amount of damages.[35] In practice, the Amsterdam Court plays a very active role in the whole process, including the service (notification) of (foreign) interested parties.[36]

As mentioned, the Dutch system is based solely on a settlement, as collective action for compensation is not yet available. In creating the WCAM mechanism, the Dutch legislature clarified that it was inspired by the U.S. class action and particularly the practical experience.[37] It deliberately chose to omit the action part, for which it provided the following reasoning:

> The WCAM opts for a collective settlement in order to avoid the complications that arise fairly often in American damages class actions. These happen because many of the issues connected with a compensation claim can only be answered individually. They might include, for example, issues of causality, contributory negligence and especially the extent of the damage. Once the legal issues in common have been dealt with, all of the individual victims then have to get involved in the proceedings so as to obtain answers to the issues affecting them individually. The result is that completion of a class action is quite often extremely complex and time-consuming.[38]

To date, six settlements have been declared binding under the WCAM.[39] A seventh request for a binding declaration has been filed in the insolvency case involving the DSB bank to compensate its former customers in May 2013.[40]

whom the damage was caused, provided that the foundation or association represents the interests of these persons pursuant to its articles of association (articles of incorporation)." *Id.*

32. *Id.*

33. *Id.*

34. BW art. 7:908(2) (Neth.).

35. BW art. 7:907(3)(e)-(f) (Neth.).

36. *See, e.g.*, Hof's-Amsterdam 23 april 2013 [ECLI:NL:GHAMS:2013:BZ8345] (Appellant/Varde Investments Ltd.) (Neth.) at 4 [hereinafter Varde Investments Ltd.].

37. *The Dutch 'Class Action (Financial Settlement) Act' ('WCAM')*, *supra* note 4.

38. *Id.*

39. Bayer AG, *supra* note 24; Varde Investments Ltd., *supra* note 36; Hof's-Amsterdam 29 april 2009, NJF 2009, 247 m.nt. [ECLI:NL:GHAMS:2009:BI2717] (Stichting Vie D'Or) (Neth.) [hereinafter Vie D'Or]; Shell Petroleum NV, *supra* note 7; Hof's-Amsterdam 15 juli 2009, JOR 2009, 325 m.nt. A.C.W. [ECLI:NL:GHAMS:2009:BJ2691] (Randstad Holding N.V.) (Neth.) [hereinafter Vedior]; Converium, *supra* note 8; Kramer, *supra* note 6, at 78 (addressing a table listing these cases).

40. *See* Administrators of DSB Bank N.V., Insolvency Report No. 18 (2013), *available at* http://www.dsbbank.nl/crediteuren/en/public-reports/dsb-bank-%28public-reports%29/ (addressing the Eighteenth Public

Dutch practitioners generally regard it as a satisfactory system. In 2013, several amendments to the Act have been introduced to regulate collective redress in insolvency cases and to strengthen certain requirements, *inter alia* those regarding the representativeness, procedural fairness, and the service of foreign defendants.[41]

Although the WCAM was not established with a view to transnational commercial cases, it has attracted international attention.[42] While the first three settlement cases involved few cross-border elements, the *Shell*, *Vedior*, and *Converium* settlements involved many foreign interested parties.[43] The *Converium* case not only involved primarily non-Dutch residents as interested parties, but also a responsible party with a corporate seat in Switzerland and concerned misleading information regarding stocks sold on the Swiss stock exchange.[44] The apparent globalization of the WCAM settlements has undoubtedly been boosted by the *Morrison* ruling of the U.S. Supreme Court, closing the door on non-US residents buying stocks on a foreign stock exchange ('foreign cubed actions').[45] The *Shell* and *Converium* settlements were in part complementary to US settlements, and were confined to non-U.S. residents.[46]

B. E.U. Policy on Collective Redress and Dutch WCAM Settlements

The E.U. has been particularly active in the area of collective redress.[47] This has been triggered by problems encountered in the enforcement of consumer law and competition law, and in the increasing importance of collective redress under the national laws of the Member States and in practice. The E.U. debate is marked by strong lobbies *pro* and *contra* collective redress and opposite views on the appropriate model, against the background of a great variety of domestic systems in the Member States and the fear for abusive litigation.[48]

Report on the DSB Bank in English).

41. *See* Eerste Kamer der Staten-Generaal, *Amendments to the Civil Code, the Code of Civil Procedure and the Bankruptcy Act to Facilitate the Collective Settlement of Mass Claims Further (Law Amending the Law Collective Settlement)*, OVERHEID.NL (June 13, 2013), https://zoek.officielebekendmakingen.nl/kst-33126-C.html.

42. Shell Petroleum NV, *supra* note 7, at 3.2; Vedior, *supra* note 39; Converium, *supra* note 8, at 1-2.

43. *See generally* Shell Petroleum NV, *supra* note 7, at 3.2; Vedior, *supra* note 39, at 2.8; Converium, *supra* note 8, at 1-2.

44. Converium, *supra* note 8, at 2.

45. *See* Kaal & Painter, *supra* note 11, at 165.

46. Shell Petroleum NV, *supra* note 7, at 3.2; Converium, *supra* note 8, at 1-2.

47. See Duncan Fairgrieve & Geraint Howells, *Collective Redress Procedures: European Debates*, *in* EXTRATERRITORIALITY AND COLLECTIVE REDRESS 15-41 (Duncan Fairgrieve & Eva Lein, eds., 1st ed. 2012) for an overview of the initiatives and developments.

48. *Communication from the Commission*, *supra* note 2, at 3.

1. Sectorial Approaches and the Horizontal Recommendation on Collective Redress

Initially, the European debate focused on sectorial approaches in the area of competition law and consumer law.[49] The Directorate General Competition ("DG COMP") commissioned a study on the issue of damages and redress.[50] This 2004 study concluded that the award of private damages for the violation of E.U. competition law were underdeveloped.[51] In 2005, a Green Paper on Damages Actions for Breach of E.U. Anti-Trust Rules was published,[52] followed by a White Paper in 2008, containing specific proposals to overcome the hurdles in private enforcement of competition law.[53] It promoted a combination of collective redress brought by representative organizations, such as consumer or trade associations, and collective actions brought by individuals based upon an opt-in model.[54]

At the same time, the Directorate General on Health and Consumers ("DG SANCO") was working on collective redress for the protection of consumers. The current legislative framework already provides for limited collective action in the area of consumer law pursuant of Directive 98/27/EC on Consumer Injunctions.[55] However, the Directive only deals with representative injunctive relief and does not provide for skimming off profits as a result of a violation of consumer rules or *compensatory* relief for consumers.[56] Several studies have shown that consumers have relatively little opportunity to make use of the existing mechanisms, and that financing is one of the main concerns.[57] In 2008, a Green Paper on Consumer Collective Redress was published presenting various options ranging from no additional action to enacting a European collective redress procedure.[58] After a follow-up consultation paper published in 2009, as

49. The competence for E.U. initiatives in these areas are laid down in the Treaty on the Functioning of the European Union arts. 101, 102, 169, Mar. 30, 2010, 2010 O.J. (C 83) 49 [hereinafter TEFU]. The general competence for measures to harmonize the law is laid down in TFEU article 114.

50. *See generally* DENIS WAELBROECK, ET AL., STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES: COMPARATIVE REPORT 3 (Aug. 31, 2014), *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf.

51. *Id.* (provinding an overview of activities). The debate was triggered by a CJEU ruling stating that victims of a breach of E.U. competition rules have a right to damages. Case C-453/89, Courage v. Crehan, 2001 E.C.R. I-6297 at 78.

52. *See generally Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 final (Dec. 19, 2005).

53. *See generally Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2008) 165 final (April 2, 2008).

54. *Id.* at 4.

55. Council Directive 98/27, 1998 O.J. (L 166) 51, 52 (EC).

56. *Id.*

57. *Health and Consumers*, EUROPEAN UNION, http://ec.europa.eu/dgs/health_consumer/index_en.htm (last updated Apr. 12, 2013).

58. *Commission Green Paper on Consumer Collective Redress*, at 7-14, COM (2008) 794 final (Nov. 27, 2008).

well as various hearings and informal meetings, concrete initiatives were suspended.[59]

In 2010, the Directorate Generals COMP and SANCO joined forces and were accompanied by DG Justice, since it was acknowledged that collective redress not only is about enforcing substantive law, but also has important implications for civil justice.[60] In 2011, a public consultation paper was published on a 'Coherent European Approach to Collective Redress,' providing important input to the European debate.[61] This is also evidenced by the fact that this Consultation paper received over 19,000 responses from Governments, associations, and other stakeholders, as well as from individuals.[62] Three of the questions put forward in this paper concerned the cross-border application of collective redress.[63] In particular, the possible need for rules on international jurisdiction and on recognition and enforcement was addressed.[64] These two issues have raised concern in the cross-border application of the Dutch WCAM procedure.[65]

In a Resolution adopted on its own initiative in January 2012, the European Parliament showed for the first time a certain willingness to establish European rules on collective redress.[66] The Resolution stated that this action should take the form of a horizontal instrument, covering all areas of E.U. law.[67] The Parliament pointed out that Europe must refrain from introducing a U.S.-style class action or any system that does not respect European legal traditions.[68] It even referred to the U.S. class action system, including third-party funding and punitive damages as supporting 'frivolous litigation.'[69] The Resolution underlines the need for stringent safeguards to avoid abuse.[70] These concern *inter alia* standing, the opt-

59. *Consultation Paper for Discussion on the Follow-Up to the Green Paper on Consumer Collective Redress* (May 29, 2009), *available at* http://ec.europa.eu/consumers/redress_cons/docs/consultation_paper 2009.pdf.

60. The cooperation between these DGs had also been instructed by President Barrosso in 2010. *See A Coherent European Approach to Collective Redress: Next Steps*, *Joint Information Note by Vice-President Viviane Reding, Vice-President Joaquín Almunia and Commissioner John Dalli , in Towards a Coherent European Approach to Collective Redress*, at 3, SEC (2010) 1192 (Oct. 5, 2010).

61. *See generally Commission Staff Working Document on Public Consultation, in Towards a Coherent European Approach to Collective Redress*, SEC (2010) 1192 (Oct. 5, 2010).

62. For a summary of the outcomes, see Burkhard Hess, et al., *Evaluation of Contributions to the Public Consultation and Hearing: "Towards a Coherent Approach to Collective Redress"* (Study JUST/2010// JCIV/CT/OO27/A4) at 4, *available at* http://ec.europa.eu/competition/consultations/2011_collective_redress/ study_heidelberg_summary_en.pdf.

63. Specifically, questions 14, 29, and 31. *Id.* at 9, 13.

64. *Id.* at 6-7, 13.

65. *See infra* Parts III, IV.

66. European Parliament Resolution 2011/2089 (INI) at no. 4; *see also* the Motion for a European Parliament Resolution, (2011/2089(INI)).

67. European Parliament Resolution 2011/2089 (INI) at no. 1.

68. *Id.* at no. 2.

69. *Id.*

70. *Id.* at no. 20.

in model as the only acceptable model, the loser-pays principle, and a ban on third-party funding.[71] It further considered that an ADR system should be backed up by an effective judicial redress system, in order to give incentive to parties to settle.[72]

In June 2013, the European Commission released its Communication Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States.[73] This is accompanied by a Communication entitled 'Towards a European Horizontal Framework for Collective Redress,' outlining background and policy pickets.[74] Additionally, the Commission adopted a proposal for actions for damages under national law for infringements of E.U. competition law.[75] However, this proposed directive does not oblige Member States to put collective redress mechanisms in place to enforce competition law.[76] The Recommendation aims "to facilitate access to justice, stop illegal practices and enable injured parties to obtain compensation . . . while ensuring appropriate procedural safeguards to avoid abusive litigation."[77] For this purpose, it recommends that all Member States have collective redress mechanisms in place "for both injunctive and compensatory relief, which respect the basic principles set out in this Recommendation."[78] These principles respect the different legal traditions of the Member States, however, they should ensure that the procedures are fair, equitable, timely and not prohibitively expensive. The explicit mention of the different legal traditions points to the difficult discussions that took place in view of the diverging national systems and the objections of some Member States against E.U. intervention.[79]

71. *Id.*

72. *Id.* at no. 25.

73. *Commission Recommendation of XXX on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law*, *supra* note 3, at 5.

74. *See generally id.*

75. *Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union*, at 2, COM (2013) 404 final (June 11, 2013).

76. *Id.* at 23.

77. *Commission Recommendation of XXX on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law*, *supra* note 3, at 5.

78. *Id.*

79. The Recommendation defines "collective redress" as: "(i) a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress); (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress)." A "mass harm situation" is very extensively defined as "a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons." *Id.*

The common principles relate to the standing to bring a representative action, admissibility of actions, information on a collective redress action, and the loser pays principle, as well as funding.[80] The Dutch collective settlement system by and large complies with these specific requirements.[81] As a result of the recent amendment of the WCAM, the rules on the representation have become stricter to secure representativeness.[82] The reimbursement of legal costs and (third party) funding is not an issue, since the responsible party (i.e., business) wishing to settle bears all the costs.[83] More important for the present purposes, the Recommendation states that "[t]he claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle)."[84] ADR and settlements are presented as an addition to judicial procedures.[85] The possible implications of these principles, as well as cross-border aspects will be elaborated in the following sub-section.

2. Possible Implications for the Dutch WCAM and Cross-Border Litigation

The Recommendation is a set of non-binding common principles.[86] It is unusual for the Commission to choose this particular type of instrument, but for the moment it is the only compromise that was feasible on this matter. A proposal for a binding regulation or directive would have needed the approval of the Council and the European Parliament, and it would have been unlikely that the required majority of Member States would approve a harmonised system of European collective redress.[87] However, the Recommendation is not merely a shot in the dark. "The Member States should implement the principles set out in this Recommendation in national collective redress systems by [26 July 2015] at the latest."[88] It further obliges Member States to collect reliable annual statistics

80. *Id.* at 4-17.

81. *But see supra* Part II.B.ii.

82. *See supra* Part II.A.

83. *See supra* Part II.A.

84. *Commission Recommendation of XXX on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law*, *supra* note 3, at 21.

85. *Id.* at 25-28.

86. *Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union*, *supra* note 75.

87. Such uniform procedures have in recent years been established for orders for payment, European Order for Payment Procedure, 2006 O.J. (L 399) at 1, and small claims, European Small Claims Procedure, 2007 O.J. (L 199) at 1; while a proposal for a European account preservation order is pending. *Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to Facilitate Cross-Border Debt Recovery in Civil & Commercial Matters*, at 1, COM (2011) 445 final (July 25, 2011).

88. *Commission Recommendation of XXX on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union*

on judicial and out-of-court collective redress.[89] Furthermore, it is to be expected that the Commission will have a stringent follow-up and that this Recommendation is only a first step in the further harmonization.[90] Additionally, the Recommendation may have a more indirect effect, particularly on the recognition of Dutch settlements in other Member States.[91]

The Dutch WCAM scheme is, however, not in compliance with the common principles of the Recommendation in all respects. The first important issue is that the Recommendation requires a collective action system.[92] Settlements are only encouraged to settle the dispute and to be verified by a court taking into consideration the interests and rights of all parties involved.[93] As discussed earlier, the Netherlands deliberately chose not to put a collection action for the compensation of damage in place when the WCAM was enacted.[94] However, in 2011 a motion was filed to extend the current scheme for collective injunctive relief filed by representative organisations, pursuant to Article 3:305a BW to compensation for victims.[95] To date, this initiative has not yet resulted in more concrete steps. In its response to the Recommendation of the Commission, the Dutch Government does not respond to this issue. Generally, the Dutch government expresses its doubts on whether the Recommendation fulfils the E.U. law requirements of proportionality and subsidiarity.[96] The Netherlands does not seem to have the immediate intention to establish a collective action to accord with the Recommendation.

The second possible incompatibility is that the Recommendation is clearly based on an opt-in principle, though it does not fully shut the door on opt-out mechanisms.[97] The abovementioned Recommendation No. 21 adds that any exception to the opt-in principles, by law or by court order, "should be duly justified by reasons of sound administration of justice."[98] In its response to the Recommendation, the Dutch Ministry stated that the Netherlands assumes that

Law, *supra* note 3, at 10.

89. *Id.*

90. This is a policy tactic that has also been pursued in the area of ADR, where in the 1990's Recommendations were released and that has eventually resulted in several binding instruments.

91. *See infra* Part IV.

92. *Commission Recommendation of XXX on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law*, *supra* note 3, at 7.

93. *Id.* at 8.

94. *See supra* notes 37-38 and accompanying text.

95. The so-called 'motie Dijksma', *see* Tweede Kamer der Generaal, Vergaderjaar, 33000-XIII, no. 14 at 2 (2011-12), *available at* https://zoek.officielebekendmakingen.nl/kst-33000-XIII-14.html.

96. Tweede Kamer der Staten-Generaal, Vergaderjaar, 22 113, no. 1663, Fiche 'Mededeling en Aanbeveling Europees Horizontaal Kader Voor Collectief Verhaal', no. 4, at 3 (2012-13) (stating that European initiatives have added value as far as they concern *cross-border cases* and that as far as the type of procedures and the structure of procedures are concerned Member States should be able to employ their own initiatives).

97. *See generally Communication from the Commission*, *supra* note 2.

98. *Id.* at 11.

the exclusivity of the opt-in principle does not apply to collective *settlements*.[99] It continues that in case the European Commission also intends to extend its application to settlements, the Netherlands has serious questions.[100] It argues that the associated risk of abuse does not extend to the Dutch settlement system; opt-out is effective for settlements and the WCAM system works satisfactorily for the settling parties.[101] Though these may be good arguments, it will likely not eliminate the European criticism of the Dutch WCAM.

In regards to the *cross-border* aspects, the Recommendation provides little guidance.[102] Recommendation No. 17 provides that Member States should ensure that where a dispute concerns parties from different Member States, a single collective action in a single forum is not prevented by national rules on admissibility or standing of foreign groups of claimants or representative entities.[103] The Dutch WCAM mechanism clearly involves foreign victims and the law does not prohibit foreign representatives.[104] According to Recommendation No. 18, any representative entity that has been officially designated in advance by a Member State to have standing should be permitted to seize the court in the Member State having jurisdiction.[105] This provision should ensure the recognition and legal standing of representative entities in other Member States.[106]

The Recommendation does not touch at all upon the questions of international jurisdiction, the recognition and enforcement or the applicable law.[107] In the accompanying Communication, the Commission remarks that many stakeholders have in fact asked for jurisdictional rules.[108] However, views differ as to the content of such rules.[109] The Commission considers that the rules of the

99. Tweede Kamer der Staten-Generaal, Vergaderjaar, 'Mededeling en Aanbeveling Europees Horizontaal Kader Voor Collectief Verhaal', *supra* note 96, at 4.

100. *See generally Commission Recommendation of XXX on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law, supra* note 3.

101. *Communication from the Commission*, *supra* note 2, at 11.

102. *See generally* Tweede Kamer der Staten-Generaal, Vergaderjaar, 'Mededeling en Aanbeveling Europees Horizontaal Kader Voor Collectief Verhaal', *supra* note 96.

103. *Commission Recommendation of XXX on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law*, *supra* note 3, at 7.

104. *See generally* HÉLÈNE VAN LITH, THE DUTCH COLLECTIVE SETTLEMENTS ACT AND PRIVATE INTERNATIONAL LAW (2010), *available at* http://ec.europa.eu/competition/consultations/2011_collective_redress/saw_annex_en.pdf.

105. *Commission Recommendation of XXX on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law*, *supra* note 3, at 7.

106. *See id.*

107. *See generally id.*

108. *Communication from the Commission*, *supra* note 2, at 13.

109. *See supra* Part II.B.ii.

Brussels I Regulation should be "fully exploited."[110] In view of the jurisdictional problems, as will be elaborated in the next section, this lack of further guidance is to be regretted.[111] As to issues of recognition and enforcement, the Commission remarks that a future report on the application of the Brussels I Regulation should include information on the effective enforcement of cross-border collective redress actions.[112] However, the subsequent report on the recently amended Brussels I Regulation is only to be expected by 2022.[113] In relation to applicable law, the Commission states that it is not persuaded that special conflict of law rules are required to avoid the application of multiple laws.[114] This means that the existing European private international law rules will continue to govern cross-border collective settlements under the Dutch WCAM. In that regard the Recommendation is a missed opportunity

III. DUTCH COLLECTIVE SETTLEMENTS AND INTERNATIONAL JURISDICTION

This section focuses on the question whether the Amsterdam Court of Appeal has international jurisdiction to assess the settlement and to declare it binding for it to have preclusive effect. International jurisdiction in Dutch and E.U. law should be distinguished from subject-matter jurisdiction under U.S. law,[115] as was at stake in the landmark case of *Morrison v. National Australian Bank*, where it was ruled that the Securities Exchange Act did not extend to investors residing outside the United States that purchased from a non-U.S. defendant on a foreign securities exchange.[116] From a European perspective this would be viewed as the scope of the domestic law, or an issue of choice of law. However, the result of not having international jurisdiction and not having subject-matter jurisdiction is in essence the same: those (foreign) parties are not welcome in court. It must be noted that the limited application of Dutch laws on financial services, for example the Act of Financial Supervision (*Wet Financieel Toezicht*) to financial institutions in the Netherlands, is not considered in the context of international jurisdiction or the admissibility of claims relating to private damages or compensation in a civil law suit.[117]

110. *Communication from the Commission*, *supra* note 2, at 13.

111. *See supra* Part II.B.ii.

112. *Communication from the Commission*, *supra* note 2, 13-14.

113. *See* Regulation 1215/2012, *supra* note 13, at art. 79.

114. *Communication from the Commission*, *supra* note 2, at 14.

115. *See generally* Morrison v. Nat'l Australian Bank, 130 S. Ct. 2869 (2010).

116. *See id*.

117. *See* WET FINANCIEEL TOEZICHT [WFT] (Act of Financial Supervision), §§ 1:2, 1:6.

A. The Applicable Rules and the Jurisdictional Problem

In the Netherlands, three jurisdictional systems are relevant for commercial cases and have been applied in WCAM cases. The primary system is that of the Brussels I Regulation.[118] Resulting from a recast, as of January 10, 2012, this Regulation will be replaced by an amended version, referred to as the Brussels I-bis Regulation.[119] This Regulation will not bring about important changes in relation to the jurisdiction rules relevant for securities collective redress.[120] The Brussels I Regulation applies generally in civil and commercial matters, in the situation where the defendant is domiciled in an E.U. Member State, or where the courts of an E.U. Member States have been chosen by way of a forum selection clause.[121] The concept of domicile is in relation to legal persons widely defined in Article 60 Brussels I, and is either the place of the statutory seat (in the United Kingdom and Ireland the registered seat), or the central administration, or the principal place of business.[122] For natural persons Article 59 refers to the national law of the Member States.[123] In particular cases, the parallel Lugano Convention applies, notably where defendants from Iceland, Norway or Switzerland are involved or where the courts of these countries have been chosen.[124] Hereafter, where reference to the Brussels I Regulation is made, the same will apply to the Lugano Convention.

Where neither the Brussels I Regulation nor the Lugano Convention applies, domestic international jurisdiction rules apply. The Dutch Code of Civil Procedure includes rules in Articles 1-14 that are largely based on the Brussels I system, though the domestic rules are generally less strict than the distributive E.U. rules.[125] A feature of the Dutch domestic rules relevant in the context of WCAM settlements is that it includes a specific rule for cases introduced by way of a petition, as opposed to cases that are brought to court by way of a writ of summons.[126] Petition cases under Dutch law are certain family cases, as well as specific requests in relation to *inter alia* corporations. Also the request to declare a WCAM settlement binding is a petition procedure, which means that Article 3 of the Dutch Code of Civil Procedure applies.[127] Contrary to the defendant-

118. Kramer, *supra* note 6, at 63-90.

119. *See* Regulation 1215/2012, *supra* note 13.

120. Kramer, *supra* note 6, at 63-90.

121. *See* Council Regulation 44/2001, arts. 1-2, 4, 2001 O.J. (L 12) 1.

122. *See generally id.* at art. 60.

123. *See generally id.* at art. 59.

124. *See generally* Regulation 1215/2012, *supra* note 13.

125. *See generally* Rv arts. 1-14 (Neth.).

126. *Id.* at art. 3.

127. *Id.* ("Where legal proceedings are to be initiated by a petition of the petitioner or his solicitor and it concerns other legal proceedings then those meant in Article 4 and 5, Dutch courts have jurisdiction:
a. if either the petitioner or, where there are more petitioners, one of them, or one of the interested parties mentioned in the petition has his domicile or habitual residence in the Netherlands;

orientated Brussels I and Lugano rules, this Dutch provision provides for the Dutch court if the petitioner is domiciled or has his habitual residence in the Netherlands.[128]

The application of the jurisdictional rules under these systems and particularly the European rules poses challenges. These rules are designed in view of typical litigation where one claimant and one defendant are involved and are not tailored to collective cross-border litigation.[129] The specific Dutch WCAM scheme makes the application of the existing jurisdictional rules even more complicated. In a classical collective action, the group of victims is to be regarded as the plaintiff whereas the responsible business is the defendant. However, in the situation of the WCAM an out-of-court settlement is reached between the responsible business and the representative organization(s) and/or association(s) on behalf of the interested parties (injured parties).[130] The question is on which basis the Amsterdam Court of Appeal has international jurisdiction to declare the settlement binding in the defendant-oriented European jurisdictional scheme.

B. The Brussels Scheme: Relevant Jurisdiction Rules for Securities Litigation

The general rule of the Brussels I Regulation is that the court of the Member State where the defendant is domiciled has jurisdiction, pursuant to Article 11.[131] The Court of Justice of the European Union ("CJEU") has repeatedly emphasized the primacy of this rule, making the other rules the exception.[132] This provision allows for the bundling of claims against a single defendant in a classical class action setting.[133] It does not require any further connection to this forum and thus also applies where a tort or contractual breach occurred in another country or where (all) plaintiffs reside in another country.[134] The CJEU outlawed the *forum non conveniens* exception under the Brussels I Regulation and specifically Article 2, even where the competing forum is a non-E.U. country.[135] In relation to the Dutch WCAM, the question is which party is to be regarded as the defendant.

b. if the petition relates to proceedings which are or have to be initiated by a writ of summons and which fall under the jurisdiction of the Dutch courts;

c. if the legal proceedings are otherwise sufficiently connected with the Dutch legal sphere.")

128. *Id.*

129. Horatia Muir Watt, *Brussels I and Aggregate Litigation or the Case for Redesigning the Common Judicial Area in Order to Respond to Changing Dynamics, Functions and Structures in Contemporary Adjudication and Litigation*, 30 IPRAX, at 112 (2010).

130. *See generally* Kaal & Painter, *supra* note 11, at 133, 165-85.

131. Council Regulation 44/2001, *supra* note 121, at art. 11.

132. *See generally* Case C-189/87, Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst and Co., 1988 E.C.R. 5565.

133. *See id.*

134. Council Regulation 44/2001, *supra* note 121, at 4-5.

135. Case C-281/02, Owusu v. Jackson, 2002 E.C.R. I-1383.

In the following sub-section, it will be discussed that the Dutch Court has held that the *interested parties* should be regarded as defendants, and thus Article 2 applies.[136] It is submitted that this approach is highly questionable.[137]

Moreover, Article 6(1) Brussels I Regulation provides an alternative jurisdiction rule regarding multiple defendants.[138] It only applies where "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."[139] The CJEU has construed this ground of jurisdiction narrowly since it deprives (other) defendants from litigating in their home forum.[140] This provision is not to be applied to the situation where multiple *plaintiffs* are involved.[141] However, since the Amsterdam Court of Appeal has held that the interested parties are to be regarded as defendants, Article 6(1) may be of use in the WCAM procedure.[142] This provision does not extend to all cases. It does not apply to cases where protective jurisdiction rules apply, namely consumer contracts, insurance contracts and employment contracts.[143] These protective rules will, however, generally be of little relevance in securities litigation. If in a case, the investor is to be qualified as a consumer within the meaning of Article 15 Brussels I, this would result in (exclusive) jurisdiction of the court where the consumer has his habitual residence.[144]

Alternative jurisdictional rules relating to the subject matter of the case are provided in Article 5 Brussels I Regulation.[145] Article 5(1) relates to contractual obligations and provides jurisdiction for the court where the contract is to be performed. Article 5(3) is concerned with tortious claims and refers to the court of the place where the harmful event occurred.[146] Generally, it may be expected that the tort provision will have the most potential for the basis for jurisdiction in collective redress cases, and would to a certain extent enable parties to concentrate the case in one single forum.[147] This is particularly so since the CJEU has interpreted this rule in its famous *Rhinewater* case as giving the claimant a choice between the place where the harmful event giving rise to the damage

136. *See infra* Part III.C.i.

137. *See infra* Part III.C.i.

138. Council Regulation 44/2001, *supra* note 121, at 4-5.

139. *Id.*

140. *See* Case C-189/87, Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst and Co., 1988 E.C.R. 5565 (a landmark case).

141. *See* Eva Lein, *Cross-Border Collective Redress and Jurisdiction under Brussels I*, *in* EXTRATERRITORIALITY AND COLLECTIVE REDRESS 129, 138 (Duncan Fairgrieve & Eva Lein eds., 2012).

142. *Id.* at 139.

143. Council Regulation 44/2001, *supra* note 121, at 5-7.

144. *Id.* at 7.

145. *Id.* at 4.

146. *Id.*

147. *See id.*

occurred and the place where the damage was sustained.[148] However, as will be discussed more extensively in the following sub-section, in Dutch practice, it is the contract-jurisdiction included in Article 5(1) that has been used to vest jurisdiction.[149]

The last head of jurisdiction to be considered is the choice of forum as laid down in Article 23 Brussels I Regulation. It provides liberal rules to select the court of a Member State.[150] However, in relation to the Dutch WCAM, it is doubtful whether the opt-out scheme would suffice to fulfill the requirement of true consent.[151] In legal literature, it has been argued with reference to the *Gerling* case[152] of the CJEU that interested parties in the WCAM scheme are likely to be bound as non-party beneficiaries on whose behalf the choice of court agreement has been breached.[153] However, this case concerned the situation where the beneficiary actively invoked the choice of forum agreement to bring proceedings in another court as an alternative to the otherwise applicable rules of jurisdiction.[154] Other case law seems to be more restrictive in relation to third parties, particularly where weaker parties (e.g., consumers, insured parties/beneficiaries) are concerned.[155] Additionally, the general E.U. ban on opt-out schemes seems not to favor the binding force of a choice of court in relation to an interested party that did not explicitly opt out. In Dutch practice, the inclusion of a choice of court clause in the settlement agreement is not (yet) standard.

As a matter restricting jurisdiction, the rules on parallel proceedings pose challenges. Articles 27-30 Brussels I provide a rather stringent regime on a 'first come, first serve basis.'[156] The issue could arise where litigants, groups of

148. Case 21/76, Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A., 1976 E.C.R. 1735.

149. *See infra* Part III.C.

150. *See* Council Regulation 44/2001, *supra* note 121, at 8.

151. *See*, *e.g.*, Lein, *supra* note 141, at 138; M.F. Poot, *Internationale Afwikkeling van Massaschade met de Wet Collectieve Afwikkeling Massaschade*, *in* GESCHRIFTEN VANWEGE DE VERENIGING CORPORATE LITIGATION 2005-2006, 179 (M. Holtzer, et al. eds., 2006).

152. Case 201/82, Gerling Konzern Speziale Kreditversicherungs-AG v. Amministrazione del Tesoro dello Stato, 1983 E.C.R. 2503.

153. *See* Astrid Stadler, *Die Grenzüberschreitende Durchsetzbarkeit von Sammelklagen*, *in* AUF DEM WEG ZU EINER EUROPÄISCHEN SAMMELKLAGE? 159 (Matthias Casper, et al. eds., 2009) (discussing enforceability of class action agreements though not specifically in relation to the WCAM); VAN LITH, *supra* note 104.

154. *See generally* Gerling Konzern Speziale Kreditversicherungs-AG, E.C.R. 2503.

155. *See, e.g.*, Case C-112/03, Société financière et industrielle du Peloux v. Axa Belgium, 2005 E.C.R. I-3707. This case was, however, distinct from the *Gerling* case, *supra* note 152. It concerned the exception to the prohibition of choice of forum clauses in (consumer) insurance contracts, where the choice of court is in favor of the court of the common residence of the parties. The Court ruled that a choice of court cannot be invoked against a third-party beneficiary of the (group) insurance contract, where it would undermine the objective of protection of the weaker party (which was the case in this situation, since the beneficiary was domiciled in another Member State).

156. For extensive discussion on this matter, *see generally* Justine N. Stefanelli, *Parallel Litigation and Cross-Border Collective Actions Under the Brussels I Framework: Lessons From Abroad*, *in*

litigants, or interested parties are (potentially) involved in collective actions or settlements pursued in different Member States, or where an individual litigant starts proceedings in another Member State. To apply the rules on *lis pendens*, Article 27 requires that the claim concerns the *same cause of action* and the *same parties*.[157] In the *Tatry* case, the CJEU ruled that both the object and the cause of action must be common in the parallel proceedings.[158] The cause of the WCAM obviously is the mass tort. However, in view of the specific object of the WCAM procedure, i.e., to obtain a binding declaration of the settlement, it is questionable whether a situation of *lis pendens* would occur if the competing procedure is a collective *action* for damages.[159] Additionally, it is doubtful whether the requirement that it concerns the same parties is fulfilled in the specific situation of opt-out settlements under the Dutch WCAM where the interested parties as such are not litigating parties.[160] The issue of parallel proceedings has not come up in Dutch practice, and it will not be further discussed.

C. Vesting Jurisdiction in the Shell *and* Converium *Cases*

Of the six settlements that have been declared binding as to date, the question of international jurisdiction was addressed in only two cases, namely the *Shell* case and the *Converium* case.[161] Both concerned securities cases where the main issue was misleading information provided to the investors.[162] In another case, the securities lease case *Dexia*, there were 4,000 Belgian interested parties involved, but these were excluded from the settlement in view of particular mandatory rules in force in Belgium.[163] Clear cross-border aspects were also evident in two other cases.[164] In the *Vedior* case, approximately 55% of the interested parties were domiciled abroad and in the *Vie d'Or* case a small minority of the interested parties was domiciled outside the Netherlands (approximately 5%).[165] However, in these cases, the Amsterdam Court of Appeal did not deliberate on the question whether it had international jurisdiction.[166] This is probably because all the

EXTRATERRITORIALITY AND COLLECTIVE REDRESS 143, 143-70 (Duncan Fairgrieve & Eva Lein eds., 2012).

157. Council Regulation 44/2001, *supra* note 121, at 9.

158. Case C-406/92, Tatry v. Maciej Rataj, 1994 E.C.R. I-5439.

159. VAN LITH, *supra* note 104, at 68; Stefanelli, *supra* note 156, at 146 (referring to the Drouat case, Case C-351/96, Drouot Assurances SA v. Consolidated Metallurgical Industries (CMI industrial sites), 1998 E.C.R. I-3075). In this case the Court ruled that parties can be considered as the same if their interests are indissociable. This case concerned a subrogated insurer using this claim as a result of compensating the insured party. It is, however, not likely that this situation can be compared to parties in opt-out collective settlements.

160. VAN LITH, *supra* note 104, at 68-69.

161. *See infra* Parts III.C.i-ii.

162. *See infra* Parts III.C.i-ii.

163. *See generally* Shell Petroleum NV, *supra* note 7.

164. *See generally* Vie D'Or, *supra* note 39.

165. *Id.* at 43.

166. *Id.*

participating parties, notably the (allegedly) responsible parties and the representatives, were Dutch.[167]

1. The Shell *Settlement*

The *Shell* case concerned shareholders, residing all over the world, who had suffered financial losses caused by a sudden drop in the price of Shell shares.[168] This was allegedly[169] caused by misleading information by Shell on its oil and gas reserves. The settlement was concluded on 11 April 2007 between the *ad hoc* Shell Reserves Compensation Foundation, the Dutch Association for Shareholders (*Vereniging voor Effectenbezitters,* "VEB"), two Dutch pension funds, on behalf of the injured parties, and the allegedly responsible Shell Group (Shell Petroleum NV and Shell Transport and Trading Company Ltd).[170] The settlement excluded U.S. shareholders, since several class actions were pending in the United States.[171] In the same year, a New Jersey court refused to take jurisdiction over non-U.S. shareholders and denied these shareholders their claim since Shell did not engage sufficient conduct in the United States for a U.S. court to have subject-matter jurisdiction.[172] The Dutch settlement is thus complementary to the US action. The Amsterdam Court by turn explicitly considered the US class action and judgment.[173] On 29 May 2001, the Amsterdam Court of Appeal declared the settlement binding on non US-parties.[174]

The Amsterdam Court of Appeal considered that in relation to foreign interested parties, jurisdiction can be vested on the basis of Article 3(a) of the Dutch Code of Civil Procedure, since five of the six requesting parties were domiciled in the Netherlands.[175] As far as the interested parties who were domiciled in an E.U. or EFTA Member State, the court considered that the Brussels I Regulation or Lugano Convention was applicable, since it concerns a civil and commercial matter.[176] It is clear that the Court regards the interested parties as the defendant, but it did not provide further reasoning on this point.[177] The court continued that in relation to the Dutch interested parties/defendants, Article 2 Brussels I Regulation and Lugano Convention provides a basis for

167. *See* VAN LITH, *supra* note 104, at 20.

168. *See generally* Shell Petroleum NV, *supra* note 7.

169. By concluding the settlement the company does not admit liability.

170. VAN LITH, *supra* note 104, at 20.

171. *Id.*

172. *In re* Royal Dutch Shell Transport Securities Litigation, 522 F.Supp.2d 712 (D.N.J. 2007).

173. Shell Petroleum NV*, supra* note 7.

174. *Id.*

175. *See supra* note 127 for the contents of this Dutch provision.

176. *See generally* Shell Petroleum NV, *supra* note 7.

177. *See generally id.*

jurisdiction.[178] These concerned at least one Dutch bank (the Dexia bank) and 751 other (legal) persons.[179]

In relation to the non-Dutch interested parties/defendants, the Amsterdam Court of Appeal used Article 6(1) Brussels I to vest jurisdiction.[180] The court rather extensively deliberated on the requirement that the claims are so closely connected that hearing them together to avoid the risk of irreconcilable judgments is expedient. It considered that if claims for a binding declaration or similar (declaratory) claims would be brought in different Member States, there would be a great risk that the cases would be decided differently. The court further considered that the interests served by Article 6(1) cannot be undermined by the fact that the binding declaration might change the applicable law, in view of a choice of law clause for Dutch law included in the settlement. Neither does the fact that if the English courts would recognize the judgment; interested parties that did not opt-out can no longer seize the English courts. These considerations relate to the fact that one of the alleged responsible parties was the English company Shell Transport and Trading Company Ltd. who had dealt with groups of English interested parties. It considered that though the Dutch and English Shell company were formally separate legal entities, they had the same course and conducted similar actions and maintained single consolidated group annual accounts.

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178. *See generally id.*

179. *See generally id.*

180. *See generally id.*

181. *Id.* at 5.21.

182. Shell Petroleum NV, *supra* note 7, at 5.23, 5.24.

183. *Id.* at 5.23.

184. *Id.* at 5.22.

had the same course and conducted similar actions and maintained single consolidated group annual accounts.[185]

2. *The* Converium *Settlement*

The second case is the *Converium* case, which in view of the adopted wide jurisdictional reach has been extensively debated and criticized, both in Dutch doctrine and abroad.[186] In this case, the responsible parties were a Swiss reinsurance company, Converium Holding AG (currently known as SCOR Holding AG) and the Swiss company Zurich Financial Service Ltd. that sold shares for Converium.[187] It sold shares of stocks listed on the SWX Swiss Exchange ("SWX") and on the New York Stock Exchange ("NYSE").[188] Investors suffered losses as a result of alleged misstatements by these companies, causing the share prices to drop.[189] Class actions were brought in the United States, which were consolidated in the Southern District Court of New York.[190] In 2008, that court declined subject-matter jurisdiction in relation to foreign class members buying shares on the SWX.[191] Two later U.S. settlements were also confined to U.S. residents and non-U.S. residents buying on the NYSE.[192] On 8 July 2010, the *Converium* settlement in the Netherlands was concluded for non-U.S. shareholders that had bought shares on the SWX.[193] The *ad hoc* Converium Foundation, incorporated in the Netherlands and the Dutch Shareholders association (VEB) were the representatives in the case.[194] Of the approximately 12,000 interested parties, 8,500 were Swiss residents and 1,500 U.K. residents.[195] Only 3% of the interested parties were resident in the Netherlands.[196] In an interim decision of 12 November 2010, the Amsterdam Court provisionally accepted jurisdiction, and it upheld this in its final decision of 17 January 2012, declaring the settlements binding.[197]

The Amsterdam Court provided an extensive reasoning to justify its international jurisdiction.[198] Before going into the details of the applicable jurisdiction rules, the court explicated that a request to declare the settlement

185. *Id.* at 5.26.
186. Kramer, *supra* note 6, at 79.
187. Converium, *supra* note 8.
188. *Id.* at 2.1.
189. Kaal & Painter, *supra* note 11, at 177.
190. Converium, *supra* note 8, at 5.2.1.
191. *Id.* at 2.2.
192. *Id.*
193. *Id.* at 1.
194. *Id.* at 10.4.
195. Kramer, *supra* note 6, at 63, 78.
196. *Id.* at 78.
197. Converium, *supra* note 8, at 2.14.
198. Kramer, *supra* note 6, at 79.

binding under the WCAM scheme has two main purposes. The first one is to secure the binding force of the obligation to pay compensation to the victims.[199] The second aim is to ensure that the interested parties (beneficiaries) could no longer initiate proceedings against the allegedly liable parties.[200] The Court underlines that the settlement is complementary to actions and settlements in the United States, from which non-U.S. parties and parties that did not buy shares on the NYSE but on the SWX were excluded.[201] In view of the restriction of the right of access to justice as a result of binding declaration and the right to be heard—as guaranteed by Article 6 of the European Convention on Human Rights ("ECHR"), the Dutch Constitution and the Rv (Dutch Civil Code of Procedure)—the Court states that it is essential that the interested parties can express their views on the question of jurisdiction.[202] In line with the *Shell* case, the Amsterdam Court of Appeal bases its jurisdiction on the of the Brussels I Regulation (in relation to parties domiciled in the European Union), on the Lugano Convention (in relation to interested parties domiciled in Switzerland), as well as Dutch internal jurisdiction rules (in relation to interested parties that were domiciled outside the European Union or Lugano States)."[203]

As in the *Shell* case, it alleged that the interested parties are to be regarded as 'defendants' and this provided jurisdiction for the Dutch Court in relation to the approximately 200 Dutch (known) interested parties.[204] This also created jurisdiction for the other interested parties pursuant to Article 6(1) Brussels I.[205] The Amsterdam Court of Appeal "considered that it concerned a collection of claims whereby the defendants would—once the settlement was declared binding—no longer be entitled to bring proceedings in any other court."[206] As in the *Shell* case, the court reasoned that bringing the claim in different Member States would result in different and thus irreconcilable judgments.[207] The close connection and the sound administration of justice justify adopting jurisdiction over the other approximately 11,800 interested parties as well, according to the Court.[208]

Probably realizing that these bases were rather weak in view of the very small number of Dutch interested parties, the Court additionally turned to Article 5(1) Brussels I concerning contractual claims to found jurisdictions.[209] For this

199. Converium, *supra* note 8, at 2.8.
200. *Id.* at 2.10.
201. *Id.* at 2.5.
202. *Id.* at 2.13; Kramer, *supra* note 6, at 8.
203. Kramer, *supra* note 6, at 79.
204. *Id.* at 80.
205. Converium, *supra* note 8, at 2.6.
206. *Id.*
207. *Id.*
208. *Id.* at 2.11.
209. Kramer, *supra* note 6, at 80.

purpose, it did not consider the nature of the underlying claim (which was tortious), but focused on the settlement agreement as the basis of the claim.[210] The Court referred by analogy to a CJEU ruling on Article 5(3) concerning tortious claims, in which it was decided that this provision could also be used as a jurisdictional basis if it concerns a preventive action.[211] It also mentions another CJEU case where the court ruled that Article 5(1) could also be invoked when the formation of the contract was contested.[212] It argued that the place of performance of the obligation to pay compensation was in the Netherlands, since the representative organizations were seated in the Netherlands.[213] The Court concluded that on each of the bases mentioned independently, the Dutch court had international jurisdiction.[214]

As in the *Shell* case, in relation to interested parties/defendants that are not domiciled in the European Union or the EFTA States, the Amsterdam Court used Article 3 of the Dutch Code of Civil Procedure to establish jurisdiction.[215] It concluded that in relation to these parties it has jurisdiction on the basis of Article 3(a) since two of the requesting parties (the Converium foundation and the Dutch shareholders association) were domiciled in the Netherlands.[216] Additionally, it used Article 3(c) to establish jurisdiction.[217] This article explains that the Dutch court has international jurisdiction if the legal proceedings are otherwise sufficiently connected with the Dutch legal sphere.[218] This is the case, according to the Amsterdam Court of Appeal, since the performance of the obligations arising out of the settlement agreement—payment of damages—was to be carried out in the Netherlands.[219] This approach is in line with the purpose of the WCAM scheme: to declare the settlement binding so that is obtains preclusive effect upon all interested parties that did not opt out.[220] However, the link with the Netherlands is extremely weak and the reasoning somewhat artificial.[221] It remains to be seen whether this would stand the jurisdictional review in case the responsible party seeks recognition to invoke *res iudicata* against a party initiating litigation in another country.[222]

210. Converium, *supra* note 8, at 2.8.

211. Case C-167/00, Verein für Konsumenteninformation v. Karl Heinz Henkel, 2002 E.C.R. I-8111, I-8124, I-8142.

212. Case 38/81, Effer SpA v. Hans-Joachim Kantner, 1982 E.C.R. 825, 832.

213. Converium, *supra* note 8, at 2.9.

214. *Id.* at 2.14.

215. *See supra* note 125 for the text of this Dutch provision.

216. Converium, *supra* note 8, at 2.12.

217. *Id.*

218. *See supra* note 127 for the text of this Dutch provision.

219. Converium, *supra* note 8, at 2.12.

220. VAN LITH, *supra* note 104, at 17.

221. *See id.* at 58.

222. *See infra* Part IV.C.

D. Problematic Issues and Further Criticism

The reasoning of the Amsterdam Court of Appeal has two primary problems. The first one is the positioning of the interested parties or beneficiaries ("*belanghebbenden*") as defendants.[223] It is questionable whether the concept of defendant or person to be sued can be construed so as to cover the interested parties in the WCAM scheme.[224] The case law of the CJEU does not give guidance on this point.[225] Views in doctrine differ, though Dutch scholars and practitioners generally seem to support the assessment of the Amsterdam Court.[226] The reasoning is that these parties are notified of the request to declare the settlement binding, they can raise objections, and have the right to file a petition. In addition, the parties' rights are protected by procedural guarantees and the opt-out right, and they are regarded as potential defendants or respondents.[227] From the perspective of the purpose of the WCAM, to get the settlement agreement declared binding, this seems reasonable.[228] However, from an outsider's or European perspective to regard parties that are *au fond* beneficiaries of the settlement agreement and from a litigation perspective, potential claimants as defendants might very well not be acceptable.[229] At the same time, it is clear that the Brussels I Regulation does not seem to offer a much better alternative to vest jurisdiction, and Article 2 is the main rule that should accommodate all types of cases.[230] In the WCAM scheme, surely the allegedly responsible party is also not intended to be regarded as a defendant.[231]

The second problematic issue is the application of the international jurisdiction rules relating to the subject-matter, as included in Article 5 Brussels I Regulation.[232] In the *Converium* case, the Court used Article 5(1) on contract jurisdiction as a basis, regarding the settlement agreement as a contract *sui generis*.[233] The CJEU has ruled that the term "contract" has to be interpreted

223. *See* Kramer, *supra* note 6, at 80.

224. This qualification is also remarkable in view of a ruling of the Dutch Supreme Court in a corporate petition case, where it explicitly disregarded the domicile of the interested parties for the purpose of the Brussels I jurisdiction rules. S*ee* HR 25 juni 2010, NJ 2010, 370 m.nt. (Neth.).

225. VAN LITH, *supra* note 104, at 38.

226. *See* Maurice V. Polak, *Ledereen en Overal? Internationaal Privaatrecht Rond Massaclaims*, 81 NJB 2346, 2349 (2006); Ruud Hermans & Jan de Bie Leuveling Tjeenk, *International Class Action Settlements in the Netherlands Since* Converium, *in* INTERNATIONAL COMPARATIVE LEGAL GUIDES, CLASS AND GROUP ACTIONS 2014, no. 11 (2013), *available at* http://www.mondaq.com/x/270462/international+trade+investment/International+Class+Action+Settlements+In+The+Netherlands+Since+Converium. Contra VAN LITH, supra note 104, at 42-45.

227. VAN LITH, *supra* note 104, at 38.

228. Kramer, *supra* note 6, at 88.

229. *Id.*

230. VAN LITH, *supra* note 104, at 39.

231. *Id.* at 38-39.

232. *Id.* at 42.

233. *See* Converium, *supra* note 8; *See* VAN LITH, *supra* note 104, at 43.

autonomously, meaning "obligations entered into by free will."[234] In general, the CJEU uses a restrictive interpretation.[235] For example, pre-contractual liability is not to be regarded as a contractual matter.[236] The settlement agreement only becomes a binding contract towards the interested parties, once it has been declared binding, and it may be doubted whether this head of jurisdiction can be used.[237]

The wide jurisdictional reach coupled with the general attractiveness of the Dutch WCAM scheme has resulted in "class settlement tourism" to the Netherlands.[238] It is highly controversial whether the way in which the Amsterdam Court of Appeal establishes jurisdiction is acceptable.[239] Additionally, Dutch practice has resulted in forum shopping, as evidenced in the *Converium* case, a phenomenon that contradicts the European civil justice system.[240] The wide jurisdictional reach of the Amsterdam court has been criticized in the Netherlands and in other countries.[241] For example, a Latin-American commentator stated "Amsterdam is aggressively vying to establish itself as a hub for worldwide class action settlements."[242] A Belgian commentator also criticized the way the Dutch court underpinned its jurisdiction, but was more mild in his opinion to state that "I prefer to believe that the Amsterdam judges worked on the basis of sincere belief that their solution was the best possible one in the given circumstances."[243]

234. Case 34/82, Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging, 1983 E.C.R. 987; Case C-26/91, Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA, 1992 E.C.R I-3967; *see also* VAN LITH, *supra* note 104, at 43-44.

235. VAN LITH, *supra* note 104, at 44.

236. Case C-334/00, Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS), 2002 E.C.R. I-7357.

237. In a Dutch commentary, it has also been argued that the location of the obligation in question within the meaning of Art. 5(1) has to be decided in accordance with the *lex causae* and that the applicable Dutch law (Art. 6:116, BW) refers to the place of creditors; in other words the domicile of the *interested parties* and not that of the Converium Foundation. *See* VAN LITH, *supra* note 104, at 52-53. However, according to CJEU Tessili, Case 12/76, Tessili v. Dunlop, 1976 E.C.R. 1473, 1481, parties can also stipulate the place of performance. The *ad hoc* establishment of the party bearing the obligation to pay in the Netherlands and further stipulations on payment, may be regarded as a choice for the place of performance. *See* Case 12/76, Tessili v. Dunlop, 1976 E.C.R. 1473; Converium, *supra* note 8.

238. Jeroen Kortmann, *Case Note*: Converium, 46 JOR 448, 462 (2011).

239. Kramer, *supra* note 6, at 80.

240. Resolution on Towards a Coherent European Approach to Collective Redress, EUR. PARL. DOC. P7_TA0021, no. 26 (2012). Specifically in relation to collective redress, the European Parliament in its Resolution of 2012, no. 26, points out that a rush to the court (forum shopping) should be prevented. *Id. See also* the summary of the public consultation on collective redress. Hess et al., *supra* note 62, at 13.

241. Kramer, *supra* note 6, at 80. For a critical review in the Netherlands, *see* VAN LITH, *supra* note 104, at 23.

242. Gidi, *supra* note 14, at 953.

243. Benoit Allemeersch, *Transnational Class Settlements: Lessons from "Converium"*, *in* COLLECTIVE ACTIONS: ENHANCING ACCESS TO JUSTICE AND RECONCILING MULTILAYER INTERESTS? (Stefan Wrbka, Steven Van Uytsel, Mathias Siems (eds), Cambridge University Press 2012) 364, 384.

The way the Amsterdam Court applied the European jurisdiction rules is not entirely convincing, but the Brussels I rules are simply not well suited to accommodate the WCAM scheme.[244] The application of both Article 2 and Article 6(1) is as a result problematic, whereas the contract and tort jurisdiction under Article 5 also pose difficulties. As was mentioned earlier, the opt-out nature of the WCAM scheme also casts doubt on the validity of an eventual choice of court rule under Article 23 Brussels I Regulation.[245] Though including such a choice of court rule in the settlement agreement might be wise, it is not clear whether choice of court would stand the test if such a case would end in the CJEU. The Dutch Court should submit preliminary questions to the CJEU to resolve these matters.[246] This inevitably involves the risk that the Dutch WCAM practice will be restricted.[247]

Apart from the European intricacies, it is submitted that the Dutch court has stretched its jurisdiction to the limits and perhaps even beyond, in comparison with the United States.[248] It is advisable to adopt a more reticent approach to the jurisdictional question in future cases.[249] In this regard, it is noteworthy that in June 2013, the Dutch Minister of Security and Justice reflected on the matter in response to a question of Members of Parliament.[250] The question related to concerns on the wide territorial reach of the Amsterdam Court of Appeal in the *Converium* case.[251] The Minister replied that the Court had applied the existing jurisdiction rules, and that it is primarily a European matter.[252] However, the Minister promised to critically follow the developments and to review the situation in two years.[253] The Minister further stressed that there has only been one case where there were limited connections with the Netherlands, and that none of the (interested) parties concerned raised objections against the adoption of jurisdiction by the Amsterdam Court of Appeal.[254]

Meanwhile, it is not to be expected that the European legislature will further regulate the matter of international jurisdiction in the near future.[255] In the recast of Brussels I, collective redress and the necessity to include special rules was discussed,[256] but not followed-up. As discussed, the Commission's

244. Kramer, *supra* note 6, at 80.

245. *See supra* Part III.B.

246. Kramer, *supra* note 6, at 81.

247. *See id.*

248. *See* VAN LITH, *supra* note 104, at 50-54.

249. Kramer, *supra* note 6, at 81.

250. Eerste Kamer der Staten-Generaal, Vergaderjaar 2012-2013, 33126 no. C (Memorie van Antwoord), 1-2.

251. *Id.*

252. *Id.*

253. *Id.* at 2.

254. *Id.*

255. Kramer, *supra* note 6, at 64.

256. *See Commission Green Paper on Review of Council Regulation (EC) No. 44/2001 on Jurisdiction*

Communication on collection redress refers to the Brussels I Regulation that should be "fully exploited," and the Commission refrains from further regulating the matter.[257] Solutions proposed in the legal literature concentrate on creating a single forum as much as possible.[258] This could be the place where the greater part of the damage occurred,[259] the place where the greater part of the injured parties (in the WCAM the interested parties/beneficiaries) are domiciled,[260] or the debtor's home forum, respectively the centre of the debtor's main interest ("COMI").[261] The court of the place where most of the injured parties are situated would be preferable for the purpose of investor's protection and would be most in line with the Brussels I scheme.[262] However, this does not provide easy solutions where the groups of injured parties are more-or-less equally spread and are domiciled in many different countries.[263] It is submitted that for the purpose of legal certainty, simplicity, and to facilitate a settlement and damage scheduling, the COMI is to be preferred.[264] However, this would imply that foreign allegedly responsible parties, such as Converium, are no longer admitted to the WCAM scheme.[265]

IV. RECOGNITION AND ENFORCEMENT OF DUTCH COLLECTIVE SETTLEMENTS

A. Relevance of Recognition and Enforcement and Applicable Rules

The question on the recognition and enforcement of Dutch WCAM settlements, similarly to U.S. class settlements, is often viewed from a fundamental perspective.[266] It is sometimes argued that the specific features, particularly the opt-out nature, would be irreconcilable with central values

and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, at 11, COM (2009) 175 final (Apr. 21, 2009) ("it should be reflected whether specific jurisdiction rules are necessary for collective actions").

257. *See supra* Part II.B.ii.

258. VAN LITH, *supra* note 104, at 58-61; Lein, *supra* note 141, at 141-42; *see also Communication from the Commission*, *supra* note 2, at 13.

259. This could be achieved by adapting Article 5(3) of the Brussels I Regulation; *see* VAN LITH, *supra* note 104, at 42.

260. *See Commission Green Paper on Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, *supra* note 256, at 13.

261. This concept is also used in Article 3 of the EU Insolvency Regulation. Council Regulation 1346/2000, 2000 O.J. (L 160) 1 (EC). Additionally, it has been suggested, to create a special judicial panel for cross-border collective actions within the CJEU. *See* Hess et al., *supra* note 62, at 13; *See Communication from the Commission*, supra note 2, at 13.

262. *Communication from the Commission*, *supra* note 2, at 13

263. VAN LITH, *supra* note 104, at 43.

264. *Id.* at 48.

265. Kramer, *supra* note 6, at 79.

266. *Id.* at 64-65.

regarding a fair trial or due process.[267] In a practical sense, the question can arise when an interested party seeks recognition or enforcement of the settlement in another Member State, or outside the European Union, in another country.[268] This will occur only in the unlikely event that the responsible party does not live up to its obligations under the settlement.[269] More important is the situation in which a victim initiates an individual action against the responsible party in another Member State, claiming that he is not bound by the settlement.[270] This raises the question concerning recognition of the settlement and preclusive effect of a court approval of such a settlement.[271]

Within the European Union, the Brussels I Regulation is applicable as between the Member States.[272] In the European Union, the free movement of judgments is of particular importance.[273] It is sometimes regarded as a fifth, besides the old four freedoms that aim to support the proper functioning of the internal market.[274] The full recognition and enforcement of both judgments and extrajudicial decisions, based upon the premise of mutual trust, have gained even more prominence, and judicial cooperation was intensified pursuant to the Treaty of Amsterdam in 1997, to establish a European judicial area.[275] This has also resulted in the policy to gradually abolish intermediate measures (i.e., *exequatur*) for the enforcement of judgments in another Member State.[276] Exequatur will also be abolished in the Brussels I Regulation as a result of the recast.[277] The Brussels I-bis Regulation will also amend the rules on the enforcement of settlements.[278] The current Brussels I Regulation contains particular grounds of refusal that may pose challenges to the recognition and enforcement of Dutch mass settlement.[279] The Brussels I-bis Regulation will retain the existing grounds of refusal at the stage of enforcement.[280]

267. Hess, et al., *supra* note 62, at 8.

268. VAN LITH, *supra* note 104, at 85.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 26.

273. X.E. Kramer, *Cross-Border Enforcement and the Brussels I-bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights*, 60 NETHERLANDS INT'L L REV. 343, 347 (2013).

274. The other freedoms being the freedom of persons, capital, goods and services. Kramer, *supra* note 6, at 65.

275. *See id.* at 65-67.

276. Kramer, *supra* note 273, at 345.

277. *See supra* Part III.A.; *see also* Kramer, *supra* note 273, at 345.

278. Kramer, *supra* note 273, at 355.

279. *Id.*

280. *Id.* at 356.

B. The Brussels I Scheme on Recognition and Enforcement[281]

The Brussels I Regulation does not only fall short in accommodating jurisdiction in collective redress, but the rules on the recognition and enforcement are not well suited either.[282] Apart from the remark in the Recommendation that the Brussels I Regulation applies, the E.U. policy maker did not provide further guidance.[283] It is noteworthy that in the Commission proposal on the recast of Brussels I, judgments in collective redress were excluded from the abolition of exequatur.[284] The Commission considered that the stakeholders expressed concerns in relation to the enforcement of collective redress judgments and that the procedures vary widely per Member State in relation to the scope of those procedures, which victims these cover, the (public) authorities involved, and whether they proceed from an opt-in or opt-out model.[285] Mutual trust in this matter is apparently lacking.[286] In the final version new Regulation (Brussels I-bis), this exclusion is deleted because the grounds of refusal have been retained as a safety valve to revoke enforcement.[287]

1. Recognition and Enforcement of Court Judgments

Regarding the judicial decision to declare the settlement binding under the WCAM scheme, the question is whether it is a "judgment" within the meaning of Article 32 of the Brussels I Regulation. Doctrinally, views differ on this matter.[288] A leading ruling of the CJEU is *Solo Kleinmotoren*.[289] In this case it stated that in order to be a "judgment" for the purposes of the Convention, the decision must

281. This section is largely based on Kramer, *supra* note 6, at 82-89 with the approval of the editors and the publisher.

282. *See inter alia* Watt, *supra* note 129, at 111; *see inter alia* Burkard Hess, *Cross-Border Litigation and the Regulation Brussels I*, IPRAX 2010, at 115.

283. *See supra* Part II.B.ii.

284. *Proposal for a Regulation of the European Parliament and of the Council on the Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)*, at 5, COM (2010) 748 final (Dec. 14, 2010).

285. *Id.* at 7.

286. *Id.*

287. Kramer, *supra* note 273, at 356.

288. Kramer, *supra* note 6, at 83; Polak, *supra* note 226, at 2353; Arons & Van Boom, *supra* note 17, at 880-81; Astrid Stadler, *Grenzüberschreitender Kollektiver Rechtsschutz in Europa*, 2009 JURISTENZEITUNG 121, 126; VAN LITH, *supra* note 104, at 108-11; Axel Halfmeier, *Recognition of a WCAM Settlement in Germany*, 2012 NEDERLANDS INT'L PRIVAATRECHT 176, 178-80. Negative: Watt, *supra* note 129, at 114 (in relation to class action settlements in general). In doubt: Burkhard Hess, *A Coherent Approach to European Collective Redress*, *in* EXTRATERRITORIALITY AND COLLECTIVE REDRESS 107, 114 (Duncan Fairgrieve & Eva Lein eds., 2012); PATRICK WAUTELET, BRUSSELS I REGULATION, comments, at art. 32, no. 39 (Ulrich Magnus & Peter Mankowski eds., 2011). Bariatti, *supra* note 14, focuses only on the question of whether the settlement is to be regarded as a court settlement within the meaning of article 58 Brussels I, and seems not even to consider it a possibility that the declaration qualifies as a judgment.

289. Case C-414/92, Solo Kleinmotoren v. Boch, 1994 E.C.R. I-2237.

emanate from a judicial body of a Contracting State, deciding on its own authority, on the issues between the parties.[290] That condition is not fulfilled in the case of a settlement, even if it was reached in a court of a Contracting State and brought legal proceedings to an end.[291] Settlements in court are essentially contractual in that their terms depend first and foremost on the parties' intention.[292]

As for the Amsterdam Court of Appeal, it can be disputed that it acts *ex officio*.[293] It is designated by law to decide on the declaration, but the settlement as such is reached before the declaration is requested.[294] Nevertheless, there is room to regard the settlement approval as a judgment.[295] The granting of the declaration is not just a simple 'yes or no' upon formalities. The Court has to review a whole range of issues, including whether the requirements regarding representativeness have been met, and whether the settlement amount is reasonable for each category of victims.[296] Interested parties are served and can be heard in the proceedings; these are important requirements in view of the *Denilauler* and *Gambazzi* rulings as part of the right to be heard and respecting fundamental procedural rights.[297] Throughout the process of approval, the court plays an active role in managing the case and in setting procedural requirements, e.g., regarding notification.[298] It is, therefore, likely that the decision to declare the settlement binding is to be regarded as a judgment, and thus be recognized and enforceable under the Brussels I Regulation, subject to the applicability of the grounds of refusal.[299] Furthermore, the obligations of the responsible party arising out of the settlement can be enforced.[300]

2. Enforcement of Settlements

Another question, which is particularly important if the court approval is not to be regarded as judgment, is whether the declaration can be regarded as a 'settlement' within the meaning of Article 58 Brussels I. According to this provision, the settlement is enforceable under the same conditions as authentic instruments.[301] Article 57, regarding authentic instruments, refers to the procedure

290. *Id.* at para. 17.

291. *Id.* at para. 18.

292. *Id.*

293. *See generally, e.g.*, Shell Petroleum NV, *supra* note 7.

294. *See id.*

295. *See id.*

296. *See id.*

297. *See* Case 125/79, Denilauler v. Couchet, 1979 E.C.R. 1553; Case 394/07, Gambazzi v. Daimler Chrysler, 2009 E.C.R. I-2563.

298. *See, e.g.*, *Gambazzi*, *supra* note 297.

299. *See id.*

300. *See id.*

301. *See* Council Regulation 44/2001, *supra* note 121, at art. 58.

of Article 38 *et seq.* regarding the enforcement of judgments; however, the only ground of refusal is public policy.[302]

There appear to be two problems in relation to applying Article 58 to mass settlements, and in particular those reached under the Dutch WCAM. The first is that this provision requires that the settlement has been approved by a court in the *course of proceedings*.[303] If this requirement is to be understood as having been reached in the course of adversarial proceedings, the Dutch settlement would not be covered.[304] In the earlier referenced *Solo Kleinmotoren* ruling, the European Court of Justice referred to 'an enforceable settlement reached before a court,' though this was in the context of distinguishing the settlement in dispute from a judgment.[305] It also emphasized the contractual nature of the settlement in the sense of Article 58, whereas the court approval aims to create preclusive effect for the entire group of interested parties.[306] The mass settlement itself is reached between the representative(s) and the responsible party.[307] In view of this lack of clarity, the new Brussels I *bis* Regulation includes a definition in Article 2, subsection (b).[308] It defines the court settlement as a settlement "which has been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings."[309] This will definitely cover the court approval of mass settlements, and it is likely that the current Brussels I Regulation will also be interpreted in this light, since the definition is a clarification rather than an amendment.

The second problem with the application of Article 58 Brussels I, and one that the corresponding Article 59 Brussels I *bis* does not resolve, is that it refers exclusively to the *enforcement* of settlements.[310] It provides that settlements enforceable in the Member State of origin shall be enforceable (Brussels I *bis*: enforced) in the State addressed (Brussels I *bis*: in the other Member States) under the same conditions as authentic instruments.[311] Likewise, Article 57 Brussels I and the corresponding Article 58 in Brussels I *bis* on authentic instruments only mention enforcement and not recognition.[312] The reason is that the Brussels provision on settlements is concerned with the enforcement of a settlement agreement as a contract.[313] However, as regards mass settlements, the

302. *See id.* at art. 57.

303. *See id.* at art. 58.

304. *See* Watt, *supra* note 129, at 114; *see* VAN LITH, *supra* note 104, at 111-15; *see* Halfmeier, *supra* note 288, at 178-80.

305. *See* Case C-414/92, Solo Kleinmotoren v. Boch, 1994 E.C.R. I-2237.

306. *See id.*

307. *See*, *e.g.*, *id.*

308. *See* Regulation 1215/2012, *supra* note 13, at art. 2(b).

309. *Id.*

310. *See* Council Regulation 44/2001, *supra* note 121, at art. 58.

311. *See id.*

312. *See id.* at art. 57; Regulation 1215/2012, *supra* note 119, at art. 58.

313. *See* Council Regulation 44/2001, *supra* note 121, at art. 58.

primary concern is not the enforceability of the settlement between the contracting parties; it is to recognize preclusive effect as a result of the binding nature of the settlement in relation to all the interested parties that did not opt out.[314] For this reason, the provision on settlements is probably of little use to facilitate the mass settlement.

3. Public Policy and Other Grounds of Refusal

If the mass settlement were to be regarded as a judgment under the Brussels I Regulation, its effect can nevertheless be mitigated if the grounds of refusal as laid down in Articles 34 and 35 are invoked.[315] Under the current rules, these grounds can be invoked to appeal the declaration of enforceability in declaratory proceedings regarding the recognition or where recognition is important as an incidental question.[316] Under the Brussels I *bis* Regulation, the exequatur will be abolished, but identical grounds of refusal can be applied on application by a party against whom enforcement is sought.[317] On application by an interested party, these grounds of refusal will also apply to the recognition of judgments.[318] In relation to mass limitation, the issue of recognition is most likely to arise when an interested party that did not opt out wishes to initiate individual proceedings in another Member State.[319]

Articles 34 and 35 include the public policy exception, improper service, irreconcilability of judgments, and violation of specific exclusive jurisdiction rules.[320] For the purpose of Dutch mass settlements in view of the opt-out character of the procedure, public policy within the meaning of Article 34(1) and proper service as included in Article 34(2) are particularly important.[321] In view of the criticism on the wide jurisdiction of the Dutch court in the *Converium* case, it should be noted that a violation of the jurisdiction rules is, in general, not a ground to refuse recognition or enforcement, unless particular exclusive or protective (consumer) jurisdiction rules apply.[322]

In relation to public policy, the starting point is that the law of the Member State where recognition and enforcement is sought becomes decisive.[323] However,

314. *See generally id.*

315. *See id.* at arts. 34-35.

316. *See id.* at arts. 33, 45.

317. *See* Regulation 1215/2012, *supra* note 13, at art. 46.

318. *See id.* at art. 45.

319. *See* Council Regulation 44/2001, *supra* note 121, at art. 45(1)(a).

320. *See id.* at arts. 34-35.

321. *See generally id.*

322. *See id.* at art. 35(3) (stating that the test of public policy may not be applied to the rules relating to jurisdiction).

323. *See id.* at art. 34.

it must concern a *manifest* breach of public policy.[324] The CJEU has repeatedly ruled that this ground of refusal should be interpreted strictly.[325] It is not available in the case of a discrepancy between national rules; it should concern a manifest breach of a fundamental principle.[326] A violation of Article 6 European Convention of Human Rights ("ECHR") or Article 47 of the Charter of Fundamental Rights of the European Union will generally qualify as such.[327] This ground of refusal has been accepted only in incidental cases.[328] Can the opt-out nature of the Dutch mass settlement mechanism be regarded as breaching a fundamental principle? In the Dutch literature, this question has been answered in the negative, which is backed up by certain non-Dutch scholars.[329] However, most other scholars have expressed serious doubts regarding the compatibility of the opt-out nature with domestic or European public policy.[330] In this context, it is interesting to note that the European Court of Human Rights in relation to Article 6 ECHR dealt with the issue of collective procedures in the case *Lithgow v. United Kingdom*.[331] The Court stated that the right to an individual procedure may be limited or restricted if such a restriction serves a legitimate goal and is not disproportionate.[332] In a later case, it concluded that Article 6 had not been violated, since "in proceedings involving a decision for a collective number of individuals, it is not always required that every individual is heard before a court."[333] The WCAM can be said to fulfil a legitimate goal, namely, to enable compensation of large groups of victims by means of a settlement.[334] The high number of victims and the relatively low value of the claim per victim make

324. *See id.*

325. *See* C-394/07, Gambazzi v. Daimler Chrysler Can. Inc., 2009 E.C.R. I-2563; C-7/98, Krombach v. Bamberski, 2000 E.C.R. I-1935; C-38/98, Régie Nationale des Usines Renault SA v. Maxicar SpA, 2000 E.C.R. I-2973; Case 145/86, Hoffmann v. Krieg, 1988 E.C.R. 645.

326. *See* Council Regulation 44/2001, *supra* note 121, at art. 34.

327. *See id.* at art. 47.

328. *See generally*, C-334/00, Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH, 2002 E.C.R. I-7357.

329. Arons & Van Boom, *supra* note 17, at 881-82; VAN LITH, *supra* note 104, at 124-30. See also Halfmeier, *supra* note 288, at 176, 178-80, who concludes that this procedure does not constitute a violation of German public policy.

330. Specifically in relation to the Dutch WCAM: Bariatti, *supra* note 14, at 335-36; Astrid Stadler, *Kollektiver Rechtsschutz und Revision der Brüssel I-Verordnung*, *in* RECHT OHNE GRENZEN, FESTSCHRIFT KAISSIS 951, 957 (Reinhold Geimer & Rolf A. Schütze eds., 2012). In general in relation to opt-out collective redress mechanisms: Mihail Danov, *The Brussels I Regulation: Cross-Border Collective Redress Proceedings and Judgments*, 6 J. PRIVATE INT'L L. 359, 388-91 (2010); Hess, *supra* note 282, at 120; Duncan Fairgrieve, *The Impact of the Brussels I Enforcement and Recognition Rules on Collective Actions*, *in* EXTRATERRITORIALITY AND COLLECTIVE REDRESS 171, 178-86 (Duncan Fairgrieve & Eva Lein eds., 2012).

331. *See* Halfmeier, *supra* note 288, at 176, 182. *See generally* Lithgow v. United Kingdom, 8 Eur. Ct. H.R. 329 (1986).

332. *Lithgow*, 8 Eur. Ct. H.R. at 329.

333. Wendenburg v. Germany, 2003-II Eur. Ct. H.R.

334. *See generally id.*

individual litigation an unreasonable option.[335] This case law does not explicitly address the opt-out mechanism.[336]

It is clear that the current European tide is against the opt-out system, as the Commission Recommendation evidences.[337] This led Hess to conclude that opt-out mechanisms are not in accordance with current European procedural law.[338] In spite of the substantive and procedural checks and balances in Dutch legislation, recognition and enforcement of the decision to declare the settlement binding is therefore not guaranteed in (all) the other Member States.

A specific ground of refusal relates to proper service, enumerated in Article 34(2) Brussels I.[339] It concerns the situation in which the judgment was given in default of appearance, and the document instituting proceedings was not served in a timely manner and in such a way as to enable the defendant to arrange for his defense.[340] The question is whether this provision applies to the Dutch settlements mechanism.[341] Under Dutch law, the decision to declare the settlement binding is not a default judgment, but in view of the autonomous interpretation, this will not be an obstacle.[342] A more important issue is that application of this provision requires that the interested parties can indeed be regarded as defendants within the meaning of Brussels I Regulation. If it were to be applicable within the E.U., the Service Regulation would apply. In relation to interested parties that are unknown, or where the domicile is unknown, it is important that all efforts be made to actually reach the defendant.[343] In the *Dexia* case, the Amsterdam Court of Appeal underlined the importance of a proper notice being given to the interested parties by reference to Article 6 ECHR.[344] In this case, the Court found it sufficient that the group as a whole had been served properly.[345] However, in later cases the relevant European and international instruments were consistently applied, and extensive efforts were made to serve the parties and to reach unknown parties or parties with unknown domiciles.[346] Particularly in the *Shell*

335. *See generally id.*

336. *See generally id.*

337. *See supra* Part II.B.

338. Hess, *supra* note 282, at 120.

339. *See* Council Regulation 44/2001, *supra* note 121, at art. 34(2).

340. *See id.*

341. *See* Halfmeier, *supra* note 288, at 176, 183, who concludes that this provision is not applicable.

342. Stéphanie Francq, *Article 34*, *in* EUROPEAN COMMENTARIES ON PRIVATE INTERNATIONAL LAW: BRUSSELS I REGULATION 644, 680 (Ulrich Magnus & Peter Mankowski eds., 2nd rev. ed. 2012).

343. *See generally* European Parliament and Council Regulation 1393/2007, at art. 19, 2007 O.J. (L 324) 79, 84 (EC), repealing Council Regulation 1348/2000, 2000 O.J. (L 160) 37 (EC); Case C-327/10, Hypotecní Banka, a.s. v. Lindner, 2011 E.C.R. I-11543; Case C-292/10, G v. de Visser, 2012 E.C.R. I-0000.

344. *See generally* Shell Petroleum NV, supra note 7.

345. Rv arts.1013(5) and 1017(3) (Neth.) generally require service by ordinary mail, unless the court decides differently. However, in relation to parties domiciled or residence abroad, the E.U. Service Regulation and the Hague Service Convention will apply and translations to be provided where appropriate.

346. S*ee generally, e.g.*, Shell Petroleum NV, *supra* note 7; Converium, *supra* note 8.

and *Converium* cases, the Court gave strict instructions in relation to the notification.[347] Advertisements were placed in dozens of newspapers, special websites were established, and banners were placed on websites.[348] Though the assessment of an individual case will be a task for the court of the Member State where enforcement is sought, it is submitted that in general the notification requirements are in compliance with the Brussels I and Service Regulation, and should therefore not be an obstacle to the recognition and enforcement of Dutch mass settlements.

C. Recognition and Enforcement in Other Countries

Outside the European Union and the EFTA, domestic rules on the recognition and enforcement of foreign judgments or settlements of the country where recognition or enforcement is sought will be decisive. General requirements pertain to the international jurisdiction of the court that rendered the judgment as well as due process and public policy. Specific rules on notification, requiring the personal notification of every class member or, in the situation of the Dutch WCAM, interested parties, may also be obstacles to the recognition and enforcement of Dutch settlements. It is noteworthy that the Recommendation on Transnational Groups of the International Law Association ("ILA") of 2008 provides that *res judicata* or enforcement should not be denied because the decision was rendered under an opt-out group action model.[349] The Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress of the International Bar Association ("IBA"), adopted in the same year, seem generally more reserved towards opt-out procedures.[350] It provides that a court may expect its decision to have preclusive effect over absent class members that have been given adequate notice of the proceedings and an opportunity to opt out if additional conditions arise relating to result of judgment and the representativeness.[351] The ILA Resolution and IBA guidelines do not specifically deal with collective opt-out settlements.

347. S*ee generally, e.g.*, Shell Petroleum NV, *supra* note 7; *see generally, e.g.*, Converium, *supra* note 8.

348. S*ee generally, e.g.*, Shell Petroleum NV, *supra* note 7; *see generally, e.g.*, Converium, *supra* note 8.

349. *International Civil Litigation and the Interests of the Public: Transnational Group Actions, Report and Resolution*, ILA, at 24 (2008). Resolution 10.1 reads: "The requested court should not refuse to grant res judicata effect or enforce a foreign decision merely because the decision was rendered under an opt-out group action model."

350. *See generally Guidelines for Recognising and Enforcing Foreign Judgments for Collective Redress*, IBA (Oct. 16, 2008), http://www.ibanet.org/Document/Default.aspx?DocumentUid=C1F679E5-7F71-4A19-B3F6-DF5BC79C07A9.

351. *Id.* at 13-14. Guideline 1.02 reads: "It is reasonable for a court issuing a collective redress judgment to expect its judgment to be given preclusive effect in respect of absent claimants by the jurisdictions in which the absent claimants reside if, inter alia: (i) the results obtained for absent claimants are not patently inadequate in the circumstances; (ii) the interests of absent claimants have been adequately represented; and (iii) absent claimants have been given adequate notice of the proceedings and an opportunity to opt out."

In relation to the somewhat similar U.S. settlements, it has been argued that these will not be recognized and enforced in Latin America.[352] That commentator also refers to the Netherlands in relation to the *Converium* case as a "judicial hellhole."[353] As to the United States, it is likely that it is willing to recognize and enforce Dutch WCAM settlements. In the *Shell* case brought in the U.S., the New Jersey Court, when excluding non-U.S. litigants from its jurisdiction, considered that the non U.S.-claimants are not without recourse, since a settlement had been brought to the Dutch court on their behalf for a binding declaration.[354] However, it is very unlikely that the U.S. courts will grant effect to Dutch WCAM settlements if these were to include U.S.-parties, particularly if it would concern investors that bought shares on the U.S. market. It may be assumed that it will require the Dutch court to respect similar jurisdictional limits as the U.S. Supreme Court has imposed in the *Morrison* case.[355] Vice versa, the Dutch court has been willing to recognize a U.S. class settlement.[356] As discussed earlier, in both the *Shell* case and the *Converium* case, Dutch settlements were concluded complementary to U.S. class actions and settlement, and in that regard the U.S. and Dutch systems are in communication with each other.

V. QUESTIONS OF THE APPLICABLE LAW IN THE DUTCH WCAM MECHANISM

A. The Issue of the Applicable Law and Applicable Rules

The law applicable to a collective settlement under the Dutch WCAM has different aspects. First, it is relevant to determine the law applicable to the settlement itself as a contract. Second, the law that governs the underlying legal relationship, either a tort or a contract, may be relevant. Though the WCAM scheme is not designed to establish liability, the law applicable to the underlying claims may be of relevance. The most significant issue is the reasonableness of the settlement as a prerequisite to declare the settlement binding. Third, it is important to distinguish substantive law issues from the law that governs the procedural aspects, including the requirement of representativeness. In accordance with the *lex fori processus* rule, Dutch law will naturally govern these elements if the request to declare the settlement binding is brought before the Dutch court.

In the Netherlands, the applicable substantive law is to be determined on the basis of European choice of law rules, notably the Rome I Regulation

352. Gidi, *supra* note 14, at 955-56.

353. *Id.* at 953.

354. *See supra* Part III.C.i.

355. *See generally* Morrison v. Nat'l Australian Bank Ltd.,130 S. Ct 2869, 2869 (2010).

356. *See generally* Ktr.'s-Amsterdam 23 juni 2010, JOR 2010, 225 m.nt. IN Tzankova (SOBI/Deloitte) (Neth.).

(contractual obligations) and the Rome II Regulation (non-contractual obligations).[357] In the Netherlands, the admissibility of claims does not depend upon the applicable law. Where appropriate, foreign law will be applied, including the law applicable to securities liability cases.

B. Relevant Choice of Law Rules for Mass Securities Claims

The applicable law to the *settlement agreement* will be designated on the basis of the Rome I Regulation. The main rule pursuant of Article 3 Rome I is that the parties can select a choice of law clause for, in principle, any substantive law system.[358] This choice will not affect the applicable law to the underlying legal claims, often arising out of tort.[359] If the settlement agreement does not include a choice of law, Article 4(2) Rome I will apply.[360] This designates the law of the habitual residence of the party that is to conduct the characteristic performance.[361] With regard to the settlement agreement, it is not evident which party is to be regarded as the characteristic performer. Most Dutch scholars have argued that in the WCAM settlement, this is the party that has to pay compensation.[362] This will lead to Dutch law where this party, as is the case in practice, is a habitual resident in the Netherlands. However, if one were to consider that the characteristic performance could not be determined in relation to such settlement agreement, the residual rule included in Article 4(4) will be applicable. This provision refers to the law that is most closely connected to the settlement. Relevant factors to be considered are the place of the underlying mass event, or the habitual residence of the majority of the interested parties. In practice, the settlement usually includes a choice for Dutch law. However, even in the absence of such a clause, it is likely that the Dutch court would apply Dutch law either as "place of the party having to perform the payment obligation" or the "origin" of the mass settlement. This is important to secure full application of the WCAM, including its substantive provisions laid down in the Dutch Civil Code.

With regards to the law applicable to the *underlying relationship,* it is important to decide what the basis of the liability is. If it is based on a contractual relationship (breach of contract), the Rome I will be decisive. Thus, the main rule will be that the chosen law applies pursuant to Article 3 Rome I, unless it concerns a consumer contract within the scope of Article 6(1) Rome I.[363] If no valid choice of law agreement is made, Article 4 will generally be relevant.

357. *See* Regulation 593/2008, *supra* note 15, at 6; *see* Regulation 864/2007, *supra* note 15, at 42.

358. *See* Regulation 593/2008, *supra* note 15, at 6; *see* Regulation 864/2007, *supra* note 15, at 42.

359. *See* Polak, *supra* note 226.

360. *See* Regulation 593/2008, *supra* note 15, at 6; *see* Regulation 864/2007, *supra* note 15, at 42.

361. *See* Regulation 593/2008, *supra* note 15, at 6; *see* Regulation 864/2007, *supra* note 15, at 42.

362. *See generally* Polak, *supra* note 226.

363. *See* Regulation 593/2008, *supra* note 15, at 6; *see* Regulation 864/2007, *supra* note 15, at 42.

Article 4(1)(h) is important for securities litigation.[364] It outlines "a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments" within the meaning of the Markets in Financial Instruments Directive ("MiFiD").[365] According to this provision, the law of that financial market shall be applied.[366]

However, in most securities cases, liability will be based on tort, for example misleading information (prospectus liability) or fraud.[367] In those cases, the Rome II Regulation is applicable.[368] According to Article 4(1) Rome II, the law of the place in which the damage occurs will govern the liability.[369] This is "irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur."[370] In securities liability cases, there is no physical damage, making determining the place where the damage occurs more difficult.[371] In the *Kronhofer* case, the CJEU ruled in relation to Article 5(3) of the Brussels I Regulation, that the principal place where investors suffered their financial losses is the place where they hold their investment accounts.[372] This ruling is also relevant for the application of Article 4(1) Rome II.[373] In a mass securities case, there can be many places where the interested investors hold their accounts; this will ultimately lead to the applicability of a multiplicity of laws. Evidently, this will cause legal uncertainty for issuers and significantly complicated case handling for judges.[374]

To avoid the application of many possibly different laws, it has been proposed in legal literature to include a new rule that is more suited for securities litigation or to extensively apply the escape clause under Article 4(3) Rome II.[375] This provision enables applying the law of another country "[w]here it is clear from all the circumstances of the case that" this country is "manifestly more

364. Regulation 593/2008, *supra* note 15, at 6; Regulation 864/2007, *supra* note 15, at 42.

365. VAN LITH, *supra* note 104, at 118; European Parliament and Council Directive 2004/39, at art. 4.1(14), 2004 O.J. (L 145) 1 (EC).

366. VAN LITH, *supra* note 104, at 118.

367. *See* Astrid Stadler, *Conflict of Laws in Multinational Collective Actions – a Judicial Nightmare?*, *in* EXTRATERRITORIALITY AND COLLECTIVE REDRESS 191, 197-98 (Duncan Fairgrieve & Eva Lein eds., 2012).

368. Regulation 864/2007, *supra* note 15, at 42. It is sometimes claimed that certain securities cases are excluded from the scope of the Rome II Regulation since Article 1(2)(d) exempts non-contractual obligations 'arising out of the law of companies and other bodies corporate or unincorporated'. However, the dominant view is that this exception does not relate to capital markets liability. *Id.*

369. *Id.*

370. *Id.*

371. *See* Stadler, *supra* note 367, at 197-98.

372. Case C-168/02, Rudolf Kronhofer v. Marianne Maier and Others, 2004 E.C.R. I-6009 (rejecting to regard the domicile of the investor as the place where the damage occurs).

373. Regulation 864/2007, *supra* note 15, at 42 (commenting on the connection with the Brussels I Regulation).

374. *See* Stadler, *supra* note 367, at 197-201.

375. *Id.* at 200-01.

closely connected."[376] Such a manifestly closer connection might be based in particular on a pre-existing relationship between the parties, such as a contract ("accessory connection").[377] The more closely connected law could be the law of the market affected by the violation ("market place rule").[378] For listed securities, this would be the law of the place of the stock exchange, and for other securities, the place where the securities were bought, "where a public offer was made or where the prospectus [was] published."[379] It has also been suggested to bundle liability rules with the applicable disclosure duties.[380] This would lead to the law of the place where the issuer is incorporated (*lex incorporationis*) and synchronize liability with the Prospectus Directive.[381] However, since Article 4(3) Rome II Regulation is only to be applied in exceptional circumstances, bundling of liability rules with disclosure duties would probably necessitate amending the Rome II Regulation.[382]

It can be concluded that the current system is far from ideal for an efficient handling of mass securities cases.[383] Such multiplicity of laws does not only occur in securities litigation, but also in other mass harm cases.[384] However, as discussed earlier, the Commission stated in its Communication that it was not "persuaded that it would be appropriate to introduce a specific rule for collective claims which would require the court to apply a single law."[385] It added that such a rule would lead to uncertainty where it was "not the law of the country of the person claiming damages."[386] This last argument is rather strange, because the law of the person claiming damages is as such not a connecting factor in the existing choice of law rules.[387] Since there is no legislative solution expected in the near future, stretching the escape clause under Article 4(3) Rome II seems to be the most feasible option.[388]

376. Regulation 864/2007, *supra* note 15, at 42; Stadler, *supra* note 367, at 201.

377. Regulation 864/2007, *supra* note 15, at 42; VAN LITH, *supra* note 104, at 114.

378. *See inter alia* Stadler, *supra* note 367, at 201.

379. *Id.* at 200.

380. *Id.*

381. European Parliament and Council Directive 2003/71, 2003 O.J. (L 345) 65 (EC), *amended by* Council Directive 2010/73, 2010 O.J. (L 327) 1 (EC); Stadler, *supra* note 367, at 200.

382. *Id.* at 197.

383. *Id.* at 197-201.

384. *Id.*

385. *Communication from the Commission, supra* note 2, at 14; *see supra* Part II.B.ii.

386. *Communication from the Commission*, *supra* note 2 at 14.

387. *See supra* Part V.B. There are exceptions; notably Article 6(1) refers to the law of the habitual residence of the consumer in relation to contracts covered by that provision. Regulation 593/2008, *supra* note 15, at 6.

388. *See Communication from the Commission*, *supra* note 2, at 14.

C. Dutch Practice and Specific Issues in the WCAM

The issue of applicable law is seldom addressed in Dutch practice regarding the WCAM.[389] Apart from the first case, the DES case, the settlement agreement included a "choice of law clause for Dutch law" in all cases.[390] The law applicable to the underlying legal relationship among the parties in WCAM cases has not explicitly been addressed by the Dutch court in the cases it has dealt with.[391] To avoid possible complications with the applicable law, in the *Dexia* case, concerning securities lease products, the concluding parties decided to exclude Belgian parties before it reached the court.[392] It was clear that particular mandatory Belgian consumer rules would have prevailed over the less strict Dutch laws applicable to the underlying claims.[393] As is the case in assessing international jurisdiction, the focus of the Amsterdam Court of Appeal is on the settlement agreements at issue.[394] The Court reviews the requirements to declare the declaration binding and provides instructions; it does not deal with the question of the liability of the allegedly responsible party.[395]

However, the law applicable to the underlying legal relationship is of importance when assessing the reasonableness of the settlement.[396] Article 7:907(3) of the Dutch Civil Code provides that the request to declare the declaration binding shall be rejected if "the amount of the compensation awarded is" unreasonable.[397] Elements to be considered pursuant to this provision are the extent of the damage and the possible causes of the damage.[398] To determine if the settlement is reasonable, it would be necessary to assess the applicable law in

389. *See* VAN LITH, *supra* note 104, at 113.

390. *Id.*

391. *See* Kramer, *supra* note 6, at 77-78; *see* Shell Petroleum NV, *supra* note 7; *see* Vie D'Or, *supra* note 39; *see* Converium, *supra* note 8; *see* Hof's-Amsterdam 17 januari 2012, 2012 NJ, 355 m.nt. (Converium/Liechtensteinische Landesbank AG).

392. VAN LITH, *supra* note 104, at 20; *see* Shell Petroleum NV, *supra* note 7.

393. *See also* VAN LITH, *supra* note 104, at 20. Apart from Article 6(2) Rome I Regulation, limiting an eventual choice of law in respect of the underlying (contractual) claim in contracts falling under the (limited) scope of this provision, overriding mandatory rules within the meaning of Article 9 Rome I Regulation and Article 16 Rome II Regulation may have to be considered. Regulation 593/2008, *supra* note 15, at 6; Regulation 864/2007, *supra* note 15, at 42.

394. Kramer, *supra* note 6, at 84.

395. Kaal & Painter, *supra* note 11, at 167; Kramer, *supra* note 6, at 84.

396. *See* Stadler, *supra* note 367, at 198.

397. BW art. 7:907(3) (Neth.).

398. *Id.* reads: "The court shall reject the request if: . . . b. the amount of the compensation awarded is not reasonable having regard, inter alia, to the extent of the damage, the ease and speed with which the compensation can be obtained and the possible causes of the damage". According to Article 7:907(2)(a)-9(d) the settlement agreement should also include a description of the groups of interested persons according to the seriousness of their loss, an indication of the number of persons in each of these groups, the compensation to be awarded to each group, as well as the conditions these persons must fulfill to qualify for the compensation. BW art. 7:907(2)(a)-(d) (Neth.).

relation to each interested party, or at least each group of parties.[399] One might even say that this analysis requires the court to take into consideration what the potential outcome of litigation would be and to compare that with the settlement.[400] Though it is accepted in Dutch practice that the applicable law to the underlying claims of individual interested parties should be taken into account, in practice careful damage scheduling seems to be the solution.[401] The Dutch legislature rejected a recommendation to include a special rule for foreign parties in assessing reasonableness.[402] The legislature found it unnecessary since many aspects have to be considered in damage calculation, which may naturally include the applicable law.[403]

It was discussed earlier that procedural matters regulated in the WCAM, such as the representation requirements, are to be decided upon Dutch law pursuant of the generally accepted *lex fori processus* rule.[404] However, the demarcation between procedural and substantive law is not always evident.[405] In doctrine the limitation periods included in the Dutch Civil Code have been regarded as a procedural matter.[406] Article 907(5) of the Dutch Civil Code provides that the request to declare the settlement binding will interrupt the limitation period.[407] Should a party exercise his opt out right or the request be rejected, a new prescription period should be limited to two years.[408] This proposal was made in order to release the allegedly responsible party from eventual new litigations after the collective settlement for a longer period.[409] However, in the Rome I and Rome II Regulations limitation periods are explicitly mentioned as being covered by the applicable substantive law (*lex causae*), and are thus not to be regarded as a procedural matter.[410] This means that if an individual party that opted out wishes to pursue individual litigation in the Netherlands (or in another E.U. Member State) the law applicable to that claim will determine the prescription

399. *See* Stadler, *supra* note 367, at 198.

400. *Id.*

401. *See* VAN LITH, *supra* note 104, at 13.

402. *See* Parliamentary Proceedings, II 2003/04, 29 414, no. 3, 14-15; Arons & Van Boom, *supra* note 17, at 864.

403. *See* Parliamentary Proceedings, II 2003/04, 29 414, no. 3, 14-15; Arons & Van Boom, *supra* note 17, at 115.

404. *See supra* Part V.A.

405. *See generally* BW art. 7:907(5) (Neth.); Regulation 593/2008, *supra* note 15, at 6; Regulation 864/2007, *supra* note 15, at 42.

406. VAN LITH, *supra* note 104, at 119.

407. BW art. 7:907(5) (Neth.).

408. VAN LITH, *supra* note 104, at 120.

409. *Id.*

410. *See* Regulation 593/2008, *supra* note 15, at 6; *see* Regulation 864/2007, *supra* note 15, at 42.

period.[411] If that happens to be a foreign law with a longer prescription period, that law should prevail over the WCAM rules.[412]

VI. CONCLUDING REMARKS

Collective redress is on the rise in Europe and at present the Netherlands is taking the lead in transnational securities mass settlements. It is expected that the number of mass securities cases that will be brought in European courts will further increase, particularly in the aftermath of the U.S. Supreme Court decision in the *Morrison* case. The European debate and further legislative activities at the E.U. level are hampered by diverging domestic systems, fear of abusive litigation, and diverse views on the acceptable model of collective redress. The European Commission's Recommendation of June 2013 is marred by compromises and a genuine European procedure of collective action and/or settlement is not expected in the near future.[413]

The Dutch WCAM system is by and large in compliance with the common principles established by the Recommendation.[414] However, there are two points of possible conflict.[415] First, the Netherlands only has a collective settlement mechanism and not an accompanying collective action for compensation.[416] Second, the WCAM is based on an opt-out scheme whereas the Recommendation strongly proceeds from an opt-in scheme to safeguard litigants' rights.[417] Though the Recommendation is in the form of non-binding legislation, it marks the current status, and future of, collective redress in Europe.[418] Additionally, it may influence the acceptance of current cross-border case handling by the Amsterdam Court of Appeal under the WCAM, which has already been criticized.[419] It is disappointing that the Recommendation only cursorily deals with cross-border aspects of collective redress, considering that these pose real challenges.[420] As regards to international jurisdiction and the recognition and enforcement, the Commission refers to the use of the Brussels I Regulation.[421] In relation to the choice of law rules, it takes the view that special rules for collective redress are not needed.[422]

411. *See* Regulation 593/2008, *supra* note 15, at 6; *see* Regulation 864/2007, *supra* note 15, at 42.
412. *See* Regulation 593/2008, *supra* note 15, at 6; *see* Regulation 864/2007, *supra* note 15, at 42.
413. *See supra* Part II.B.
414. *See supra* Part II.B.i.
415. *See supra* Part II.B.ii.
416. *See supra* Part II.B.ii.
417. *See supra* Part II.B.ii.
418. *See supra* Parts I, II.B.ii.
419. *See supra* Part II.B.ii
420. *See supra* Part II.B.ii.
421. *See supra* Part II.B.ii.
422. *See supra* Part II.B.ii.

The establishment of international jurisdiction of the Amsterdam Court of Appeal to declare a collective settlement binding in accordance with the WCAM Act is problematic.[423] The Brussels I Regulation has been developed with a view to classical party-party litigation and does not sufficiently accommodate collective actions or settlements.[424] Therefore, a mismatch is evident between the specific WCAM design and the defendant-oriented jurisdiction rules of this Regulation.[425] In the landmark securities cases *Shell* and *Converium*, the Amsterdam Court has designated the interested parties under the WCAM scheme as "defendants."[426] It is controversial whether this is a correct understanding of the Brussels I rules since the interested parties are beneficiaries that do not as such take part in the procedure.[427] In a typical class the allegedly responsible party would qualify as defendant, but under the WCAM scheme this is not the case, since the responsible party files the petition jointly with the representatives of the class.[428] This makes the application of Article 2 (court of the defendant) and Article 6(1) (multiple defendants) Brussels I problematic.[429] In the *Converium* case international jurisdiction was additionally founded on Article 5(1) regarding contractual jurisdiction.[430] Disregarding the underlying legal relationship, the Court took the settlement agreement and the place of performance of the payment obligation resulting from the binding declaration as point of departure.[431] In the *Converium* case, the connections with the Netherlands were overall very weak and this judgment has rightfully been criticized.[432] It is submitted that the Amsterdam Court overstepped the boundaries of European and internationally accepted jurisdictional rules.[433]

The recognition and enforcement of the decision to declare the WCAM settlement binding also poses challenges.[434] Particularly, the fact that it proceeds from a settlement agreement, the opt-out scheme and the stretching of the jurisdictional limits in Dutch practice raise questions as to the recognition and enforcement under the Brussels I Regulation.[435] The settlement agreement is not clear whether the binding declaration qualifies as a "judgment" and the Brussels I rules on settlement agreements focus on enforcement rather than on recognition

423. *See supra* Part III.
424. *See supra* Part III.B.
425. *See supra* Part III.B.
426. *See supra* Part III.C.
427. *See supra* Part III.D.
428. *See supra* Part III.D.
429. *See supra* Part III.D.
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431. *See supra* Part III.D.
432. *See supra* Part III.D.
433. *See supra* Part III.D.
434. *See supra* Part IV.
435. *See supra* Part IV.A.

to secure preclusive effect.[436] Additionally, it is conceivable that grounds of refusal and notably the public policy exception may be invoked in case an individual party that did not opt out wishes to initiate individual litigation.[437] Outside Europe, the opt-out nature, specific procedural features and the wide territorial jurisdiction may also create obstacles for recognition and enforcement.[438] Similar objections have been raised in relation to U.S. class actions and settlements.[439] As between the Netherlands and the United States, as of yet, courts have been willing to recognize or implicitly acknowledge each other's settlements.[440]

The issue of the applicable law has not raised much discussion in Dutch doctrine and is seldom explicitly addressed in practice.[441] As with jurisdiction, the focus is on the particularities of the settlement agreement as a contract.[442] In all but one of the settlements that have been declared binding to date, a choice of law clause in favor of Dutch law was included.[443] The applicable law to the underlying claims may nevertheless be relevant to assess the reasonableness of the settlement amount as one of the prerequisites to declare the settlement binding.[444] It is submitted that the applicable choice of law rules of the Rome I and II Regulations, and particularly the liability rules for securities cases, are not well adapted since these will result in a multiplication of applicable laws.

The Commission's Recommendation marks a step forward in the development of collective redress in the European Union.[445] Dutch mass settlements and upcoming mechanisms in other Member States, including England and Wales, and Germany, have put Europe on the map as a venue for collective securities litigation with global aspirations.[446] However, shortcomings and uncertainties in the existing rules on cross-border litigation pose serious questions.[447] If Europe wants to take the development of collective redress a step further, the proper regulation of the cross-border aspects should be regarded as a priority.

436. *See supra* Part IV.B.i.
437. *See supra* Part IV.B.ii.
438. *See supra* Part IV.C.
439. *See supra* Part IV.C.
440. *See supra* Part IV.C.
441. *See supra* Part V.
442. *See supra* Part V.A.
443. *See supra* Part V.C.
444. *See supra* Part V.C.
445. *See supra* Parts I, II.B.i.
446. *See supra* Parts I, II.A.
447. *See supra* Part II.B.ii.