

## The Dutch Act on Collective Settlement of Mass Damages

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### I. INTRODUCTION

Until the summer of 2005, Dutch law did not offer an appropriate means for dealing with mass claims efficiently and effectively.<sup>1</sup> The multitude of parties and their individual circumstances created too much complexity for Dutch procedural law to deal with mass damages cases effectively.<sup>2</sup> In July 2005, a new mechanism for dealing with mass damages came into force.<sup>3</sup> This mechanism is based on the *Wet Collectieve Afwikkeling Massaschade* (“WCAM”), an act on collective settlement of mass damages.<sup>4</sup>

The WCAM offers a means for the settlement of mass damages.<sup>5</sup> The application of WCAM is based upon an agreement, which provides for the

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1. See generally Willem H. van Boom, *Collective Settlement of Mass Claims in the Netherlands*, ROTTERDAM INSTITUTE OF PRIVATE LAW 171, 173-78 (Matthias Casper et al. eds., 2009).

2. *Id.* at 176-77.

3. Van Boom, *supra* note 1, 177-78; see generally H.B. Krans, *The Dutch Class Action (Financial Settlement) Act in an International Context: The Shell Case and the Converium Case*, 31 C.J.Q. (2012), 141; see generally D. Ozmis & I.N. Tzankova, *De Evaluatie van de WCAM: de Kerntema's Uitgelicht*, TIJDSCHRIFT VOOR CIVIELE RECHTSPLEGING 33, 33 (2012) (Neth.).

4. See generally Van Boom, *supra* note 1; see generally Ozmis & Tzankova, *supra* note 3.

5. The WCAM has been the subject of a number of publications. See, e.g., Van Boom, *supra* note 1, at 171; see, e.g., Tomas Arons & Willem H. van Boom, *Beyond Tulips and Cheese: Exporting Mass Securities*

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settlement of mass damages claims.<sup>6</sup> This agreement must be concluded between organizations that represent victims and the parties who will provide compensation.<sup>7</sup> Once an agreement is achieved, parties can apply jointly to the court to declare the agreement binding upon all persons who suffer damage as a result of the event or events referred to in the contract.<sup>8</sup> If the court grants the application, the agreement is binding on the entire group of victims referred to in the contract.<sup>9</sup> The proceedings before the court therefore do not primarily concern the relationship between the contracting parties, but rather they concern the settlement agreement and its consequences for the victims.<sup>10</sup> The court of appeal in Amsterdam is competent to decide on the application.<sup>11</sup>

Since the enactment of this WCAM, seven applications have been brought to the court.<sup>12</sup> The application to declare the contract generally binding was granted in six of these cases.<sup>13</sup> In July 2013, several amendments to the WCAM came into force.<sup>14</sup> Two main amendments were made to the WCAM: the option of a pretrial

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*Claim Settlement from the Netherlands*, 21 EUR. BUS. L. REV. 857, 857 (2010). Regarding publications in Dutch I will limit myself to refer to Ozmis & Tzankova, *supra* note 3, at 33-42, D.F. Lunsingh Scheurleer, *Collectief Schikken met de wet Wet Collectieve Afwikkeling Massaschade*, in *IN DE SCHADUW VAN HET SLACHTOFFER* 49-58 (C.J.M. Klaassen ed., 2013). H.B. Krans, *Een Nieuwe Aanpak van Massaschade*, 2005/2 NTBR 2.

6. Van Boom, *supra* note 1, at 178; Krans, *supra* note 3, at 142.

7. Burgerlijk Wetboek [BW], art. 7:907 (Neth.); *see Krans, supra* note 3, at 142; *see Van Boom, supra* note 1, at 178. Insurance companies can also act as parties to the contract.

8. Krans *supra* note 3, at 142; Van Boom, *supra* note 1 at 179.

9. Krans *supra* note 3, at 142; Van Boom, *supra* note 1 at 179; BW, art. 7:907 (Neth.).

10. Once the settlement agreement is declared generally binding these victims referred to in the contract are considered as parties to the settlement agreement. BW art. 7:908 (Neth.); *see infra* Part VIII.

11. Wetboek van Burgerlijke Rechtsvordering [Rv], art. 1013, para 3 (Neth.); Van Boom, *supra* note 1, at 181-82; Krans, *supra*, note 3, at 142.

12. Hof's-Amsterdam 1 juni 2006, NJ 2006, 461 m.nt. [ECLI:NL:GHAMS:2006:AX6440] (Foundation Centre DES et al.) (Neth.) [hereinafter Foundation Centre DES]; Hof's-Amsterdam 25 januari 2007, JOR 2007, 71 m.nt. AFJA Leijten [ECLI:NL:GHAMS:2007:AZ7033] (Dexia Bank Nederland NV/Foundation Platform Aandelenlease) (Neth.) [hereinafter Dexia Bank]; Hof's-Amsterdam 29 mei 2009, JOR 2009, 197 m.nt. AFJA Leijten [ECLI:NL:GHAMS:2009:BI5744] (Shell Petroleum NV/Dexia Bank Nederland NV) (Neth.) [hereinafter Shell Petroleum NV]; Hof's-Amsterdam 29 april 2009, JOR 2009, 196 m.nt. AFJA Leijten [ECLI:NL:GHAMS:2009:BI2717] (Foundation Vie D'Or) (Neth.) [hereinafter Vie D'Or]; Hof's-Amsterdam 15 juli 2009, JOR 2009, 325 m.nt. ACW Pijls [ECLI:NL:GHAMS:BJ2691] (Randstad Holding) (Neth.) [hereinafter Randstad Holding]; Hof's-Amsterdam 12 november 2010, JOR 2011, 46 m.nt. JS Kortmann [ECLI:NL:GHAMS:2010:BO3908] (Scor Holding/Interim Decision) (Neth.) [hereinafter Scor Holding/Interim Decision]; Hof's-Amsterdam 17 januari 2012, JOR 2012, 51 m.nt. BJ de Jong [ECLI:NL:GHAMS:2012:BV1026] (Scor Holding) (Neth.) [hereinafter Scor Holding]. In the seventh case there is an Interim Decision (Hof Amsterdam 12 november 2013, JOR 2013, 343 m.nt. AFJA Leijten (Schimmelpenninck and Knüppe q.q. et al./X et al.; interimdecision)), but there is not final decision yet.

13. Foundation Centre DES, *supra* note 12; Dexia Bank, *supra* note 12; Shell Petroleum NV, *supra* note 12; Vie D'Or, *supra* note 12; Randstad Holding, *supra* note 12; Scor Holding/Interim Decision, *supra* note 12; Scor Holding, *supra* note 12.

14. Stb. 2013, P. 256.

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hearing was introduced<sup>15</sup> and the scope of the WCAM was extended to apply to bankruptcy cases.<sup>16</sup>

As a consequence of the *Dexia* case, in July 2013, one of the aforementioned technical changes to the WCAM concerned a clarification of the scope of the WCAM.<sup>17</sup> According to the wording of the WCAM the agreement must seek compensation for damages.<sup>18</sup> According to the Explanatory Memorandum to the amending Act, the *Dexia* case demonstrated that claims in the case of mass damages do not have to be claims for compensation.<sup>19</sup> Many claims in the *Dexia* case concerned the validity of contracts and the remission of debts to the bank.<sup>20</sup> This contribution will explore the system under the WCAM, some aspects of case law, and some elements of WCAM's July 2013 amendment.

## II. REASON FOR AND SCOPE OF THE WCAM

Before the WCAM came into force, Dutch law did not offer the courts an adequate toolkit for dealing with mass damages.<sup>21</sup> There were several options, but each of them had serious disadvantages.<sup>22</sup> For example, Dutch law does not recognize class actions to allow parties to ask for compensation in a collective action.<sup>23</sup> A foundation or an association that meets certain requirements can institute an action intended to promote the similar interests of other persons, but the object of this right of action cannot be to seek monetary compensation.<sup>24</sup> When designing the WCAM, the legislator considered whether this restriction should be abolished, but decided not to make that change.<sup>25</sup> Opening up the possibility of seeking monetary compensation in a class action would make a procedure with a large number of claimants “unmanageable.”<sup>26</sup> Settlement of

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15. *See infra* Part IV.

16. In the Explanatory Memorandum to the amendment to the WCAM, the Minister refers in this respect to the bankruptcy of the DSB Bank (a Dutch bank which was declared bankrupt in 2009). The validation of individual bank creditors' claims can be an administrative burden, so stated the Minister. The WCAM procedure could be an appropriate procedure in mass claims to replace this costly and time-consuming validation procedure. *See* MvT, TK 2011-13, 33 126, no. 3, p. 10-11. This new option for the application of the WCAM in bankruptcy cases will be excluded from this article.

17. *See id.* at 17.

18. *See, e.g.*, BW art. 7:907 para. 1 (Neth.).

19. *Id.* at 29.

20. The WCAM can also be applied to agreements that provide aggrieved persons with other rights than compensation. *See* BW art. 7:907 (Neth.).

21. Van Boom, *supra* note 1, at 173-78 (discussing the history of the different Acts passed before the WCAM).

22. *See generally id.*

23. *See id.*

24. BW art. 3:305(a)(1) (Neth.).

25. MvT, TK 2003-04, 29 414, no. 3, part 2, pp. 2-3.

26. *Id.* at 8-9.

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mass damages claims through the WCAM would be more profitable, the Minister of Justice stated.<sup>27</sup>

The direct cause for the WCAM was the *DES* Case.<sup>28</sup> This case concerned a defective pharmaceutical that was intended for use during pregnancy.<sup>29</sup> It transpired when this pharmaceutical caused severe physical injuries to the daughters of women who took the medicine.<sup>30</sup> These women turned to the pharmaceutical's manufacturers, but they were initially confronted with a difficulty in establishing causation, i.e. proving which manufacturer had produced the pills their mothers had taken long ago.<sup>31</sup> The case was taken to the Dutch Supreme Court on the issue of causation, which the court found in the claimants' favor.<sup>32</sup> However, this case was not yet over. After several more years, the *DES*-fund turned to the Dutch Ministry of Justice and requested its cooperation in finding a solution for this case.<sup>33</sup> The Ministry of Justice, responsible for the lion's share of civil legislation in the Netherlands, decided to draw up an act, but wanted to avoid ad hoc legislation.<sup>34</sup> The scope of the new act had to be broader than just one case.<sup>35</sup> The WCAM was the result.<sup>36</sup>

It is interesting to note the type of cases to which the WCAM has been applied so far. The WCAM does not define mass damages.<sup>37</sup> The settlement agreement must concern compensation of damages "caused by an event or similar events."<sup>38</sup> With respect to the type of cases to which the WCAM could be applied, the Minister of Justice mentioned examples during the design phase, such as the disaster at an exploding fireworks factory in Enschede (a town in the

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27. *Id.* at 5. During the parliamentary debate on the July 2013 amendments it was also argued that the prohibition to seek monetary compensation in a class action should be abolished. In its reaction the Minister of Justice discussed options for a collective action seeking monetary compensation, but did not propose the abolishment of the prohibition to seek monetary compensation in a class action. *See generally* Letter Minister Justice, TK 2011-12, 33 126, no. 6.

28. Foundation Centre *DES*, *supra* note 12; *see* P.N. van Regteren Altena, *De Collectieve Afwikkeling van de Des-zaak in Nederland*, in *HET WETSVOORSTEL COLLECTIEVE AFWIKKELING VAN MASSASCHADE 27* (A.I.M. van Mierlo et al. eds., 2005).

29. Foundation Centre *DES*, *supra* note 12, at 4.

30. *Id.*

31. Lucas Bergkamp, *Compensating Personal Injuries Caused by DES: "No Causation Liability" in the Netherlands*, 1 *EUR. J. HEALTH L.* 35, 35 (1994).

32. Foundation Centre *DES*, *supra* note 12.

33. MvT, TK 2003-04, 29 414, no. 3, p. 1.

34. *Id.*

35. *Id.*

36. In the Explanatory Memorandum to the WCAM, the Minister of Justice referred to the American class action (Rule 23 of the Federal Rules of Civil Procedure) and stated that the vast majority of the "mass tort class actions" do not lead to a final judgment, but end with a settlement. He also stated that American practices also demonstrate that parties often reach a settlement and that afterwards a fresh damages class action is started to have the settlement declared generally binding. That outcome to the settlement of mass damages actions is comparable to the WCAM, stated the Minister. *Id.* at 4.

37. *See* BW art. 7:907 (Neth.).

38. *Id.*

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Netherlands), a fire that broke out in a crowded cafe in Volendam (also a town in the Netherlands), and the *DES* case on defective medication.<sup>39</sup> When studying the WCAM and its parliamentary documentation, it is easy to gain the impression that the WCAM's design focus was on personal injury cases. However, out of the six cases dealt with under the WCAM, only one dealt with personal injury.<sup>40</sup> The other five cases have concerned purely financial matters.<sup>41</sup>

### III. THE SETTLEMENT AGREEMENT

The court application to declare a settlement agreement binding is not merely a formality. According to the WCAM, the court must consider many aspects when deciding if the settlement agreement is binding.<sup>42</sup> Many of these elements concern the settlement agreement.

This collective settlement is an agreement concerning the payment of compensation for damages caused by "an event or similar events."<sup>43</sup> The settlement agreement must include a description of the group or groups of persons on whose behalf the agreement was concluded.<sup>44</sup> The idea is that the settlement agreement uses damage scheduling.<sup>45</sup> The injured persons are divided into groups based on several factors.<sup>46</sup> The amount of compensation they are entitled to depends on their group classification.<sup>47</sup> The advantage of this damage scheduling is that there is no need to identify all the victim's individual circumstances relating to their damages: causation, exact amount of damages, contributory negligence, etc.<sup>48</sup> It is clear that this system promotes efficiency.<sup>49</sup> Since July 2013, the WCAM also makes clear that the settlement agreement must contain a description of the event or events the to which the agreement relates.<sup>50</sup>

The settlement agreement must also contain the most accurate possible indication of the number of persons belonging to the group or groups.<sup>51</sup> This requirement relates to the fact that the court will deny the request for collective binding if no sufficient guarantee is provided for the payment of the claims made

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39. MvT, TK 2003-04, 29 414, no. 3, at 18.

40. Foundation Centre DES, *supra* note 12.

41. *Id.*; Dexia Bank, *supra* note 12; Shell Petroleum NV, *supra* note 12; Vie D'Or, *supra* note 12; Randstad Holding, *supra* note 12; Scor Holding/Interim Decision, *supra* note 12; Scor Holding, *supra* note 12.

42. See BW art. 7:907 (Neth.).

43. *Id.*

44. *Id.*

45. MvT, TK 2003-04, 29 414, no. 3, part 4, pp. 8.

46. MvT, TK 2003-04, 29 414 no.3, at pp. 11-12.

47. *Id.*

48. *Id.* at 8.

49. *Id.*

50. BW art. 7:907(2)(a) (Neth.).

51. *Id.* at art. 7:907(2)(c).

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under the contract.<sup>52</sup> Several elements must be mentioned in the contract, such as the conditions for applying for compensation under the contract<sup>53</sup> and details of the address to opt out.<sup>54</sup> The agreement must, *inter alia*, also provide an option for an independent adjudication of disputes that might arise from the contract by someone other than the court which has jurisdiction according to the law.<sup>55</sup>

The amount of compensation awarded to the victims is sometimes referred to as the heart of the settlement agreement.<sup>56</sup> According to the WCAM, the court will reject an application to declare an agreement generally binding if it considers the compensation awarded unfair with respect to the amount of damages, the simplicity and speed with which the compensation can be obtained, and the available causes of the damage.<sup>57</sup>

A hardship clause can be part of the settlement agreement.<sup>58</sup> Such a clause can form the basis of a more individual approach towards victims than is envisaged by the damage scheduling.<sup>59</sup> To a certain extent, it could lead to certain victims within a group being entitled to more compensation than others.<sup>60</sup> The settlement agreement in the *DES* case did not contain a hardship clause.<sup>61</sup> The court considered that such a clause could seem appealing because the specific circumstances of the individual cases could be taken into account when establishing the amount of compensation.<sup>62</sup> However, the court went on to say, there were also reasons for arguing against that approach.<sup>63</sup> A significant number of the injured parties could argue that their cases were special, which would lead to several negative outcomes.<sup>64</sup> Therefore, the court decided that the contracting parties could in reasonableness omit that clause.<sup>65</sup> Instead, there was a clause in the *DES* case settlement agreement providing that victims for whom the burden of damage would be unreasonably hard despite the agreement's effect could be more generously compensated.<sup>66</sup> The presence of this clause played a role in the

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52. *Id.* at art. 7:907(3)(c).

53. *Id.* at art. 7:907(2)(e).

54. *Id.* at art. 7:907(2)(g).

55. *Id.* at art. 7:907(3)(d).

56. H.B. Krans, *DES en Dexia: de Eerste Ervaringen met Collectieve Afkikking van Massaschade*, 41 NJB 2598, 2602 (2007).

57. BW art. 7:907(3)(b) (Neth.).

58. Foundation Centre DES, *supra* note 12.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Foundation Centre DES, *supra* note 12.

65. *Id.*

66. *Id.*

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court's decision that the amounts of compensation agreed in the contract were not unreasonable.<sup>67</sup>

## IV. ON A VOLUNTARY BASIS

The settlement agreement necessary for the WCAM is a voluntary agreement.<sup>68</sup> The WCAM assumes that the parties will reach a collective settlement.<sup>69</sup> Why would parties voluntarily oblige themselves to provide compensation? The negotiations do not start at gunpoint. There has to be a willingness to negotiate on both sides of the table.<sup>70</sup> Several incentives to settle can be identified for the parties who provide compensation.<sup>71</sup> A few aspects that could promote out-of-court settlement will be considered in this section.<sup>72</sup>

First, the application of the WCAM decreases the chance of a multitude of individual proceedings, perhaps lasting years.<sup>73</sup> Long-lasting individual proceedings carry costs and uncertainty with them.<sup>74</sup> They can also lead to continuing bad publicity.<sup>75</sup> It is obvious that avoiding this is a potential benefit. In this respect the WCAM offers the option to prevent further damage to reputation.<sup>76</sup> The finality of the settlement agreement with the victims, who are bound by the contract, can be an incentive.<sup>77</sup> This finality can lead to a degree of certainty about the financial obligations towards the victims.<sup>78</sup>

The terminology used in the WCAM is not liable for parties or persons, but parties who commit themselves by this agreement to provide compensation.<sup>79</sup> This is deliberately done to prevent the parties who committed themselves to pay from directly or indirectly admitting that they are liable.<sup>80</sup> Victims who opt out or victims to whom the settlement agreement does not refer could use such admission in establishing their individual claims.<sup>81</sup>

The WCAM's opt-out system can also promote the number of victims who are ultimately bound by the contract, in the sense that they lose their right to start

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67. *Id.*

68. Van Boom, *supra* note 1, at 178.

69. MvT, TK 2008-09, 31 76, no. 1, p.7.

70. *See* Van Boom, *supra* note 1, at 180.

71. *Id.*

72. *See* H.B. Krans, *Procesrechtelijke Prikkel en Knelpunten van de WCAM*, in *RECHT IN REGIO* 37-38 (A.L.M. Keirse et al. eds., 2006).

73. *See* MvT, TK 2008-2009, 31 762, no. 1, p. 6.

74. *See id.*

75. *Id.*

76. *Id.*

77. MvT, TK 2003-04, 29 414, no.3, p. 1-2.

78. *Id.*

79. BW art. 7:907(1) (Neth.).

80. *See* MvT, TK 2003-04, 29 414, no.3, p. 10.

81. *See infra* Part VIII.

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individual proceedings against the parties that, according to claimants, are liable for their losses.<sup>82</sup> Moreover, if the parties who commit themselves to providing compensation wish to avoid excessive uncertainty about the number of victims who will opt out, they can make a reservation on that point.<sup>83</sup> The settlement contract cannot be conditional, except for a condition as to the percentage of victims referred to in the contract who may opt out.<sup>84</sup> If such a condition is part of the contract, the parties who commit themselves by the agreement to provide compensation are entitled to terminate the contract if the agreement fails to cover enough victims.<sup>85</sup> The agreement in the *DES* case contained such a condition,<sup>86</sup> while the agreement in the *Dexia* case did not contain such a condition.<sup>87</sup>

A WCAM application must be filed at the court of appeal in Amsterdam.<sup>88</sup> The legislature deliberately chose a court of appeal instead of a first instance district court as the competent court.<sup>89</sup> A court of appeal decision in WCAM cases is open to cassation, but only by the applicants together.<sup>90</sup> This system means that a WCAM application will only be brought before the Supreme Court, which rules in cassation, if the court of appeal denies an application to declare the settlement contract generally binding.<sup>91</sup> If the request is granted, cassation is not possible.<sup>92</sup> This system has caused debate among Dutch scholars.<sup>93</sup> The Minister opposed more generous options for appeal because in a procedure where a large number of interested parties are involved, an option for appeal can cause serious delay for all of them.<sup>94</sup> The Minister gave great weight to the avoidance of delay.<sup>95</sup> Therefore, it is a one-shot procedure except for cassation. In some ways this is remarkable because it offers interested victims only one chance to articulate their views.<sup>96</sup> However, if victims are not happy with the final result, they retain the option to opt out.<sup>97</sup>

It can easily be argued that the WCAM does not provide sufficient incentive for the parties to settle voluntarily. This is true—there is no formal pressure.<sup>98</sup> So far, agreements have nonetheless been achieved in the Netherlands. Apparently, both

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82. Van Boom, *supra* note 1, at 185.

83. *See id.*

84. *See id.* at 186.

85. BW art 7:908(4) (Neth.).

86. *See* Foundation Centre DES, *supra* note 12.

87. *See generally* Shell Petroleum NV, *supra* note 12.

88. RV art. 1013(3) (Neth.).

89. *See id.*

90. *Id.* at art. 1018(1).

91. Krans, *supra* note 56, at 2599-2601.

92. *Id.* at 2600.

93. *Id.* at 2601.

94. MvT, TK 2003-2004, 29 414, no.3, p. 31.

95. *Id.* at 15.

96. *Id.*

97. *See infra* Part VIII.

98. *See generally* RV art. 1013 (Neth.).



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sides in these settled cases have recognized the benefits of the WCAM. Nevertheless, in recent years the Dutch Legislature has considered how to promote out-of-court settlement. An evaluation of the WCAM in 2008 played an important role.<sup>99</sup>

At the time of that evaluation, two cases had been handled under the WCAM (*DES* and *Dexia*) and settlement agreements had already been concluded in other cases.<sup>100</sup> In a letter to Parliament on the evaluation, the Minister of Justice stated that the total value of these cases was just under EUR 1.5 billion.<sup>101</sup> Consultation with judges, lawyers, interest organizations, and the parties who had caused the damages and were directly involved in these cases were part of the evaluation.<sup>102</sup> One of the main findings was that the WCAM provides an efficient and effective method for settling damages collectively, but in the absence of a willingness to negotiate, the Act does not supply a solution.<sup>103</sup> One of the other findings of the evaluation is that the WCAM is widely applicable, although this was not always reflected properly by the terminology used in the Act.<sup>104</sup> A third finding of the evaluation concerned the concurrence of individual proceedings and the judicial examination of the application.<sup>105</sup> The *Dexia* case demonstrated that the legal rules on suspension required adjustment, for example, to avoid that this concurrence influences the success of the settlement agreement.<sup>106</sup>

Based on the evaluation, the Minister of Justice proposed several additional measures.<sup>107</sup> One of them was a pretrial hearing, which has been part of the WCAM since July 2013.<sup>108</sup> This pretrial hearing offers parties and the court the opportunity to explore whether a collective settlement can be reached.<sup>109</sup> The goal is, according to the Minister of Justice, to assist parties in the out-of-court negotiations so that they can conclude a settlement agreement.<sup>110</sup> At this hearing, the court might be able to assist parties in formulating the main point of dispute and stimulate them to reach a settlement, according to the Explanatory Memorandum.<sup>111</sup> It had already been suggested in the 2008 WCAM evaluation

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99. See generally MvT, TK 2003-04, 29 414, no.3.

100. See Foundation Centre DES, *supra* note 12; see Shell Petroleum NV, *supra* note 12.

101. MvT, TK 2008-09, 31 762, no. 1, p. 3.

102. *Id.* at 5-6.

103. *Id.* at 4.

104. *Id.*

105. *Id.*

106. *Id.* at 5-6; see *infra* Part VII.

107. See generally MvT, TK 2003-04, 29 414 no.3

108. See RV art. 1018(a) (Neth.). The other change is that since that date the WCAM is also applicable to bankruptcy cases. In the explanatory memorandum to the amendment to the WCAM, the Minister refers to the bankruptcy of the DSB Bank in 2009. The validation of individual bank creditors' claims can be an administrative burden. The WCAM procedure could be an appropriate procedure in mass claims to replace this costly and time-consuming validation procedure. See also MvT, TK 2011-2012, 33 126, no. 3, p. 7.

109. See RV art. 1018(a) (Neth.).

110. MvT, TK 2011-12, 33 126, no. 3, p. 26.

111. *Id.* at 25.

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that the court could assist the parties in formulating some of the important points for negotiation and encourage them to reach agreement.<sup>112</sup>

In the 2008 evaluation, the Minister also suggested introducing the option for courts to ask questions directly to the Supreme Court by way of pre-judicial procedure, which was introduced in Dutch law in 2012.<sup>113</sup> The application of the WCAM was an important motive for introducing this pre-judicial procedure.<sup>114</sup> Being able to seek answers from the highest court on essential legal issues can have several benefits in mass cases. The Minister of Justice lists several advantages in the Explanatory Memorandum to the Act on pre-judicial questions to the Supreme Court.<sup>115</sup> One is that it can promote out-of-court settlement.<sup>116</sup> Moreover, if the answer to an important legal question can be taken into account in the settlement agreement, this can improve the quality of that agreement and enhance its acceptance, and avoid possible later dissatisfaction with its content.<sup>117</sup> In addition, it might prevent aggrieved parties opting out or initiating individual proceedings.<sup>118</sup> Therefore, although the application of the WCAM played an important role in introducing the pre-judicial procedure into Dutch law, the scope of this new procedure was deliberately not limited to WCAM cases. However, there is a restriction with respect to WCAM cases: the option to ask questions of the Supreme Court is not available to the court dealing with a WCAM application.<sup>119</sup>

The rationale behind this exclusion is that once the WCAM application for collective binding effect is filed, the court has to decide whether the settlement agreement is fair. This settlement agreement could very well have been concluded, despite some of the legal issues relevant to it not having been settled definitively.<sup>120</sup> Therefore, the Minister stated that asking questions of the Supreme Court at that stage could disturb the balance of a settlement agreement.<sup>121</sup>

Considering the introduction of the pre-judicial procedure and the pretrial hearing, the Dutch legislator can be regarded as having chosen to increase the role of the courts in WCAM proceedings. Considering the aforementioned possible advantages of these new mechanisms, this would appear to be a good thing because it could promote the conclusion of settlement agreements and therefore decrease the chances of multiple individual proceedings.

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112. MvT, TK 2008-09, 21 762, no. 1, p. 6.

113. *Id.*

114. *See* RV art. 392-94 (Neth.).

115. MvT, TK 2010-11, 32 612, no.3 p.6.

116. *See id.*; *see also* RV art. 392 (Neth.).

117. MvT, TK 2010-11, 32 612, no.3 p.6.; *see also* RV art. 392(3)-(4) (Neth.).

118. *See* MvT, TK 2010- 11, 32 612, no. 3, pp. 3-4.

119. *Id.* at 7; *see also* RV art. 392(1) (Neth.).

120. *See* MvT, TK 2010-2011, 32 612, no. 3, p. 6.

121. *Id.*

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## V. CONTRACTING PARTIES

As far as the “paying side” is concerned, one or more parties who commit themselves by this agreement to pay compensation conclude the settlement contract.<sup>122</sup> The Legislature has, as stated, chosen not to use the word ‘liable’ in the WCAM.<sup>123</sup> Therefore, it can remain undecided whether the parties who provide compensation are in fact liable.<sup>124</sup> Insurance companies can also be contracting parties.<sup>125</sup> In the Explanatory Memorandum, the Minister of Justice remarked that insurance companies can take the initiative for negotiations on a settlement agreement.<sup>126</sup>

Parties on the other side have to be victim representative organizations: foundations or associations with full legal competence, which must represent the interests of the victims according to their statutes.<sup>127</sup> In addition, the court must deny a request for collective binding effect if the organization is not sufficiently representative of the interests of the persons on whose behalf the agreement is concluded.<sup>128</sup> Practice has shown that the settlement agreements in several cases were concluded by more than one foundation or association.<sup>129</sup>

Accordingly, the Court has to rule on the requirement of representativeness.<sup>130</sup> In the *DES* case, it was argued that a representative organization (*Stichting Des-centrum*) was not sufficiently representative because (to put it briefly) it was not clear whether the outcome of the negotiations was sufficiently satisfactory for the victims.<sup>131</sup> The court ruled that it was possible for the outcome of negotiations to be less than some people hoped for or expected, but this would not stand on its own as a sufficiently concrete indication that a significant group of victims rejects the outcome of negotiations.<sup>132</sup> In that sense, there was no reason to consider the *Stichting Des-centrum* insufficiently representative of the victims’ interests.<sup>133</sup>

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122. Van Boom, *supra* note 1, at 179.

123. *See generally id.*

124. *See generally id.*

125. *See* MvT, TK 2003-04, 29 414, no.3, part 3, pp. 10-11.

126. *Id.*

127. BW art. 7:907(1)(c) (Neth.).

128. BW art. 7:907(3)(f) (Neth.).

129. This was also expressed in the parliamentary documents leading to the amendment of the WCAM in July 2013. *See* MvT, TK 2012-13, 33 126, no. 3, p. 14. Accordingly, this amendment clarified in the wording of the Act that the agreement can be concluded by one or more associations or foundations representing the interests of the victims. *See* MvT, TK 2011-13, 33 126, no. 3, p. 14.

130. The aforementioned July 2013 amendment of the WCAM also tightened the requirements on representativeness for a foundation or an association to start a collective action by changing BW art. 3:305(a)(2) (Neth.). This representativeness requirement for collective actions has since then been the equivalent of the same requirement in the WCAM. MvT, TK 2012-2013, 33 126, no. 3, p. 10.

131. Foundation Centre DES, *supra* note 12.

132. *Id.*

133. *See* Krans, *supra* note 56, at 2600-01.

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In *Dexia*, the court of appeal in Amsterdam ruled that it was not necessary for each of the four applicants to represent the entire group of victims, as long as each of them was sufficiently representative of a sufficiently significant group of these people.<sup>134</sup>

## VI. JUDICIAL ASSESSMENT

Once an agreement is concluded, the contracting parties can ask the court to declare the settlement generally binding.<sup>135</sup> The request must be done jointly by the contracting parties.<sup>136</sup> Therefore, from that point on, these parties have a common goal: the general binding effect of the settlement agreement.<sup>137</sup> This, of course, does not mean that only the voice of the contracting parties can be heard in court.<sup>138</sup> Before ruling on the application, the court must call the persons on whose behalf the agreement is concluded, as far as they are known.<sup>139</sup> They are, of course, not obliged to come to the court, but they must have the opportunity to appear.<sup>140</sup> They are also entitled to file a statement of opposition.<sup>141</sup>

The court must consider many aspects, especially of the settlement contract, when deciding to grant or to deny the application. Given the consequences of a positive court decision, such careful deliberation is fully justified.<sup>142</sup>

One of the grounds for the court to deny the application is if the settlement agreement does not contain all the prescribed elements: damage scheduling, an accurate indication of the number of victims per group, the amount of compensation awarded, the conditions that must be met by the victims, the name or address for an opt-out declaration, etc.<sup>143</sup>

Perhaps the most important element is the amount of compensation awarded.<sup>144</sup> If this amount is not reasonable, the Act requires the court to deny the application.<sup>145</sup> The WCAM prescribes that when deciding the amount of compensation, the court must consider the simplicity and the speed at which the compensation can be obtained and the possible causes of the damage.<sup>146</sup> The court

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134. Shell Petroleum NV, *supra* note 12.

135. BW art. 7:907(1) (Neth.).

136. *Id.*

137. *See id.*

138. *See* RV art. 1013(5) (Neth.).

139. *Id.*

140. *Id.*

141. *Id.*

142. *See id.*; *see generally* BW art. 7:907(1) (Neth.).

143. *See* BW art. 7:907(2) (Neth.).

144. *See id.* at art. 7:907(3)(b); *see* Krans, *supra* note 56, at 2602.

145. *Id.*

146. *Id.*

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has considered this point in its rulings in all of the cases decided so far, and fairly comprehensively in several other cases.<sup>147</sup>

In the *Dexia* case, for example, some of the aggrieved persons referred to in the contract who presented their views on the request in the WCAM proceedings stated that the agreed amounts of compensation did not sufficiently reflect the damage suffered.<sup>148</sup> The court considered, after having investigated the structure of the agreements and the agreed amounts, that the settlement agreement was the outcome of negotiations undertaken in a context of insecurity, where concessions were made by both sides and risks were estimated.<sup>149</sup> The mere fact that the agreement did not provide for full compensation, or the higher amount that the complainants preferred, could not give rise to the conclusion that the agreed amounts were not fair.<sup>150</sup> The court also extensively explored the criticism leveled at *Dexia* for the damage.<sup>151</sup> Having established this criticism, the court ruled that the agreed amounts were sufficient in the context of these criticisms.<sup>152</sup> The arguments presented by the claimants that the agreed amounts were not high enough were ultimately rejected.<sup>153</sup>

Deciding on the fairness of the agreed amount can be an especially difficult task for the court given that the WCAM procedure is special in the sense that the court can only rule on a joint application.<sup>154</sup> The contracting parties must bring the application together.<sup>155</sup> This means that once the settlement agreement is concluded, the contracting parties, who previously negotiated the settlement, gain a common goal: securing a declaration from the court that the contract is binding upon all the persons referred to in the contract. The result of this procedure is that, once they turn to the courts, their interests are common.<sup>156</sup> However, the court must decide the application on the basis of the interests of all the victims

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147. See, e.g., *Dexia Bank*, *supra* note 12; see, e.g., *Vie D'Or*, *supra* note 12; see, e.g., *Shell Petroleum NV*, *supra* note 12; see, e.g., *Randstad Holding*, *supra* note 12; see, e.g., *Scor Holding*, *supra* note 12.

148. *Dexia Bank*, *supra* note 12.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* Among Dutch scholars there seems to be no consensus on the nature of this assessment by the court. It is stated that the assessment of the fairness of the compensation in the agreement is extensive. B.J. BROEKEMA-ENGELN, *TEKST & COMMENTAAR BURGERLIJK WETBOEK* (J.H. Nieuwenhuis et al. eds. 2013); BW art. 7:907(5) (Neth.). On the other hand it is also remarked that this assessment is more marginal. W.J.J. LOS, *Toepassing van de WCAM Bespiegelingen Over de rol en de Taak van de Rechter*, in *COLLECTIEVE ACTIES IN HET ALGEMEEN EN DE WCAM IN HET BIJZONDER* par. 6 (2013); A.J. KOK AND M.H.C. SINNIGHE DAMSTÉ, *CONVERIUM: EEN STAP VOORUIT BIJ COLLECTIEVE AFWIKKELING VAN INTERNATIONALE MASSASCHADE IN NEDERLAND*, *TIJDSCHRIFT VOOR DE ONDERNEMINGSRECHTSPRAKTIJK* 34 (2011). For another recent publication on this topic see CARLA KLAASSEN, *DE ROL VAN DE (GEWIJZIGDE) WCAM BIJ DE COLLECTIEVE AFWIKKELING VAN MASSASCHADE 'EN NOG WAT VAN DIE DINGEN'*, *ARS Aequi* par. 4.1 (2013).

154. See BW art. 7:907(1) (Neth.); see also RV art. 1013 (Neth.).

155. See RV art. 1013 (Neth.).

156. See BW art. 7:907(1) (Neth.); see also RV art. 1013 (Neth.).

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referred to in the contract.<sup>157</sup> Any objections must be brought by those victims, but these victims have no options for appeal or cassation.<sup>158</sup>

If the court feels the need to hear an expert's opinion, it can order that one or more experts give their opinions on matters relevant to the application.<sup>159</sup> An expert report can, for example, concern the representativeness.<sup>160</sup> The agreed amount of compensation can also be the topic of an expert report.<sup>161</sup> The *Dexia* case, for example, concerned several types of financial product contracts.<sup>162</sup> One of the defenses offered was that the bank itself had incurred no or limited losses on the shares in question because it had not actually bought and held the shares itself.<sup>163</sup> It was therefore argued that it was not reasonable for these losses to have been covered by the bank's clients (who bought complicated financial products from the bank).<sup>164</sup> The Amsterdam court ordered an expert report on that point.<sup>165</sup> The Dutch Authority on Financial Markets ("AFM") was appointed as expert.<sup>166</sup> Based on the AFM report, the court ruled that there was insufficient reason to doubt that Dexia had bought and held the shares.<sup>167</sup>

The judicial review of the application and the settlement agreement has to cover other aspects as well.<sup>168</sup> The court must, for example, deny an application if insufficient security is lodged to pay the contractual amounts.<sup>169</sup> The court has explicitly considered this point in several cases so far.<sup>170</sup> The agreement also has to provide for independent dispute resolution (by another person than the judge deemed competent according to the law) on issues that may arise from the agreement.<sup>171</sup> In the *Shell* and the *Dexia* cases, the Amsterdam court allowed the settlement agreement to provide that aggrieved parties may choose whether they wanted to bring a dispute concerning the contract before a disputes committee or before the court.<sup>172</sup> In the Explanatory Memorandum to the recent amendments to

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157. Van Boom, *supra* note 1, at 182.

158. *See id.* at 186.

159. RV art. 1016 (Neth.).

160. MvT, TK 2003-04, 29 414, no.3, p. 29.

161. *Id.* at 14-15.

162. Dexia Bank, *supra* note 12.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *See* Van Boom, *supra* note 1, at 183.

169. *Id.*

170. *See* Dexia Bank, *supra* note 12; *see* Vie D'Or, *supra* note 12; *see* Shell Petroleum NV, *supra* note 12; *see* Randstad Holding, *supra* note 12.

171. BW art. 7:907(3)(d) (Neth.). Until the amendment of the WCAM in July 2013, what was required was an independent determination of the (individual) compensation.

172. Dexia Bank, *supra* note 12; Shell Petroleum NV, *supra* note 12.

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the WCAM, the Memorandum reiterated that this was allowed because it is an extension of the dispute resolution options available to victims.<sup>173</sup>

The court must also consider whether the interests of the persons on whose behalf the agreement was concluded are otherwise insufficiently safeguarded, and whether that group is large enough to justify the declaration that the agreement is binding.<sup>174</sup>

In the Explanatory Memorandum to the WCAM, the Minister of Justice stated that the court, when deciding on the fairness of the agreed amounts, can take into account that the total property available to the party providing compensation is insufficient to compensate all the victims entirely.<sup>175</sup> It would appear logical that restrictions to the availability of resources are taken seriously. The fact that the available amount can be taken into account should improve the chances that a settlement agreement will be concluded. On the other hand, it might not be easy to establish the amount available for the execution of the settlement agreement.<sup>176</sup> In its advice on the draft WCAM, the Netherlands Association for the Judiciary (Nederlandse Vereniging voor Rechtspraak ["NVvR"]) was critical on this point and stated that the courts might not have insight into the capacity for payment of the party who caused the damage.<sup>177</sup>

The court can order the parties to complete or to adjust the agreement before deciding on its application.<sup>178</sup> In the *DES Case*, the Amsterdam court ruled that, as a starting point, this option may only be used if the request for collective binding effect will be declined on one of the grounds for refusal of art. 7:907 paragraph 3 of the Civil Code, such as the reasonableness of the agreed amount or insufficient security or insufficient representativeness of the contracting foundation or association.<sup>179</sup>

## VII. OTHER PROCEDURAL RULES

This section will discuss some procedural aspects of the WCAM. At the instigation of the Advisory Commission for Civil Procedure Law, the handling of WCAM cases was concentrated at one court.<sup>180</sup> When choosing the court of appeal in Amsterdam, the Minister stated that would enable WCAM cases to benefit from the financial expertise of the Enterprise Division (*Ondernemingskamer*).<sup>181</sup> This Enterprise Division is part of the Amsterdam

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173. MvT, TK 2011-13, 33 126, no. 3, pp. 10-11.

174. See BW art. 7:907(3)(e), (g) (Neth.).

175. MvT, TK 2003-04, 29 414, no.3, pp. 3, 13. See generally Krans, *supra* note 5, at 7, 8.

176. Letter from the Scientific Committee to the Mayor, p. 3 (Aug. 26, 2011) (on file with author).

177. *Id.*

178. BW art. 7:907(4) (Neth.).

179. See generally Foundation Centre DES, *supra* note 12.

180. MvT, TK 2003-04, 29 414, no.3, p. 25.

181. *Id.*

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Court of Appeal and deals with (to put it in briefly) corporate litigation.<sup>182</sup> This fits well with mass damages claims related to financial products. The connection between the expertise of the Enterprise Division and mass damages might be less obvious when personal injury is involved, but the fact that it may be useful to have some experience in corporate litigation when handling WCAM cases, with their multitude of interested persons, cannot be excluded. Thus, concentrating WCAM cases in a single court is a positive step. Given that five of the six WCAM cases so far have concerned the field of finance, the rationale for the choice of the Amsterdam court seems better founded than might have been expected at the time the WCAM was designed. Although the Legislature's motivation for this one court does not explicitly refer to WCAM cases on financial products and the usefulness of the experience of the Enterprise Division, choosing this court seems appropriate.

Of course, the application for collective binding effect has to meet several requirements.<sup>183</sup> For example, until July 2013 it was formally required that the names and addresses of all the victims known to the contracting parties had to be listed on the face of the application.<sup>184</sup> However, the Amsterdam court has allowed names and addresses to be listed in an appendix. In the *Vie d'Or* case, a CD-ROM with these facts was allowed.<sup>185</sup> It is now no longer required for the names of the victims known to the parties to be listed on the face of the application, but the court can order, on request or *ex officio*, that the names and addresses of the victims known to the contracting parties be supplied to the court.<sup>186</sup>

All injured persons referred to in the settlement contract should have the opportunity to be heard on request and must be notified.<sup>187</sup> This notification can be by normal post, unless the court decides otherwise.<sup>188</sup> In the *Shell* case, the court allowed that potentially interested persons in the Netherlands, on whose behalf the agreement was concluded—as far as they were known to the claimants—be notified by normal post.<sup>189</sup> In the *Vie d'Or* case, the court allowed that the persons on whose behalf the agreement was concluded and who resided in the Netherlands were notified by email.<sup>190</sup> The recent amendment to the

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182. See generally ONDERNEMINGSKAMER, available at <http://www.rechtspraak.nl/organisatie/gerechtshoven/amsterdam/overhetgerechtshof/organisatie/ondernemingskamer/pages/default.aspx#TOCHheadingRichHtmlField17>.

183. See generally RV art. 1013(1) (Neth.).

184. See generally *id.*

185. *Vie D'Or*, *supra* note 12.

186. See RV art. 1013(6) (Neth.) (stating that it is sufficient to note the last addresses of the victims known to the contracting parties).

187. See *id.* at art. 1013(5).

188. *Id.*

189. *Shell Petroleum NV*, *supra* note 12.

190. If the requesting parties did not have the email addresses, notification by regular letter was permitted. *Vie D'Or*, *supra* note 12.



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WCAM follows this practice: the court may order the requesting parties to supply names and addresses of known victims, in a manner determined by the court.<sup>191</sup> Practice has demonstrated that websites can play a role regarding notification.<sup>192</sup>

In addition to the calling of the persons known to the contracting parties, notification must be made in one or more newspapers (appointed by the court).<sup>193</sup> As stated in the Explanatory Memorandum to the WCAM, publication is essential because the identity of many interested persons can be unknown.<sup>194</sup> The court can even decide that notification by regular letter is too great a burden, (if the number of interested persons involved is high) and order that notification in the press will suffice.<sup>195</sup>

It is quite possible that at the time of the application—thus after agreement has been reached—several cases on the matter of the settlement agreement will have already been brought to court on an individual basis. These proceedings could have been initiated before the negotiations on the matter in question started.<sup>196</sup> Proceedings concerning disputes that the settlement agreement aims to bring to an end will be suspended once a WCAM application for collective binding effect is filed.<sup>197</sup> Before July 2013, individual proceedings were only suspended on request, but the recent amendment provided that a procedural action for suspension is unnecessary and a burden for many injured persons.<sup>198</sup> However, if for some reason the parties would prefer to continue the individual proceedings, that is, of course, a valid ground for resumption.<sup>199</sup>

As stated in Part IV, according to the Explanatory Memorandum to the recent amendments to the WCAM, the *Dexia* case has demonstrated that proceedings that were resumed during the opt-out term have led to case law that could influence other people's decisions on whether to opt-out.<sup>200</sup> Therefore, since July 2013, individual proceedings cannot be resumed until the opt-out term has elapsed.<sup>201</sup> The WCAM formulates several grounds for resumption of these individual

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191. Rv art. 1013(6) (Neth.).

192. See Foundation Centre DES, *supra* note 12; see Shell Petroleum NV, *supra* note 12; see Vie D'Or, *supra* note 12; see Randstad Holding, *supra* note 12; see 51 m.nt. BJ de Jong (Applicants/ Converium), *supra* note 12; see Dexia Bank, *supra* note 12.

193. Rv art. 1017(3) (Neth.).

194. MvT, TK 2011-13, 33 126, no. 3, p. 43.

195. *Id.* The *Shell* case has demonstrated that calling in international cases can require extra attention, but that topic does not fall within the scope of this contribution. See H.B. Krans, *The Dutch Class Action (Financial Settlement) Act in an International Context: The Shell Case and the Converium Case*, 31 C.J.Q. 141, 147-48 (2012) (on international notification in the *Shell* case and the *Converium* case).

196. See Rv art. 1015(1) (Neth.).

197. *Id.*

198. MvT, TK 2003-04, 29 414, no. 3, pp. 21-22.

199. Rv art. 1015(2)(f) (Neth.).

200. MvT, TK 2011-13, 33 126, no. 3, pp. 21-22.

201. Rv art. 1015(2)(b) (Neth.).

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proceedings.<sup>202</sup> One such ground is that it irrevocably establishes that the application for collective binding is not allowed.<sup>203</sup>

## VIII. OPTION TO OPT OUT

If the agreement is declared generally binding and that decision has become final, all injured persons referred to in the contract are entitled to compensation according to the contract.<sup>204</sup> From that moment on, injured persons referred to in the contract, who are entitled to compensation, can be considered as parties to the settlement agreement.<sup>205</sup> This means that the victims from that point on—technically parties to the contract—can claim performance of the agreement.<sup>206</sup> However, they lose their right to instigate actions themselves against the parties who committed themselves to pay compensation.<sup>207</sup> To maintain the option to lodge an individual claim, they must opt-out.<sup>208</sup>

The option to opt-out is an essential element in the WCAM system.<sup>209</sup> Once the settlement agreement becomes binding on the victims referred to in the contract, and these victims lose their right to start individual proceedings, it is obvious that several important legal principles can be at issue, such as access to court and the right to a fair and public hearing by an impartial and independent judge.<sup>210</sup> These issues were also recognized when designing the law.<sup>211</sup> It was considered crucial that there should be an option for victims to step out of the contract and to maintain their freedom to initiate individual proceedings.<sup>212</sup> Therefore, the declaration has no effect upon a person entitled to compensation, who has notified by written communication that he does not want to be bound by the contract.<sup>213</sup>

As a result, once the court has granted the application, injured persons entitled to compensation under the contract have to make up their minds: to opt-out and maintain the option to instigate individual proceedings or take the compensation under the contract. Victims aiming for “the jackpot” will probably opt-out. However, if they initiate individual proceedings, the outcome is uncertain. They run the risk of ending up empty-handed. It seems logical to

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202. See BW arts. 7:907(1), 7:908(2) (Neth.).

203. RV art. 1015(2)(c) (Neth.).

204. BW art. 7:907(1) (Neth.).

205. *Id.* at art. 7:908(1).

206. *See id.*

207. *See id.*

208. *Id.* at art. 7:908(2).

209. MvT, TK 2003-04, 29 414, no. 3, pp. 30.

210. *Id.*

211. *See id.*

212. *Id.* at 3.

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

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suppose that parties who committed themselves to provide compensation under the contract will not easily surrender in individual proceedings after an opt-out procedure. Injured parties who do not wish to handle their own cases will probably prefer “to stay in the contract” and maintain their right to their contractual claims. Compared to initiating individual proceedings, the contractual claim requires less effort and is a relatively easy road for individual victims to follow. On the other hand, the contractual compensation will probably not be full compensation, as it is the outcome of negotiations.<sup>214</sup> In the *Dexia* case, the court established that the settlement agreement was the outcome of negotiations in a situation of uncertainty, and that on both sides concessions were made and chances were estimated.<sup>215</sup> The mere fact that the agreement does not provide full compensation does not justify the conclusion that the contractual compensation is not fair, so ruled the court.<sup>216</sup> And in the *Shell* case, the court took the uncertainty of the outcome of individual proceedings against Shell into account in its decision on the fairness of the agreed amounts.<sup>217</sup>

The period for opt-out notification must be set by the court, but cannot be less than three months.<sup>218</sup> In several cases so far, the court has set this term at three months, either *ex officio*<sup>219</sup> or on request.<sup>220</sup> In the *Dexia* case, the court set this term at six months.<sup>221</sup> In the *Shell* case, the court underlined that the requirement of a written notification to opt-out is “light” and that this opt-out notification also can be done by email.<sup>222</sup> In the *Vedior* case, the court ruled that a simple written notification from the person entitled to compensation under the contract that he does not want to be bound to the contract suffices.<sup>223</sup> Van Mierlo has suggested that the individual proceedings brought by victims who have used the option to opt-out should be concentrated in a single court: the district court in Amsterdam. If appeals were lodged for such cases, they would therefore be brought before the Court of Appeal in Amsterdam.<sup>224</sup> This suggestion did not make it into the WCAM.<sup>225</sup>

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214. *Dexia Bank*, *supra* note 12; *see* *Foundation Centre DES*, *supra* note 12.

215. *Dexia Bank*, *supra* note 12.

216. *Id.*

217. *Shell Petroleum NV*, *supra* note 12. In the *DES* case, the court ruled that the settlement agreement was the result of negotiations. *Foundation Centre DES*, *supra* note 12.

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

219. *Foundation Centre DES*, *supra* note 12; *Vie D’Or*, *supra* note 12.

220. *Shell Petroleum NV*, *supra* note 12.

221. *Dexia Bank*, *supra* note 12.

222. *Shell Petroleum NV*, *supra* note 12.

223. *Vie D’Or*, *supra* note 12.

224. A.I.M. van Mierlo et al., *Enkele Procesrechtelijke Kanttekeningen bij Wetsvoorstel 29 414 (Wet Collectieve Afwikkeling Massaschade)*, in *HET WETSVOORSTEL COLLECTIEVE AFWIKKELING MASSASCHADE 11, 23*, (Nederlandse Vereniging Voor Procesrecht 2005).

225. *See generally* *Collective Settlement of Mass Damage Act [WCAM 2005]* (Neth.).

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IX. RECENT EU RECOMMENDATION AND COMMUNICATION

In June 2013, the European Commission adopted a Recommendation “on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.”<sup>226</sup> The Commission also published a Communication “Towards a European Horizontal Framework for Collective Redress.”<sup>227</sup> These were not the first steps at European level on the path to collective redress.<sup>228</sup> For example, in 2005 the Commission adopted a White Paper on antitrust damages actions,<sup>229</sup> and in 2008, it adopted a Green Paper on Consumer Collective Redress.<sup>230</sup> In February 2012, the European Parliament adopted a resolution titled “Towards a Coherent European Approach to Collective Redress.”<sup>231</sup> A more extensive description of European attention to the topic (including a public consultation and its outcomes) can be found in both the Recommendation and the Communication of June 2013.<sup>232</sup>

The purpose of the Recommendation of June 2013 is to “facilitate access to justice, stop illegal practices[,] and enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law, while ensuring appropriate procedural safeguards to avoid abusive litigation.”<sup>233</sup> This Recommendation sets out a set of basic principles.<sup>234</sup> The Recommendation instructs, “[a]ll Member States should have collective redress mechanisms at national level for both injunctive and compensatory relief.”<sup>235</sup> And these mechanisms should respect the basic principles of the Recommendation.<sup>236</sup> The Recommendation formulates several “Principles Common To Injunctive And Compensatory Collective Redress,” such as standing to bring a collective action,

226. Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law (2013/396/EU), 2013 O.J. (L 201) 60.

227. EUR. PARL. DOC. 2011/2089(INI) (2012); *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,”* COM, 401 (June 11, 2013).

228. See Commission of the European Communities, *White Paper on Damages for Breach of the EC Antitrust Rules*, COM, 165 (Apr. 2, 2008); see Commission of the European Communities, *Towards a European Horizontal Framework for Collective Redress*, *supra* note 227, at 794.

229. Commission of the European Communities, *Towards a European Horizontal Framework for Collective Redress*, *supra* note 227, at 794; Commission of the European Communities, *White Paper on Damages for Breach of the EC Antitrust Rules*, *supra* note 228, 165.

230. Commission of the European Communities, *Towards a European Horizontal Framework for Collective Redress*, *supra* note 227, at 794.

231. EUR. PARL. DOC. 2011/2089(INI), *supra* note 227.

232. *Id.*; Commission of the European Communities, *Towards a European Horizontal Framework for Collective Redress*, *supra* note 227, at 401.

233. Commission Recommendation of 11 June 2013, *supra* note 227, at § I.

234. *Id.*

235. *Id.* at § I.2.

236. *Id.*

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admissibility, information on a collective redress action and funding.<sup>237</sup> It also contains “Specific Principles Relating To Injunctive Collective Redress,” on expedient procedures and efficient enforcement<sup>238</sup> and “Specific Principles Relating To Compensatory Collective Redress,” on opting in, collective alternative dispute resolution and settlements, and the prohibition of punitive damages.<sup>239</sup>

In a first reaction, the Dutch Minister stated (among other things) that E.U. involvement on the field of collective redress can have added value, as far as this involvement concerns trans-boundary cases.<sup>240</sup> He also stated that the Netherlands wants to know if the principles formulated in the Recommendation and the Communication are also intended for cases without transboundary elements.<sup>241</sup> Lastly, the Minister stated that in the Netherlands the WCAM is based on an opt-out mechanism to the satisfaction of all settling parties.<sup>242</sup>

## X. CONCLUSION

The WCAM was innovative for Dutch law at the time of its introduction.<sup>243</sup> Although the Act seems to have been developed with a focus on personal injury cases, it has also proved effective for purely financial cases.<sup>244</sup> The WCAM is not based on legal approaches to enforcing the need to reach a settlement,<sup>245</sup> but practice has shown that the WCAM works.<sup>246</sup> The first cases and WCAM’s evaluation in 2008 clarified that the WCAM provides Dutch law with a method for settling mass damages collectively.<sup>247</sup> The recent introduction of the option for a pretrial hearing may turn out to be a useful instrument that could contribute to out-of-court settlement.<sup>248</sup> The same can be said of the new opportunity to ask pre-judicial questions of the Supreme Court.<sup>249</sup>

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237. *Id.* at § III; Commission of the European Communities, *Towards a European Horizontal Framework for Collective Redress*, *supra* note 227, at 4.

238. Commission Recommendation of 11 June 2013, *supra* note 225, at § IV.

239. *Id.* at § V.

240. TK 2012-13, 22 112, nr. 1663, at 3.

241. *Id.*

242. TK 2012-13, 22 112, nr. 1663, at 4.

243. *See supra* Parts I-II.

244. *See supra* Parts III, V.

245. *See supra* Part IV.

246. *See generally* A.F.J.A. Leijten, *Actualiteiten, Twee Zwaluwen aan het Begin van de Zomer, Ondernemingsrecht 2006-10/11* p. 392. Aspects of international private law are omitted from this article. *See supra* Parts II-III.

247. *See supra* Parts II-III.

248. *See supra* Parts I, IV.

249. *See supra* Part IV.