ISSN 1127-2872

PUBBLICAZIONE SEMESTRALE ANNO XVI
N. 1 GENNAIO - GIUGNO 2011



# Contratto e impresa / Europa

a cura di F. Galgano e M. Bin

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2011

CEDAM

# Dutch Treat: the Dutch Collective Settlement of Mass Damage Act (WCAM 2005)

## 1. – *Introduction*

In the ambit of adding to the discussion on the design of a possible class action procedure for Europe, this contribution shall lay out certain main aspects of the Dutch Collective Settlement of Mass Damage Act (Wet Collectieve Afwikkeling Massaschade [WCAM]) of 2005 (1). The act originated out of the deadlock in negotiations on a compensation scheme resulting from a mass of cases of cervical and breast cancer caused by DES, and is regarded as operating on the crossroads of tort law, substantive contract law, and civil procedure (2). In terms of design, it is a composite of a voluntary settlement contract sealed with a 'judicial trust mark' attached to the contract. Thus, the foundation of the WCAM is a contract between the alleged tortfeasor and an organisation representing the interests of the injured individuals (3).

As it is a very special design, we outline the procedure briefly before going into the specific questions. Basically, this is how the WCAM works:

- First, an amicable settlement agreement concerning payment of compensation is concluded between the allegedly liable party or parties on the one hand, and a foundation or association acting in the aligned common interest of individuals involved (and injured) on the other;

- The parties to the agreement then jointly petition the Amsterdam Court of Appeals to declare the settlement binding on all persons to whom damage was caused (4); these interested persons are not summoned in this procedure but are notified by post or by newspaper announcement (5);

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(1) Cf. Arts. 7:907 – 910 Civil Code (CC) and for some specific procedural law aspects Title 14 of Book 3 Code of Civil Procedure (CCP).

(2) Van Boom, *Collective Settlement of Mass Claims in The Netherlands*, in *Auf dem Weg zu einer europäischen Sammelklage?*, ed. M. Casper, et al., Muenchen, 2009, 171-192, p. 178.

(3) Apart from these two parties, in practice there is a third party to the contract: the administrator. This is usually a foundation that was incorporated especially for the purpose of distributing the settlement sum or fund, and that will execute the settlement and act as trustee of the settlement fund. It is the 'legal entity' referred to in Art. 7:907 (3) (h) CC, and it therefore needs to be party to the settlement for the Amsterdam Court to declare the settlement binding upon the injured individuals.

(4) See Art. 1013 (3) CCP for the exclusive competence of the Amsterdam Court in WCAM cases.

(5) In normal petition procedures, the interested parties are given notice by registered let-

- The Amsterdam Court hears the arguments of all interested parties;
- The Court considers several points concerning the substantive and procedural fairness and efficiency of the settlement (e.g. amount of compensation, adequate representation of interested parties);
- If the Court rules in favour of the settlement, it declares the settlement binding upon all persons to whom damage was caused and who are accommodated by the settlement, leaving non-willing parties with the opportunity to opt out within a certain period, after which the opt-out option lapses. Generally speaking, the procedure will end with one of two possible outcomes: the requested declaration is either denied or granted.

## 2. – *Collective settlement (WCAM procedure) and representative action*

### *a. The parties involved*

Under the WCAM, the settlement agreement is concluded between the allegedly liable party or parties and a foundation or association acting in the aligned common interest of individuals involved (and injured). It is a requirement for the representing party to have full legal capacity to act in court, and its articles have to set out the protection of the victims' interest as a main aim (6). Individuals, groups of victims, or only one contracting party have no power to initiate the WCAM procedure.

The defendant can be one or several parties that have agreed to pay compensation (Art. 7:907(1) CC). Note that other foundations or associations that meet the description in the previous paragraph may file a defence (Art. 1014 CCP) (7).

The Dutch Consumer Authority is also included among possible representative bodies (see Art. 2.6. Wet handhaving consumentenbescherming – Law on Consumer Law Enforcement). If the Authority wanted to initiate this procedure, it would have to write a request to the Secretary of State, as his consent is required for this action. The Consumer Authority has the official duty to restrain itself with regard to this option, as it is designed primarily for private associations (8). To date, there has been no case, nor has one been planned.

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ter (Art. 272 CCP). However, this was considered too burdensome a requirement in WCAM petitions.

(6) STUYCK ET AL., *Netherlands National Report*, 2006, p. 9.

(7) M. B. M. LOOS, *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country report Netherlands*, 2008, p. 3.

(8) M. J. pro facto (SCHOL, J. NAGTEGAAL, and H. B. WINTER), *Evaluatie Wet handhaving*

*b. What rights can be enforced through collective action?*

Basically, the WCAM entails having a voluntary settlement contract on mass damage compensation declared binding by the court. However, the WCAM is not the only instrument available for collective redress. In addition to the WCAM, there is a general rule on *representative action* in the Dutch Civil Code (Arts. 3:305a-c), which authorises representative organisations to initiate a collective representative action in the civil courts. There are no special procedural requirements that such organisations need to meet other than the general requirement that they should aim at representing a specified group of persons or specific and commonly shared interests pursuant to their articles of incorporation.

In the representative action procedure, the foundation or association may:

- seek a declaratory judgment to the benefit of interested parties that are alleging the defendant has acted wrongfully against these parties, and is thus legally obliged to do something or to abstain from doing something towards them;
- seek injunctive relief in the form of either a positive mandatory injunction or a prohibitory injunction;
- seek performance of a contractual duty of the defendant owed to various interested parties;
- seek the termination or rescission of a contract between the defendant and various interested parties ([9]).

In fact, the possibility of the representative action had already been acknowledged in case law in the 1970s. What the representative action did not – and still does not – allow is monetary relief as a remedy. Recently, the Dutch Supreme Court made clear that there is no direct possibility to declare that there is an obligation to pay damages towards all individuals concerned ([10]). The reason is that courts are supposed to assess damages in tort individually, and therefore the collective ex parte assessment is deemed impossible. This is exactly why the WCAM was introduced in 2005 – to retain the restrictions on representative action and at the same time to stimulate collective out-of-court settlements.

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*consumentenbescherming Ervaringen met het duale handhavingsstelsel en de handhavingsbevoegdheid inzake massaschade*, 2010, p. 28, referring to Memorie van Toelichting Whc, Kamerstukken II 2005/06, 30 411, nr. 3, p. 38-39.

([9]) FRENK, *Kollektieve akties in het privaatrecht* (diss. Utrecht), Deventer 1994, 355.

([10]) Cf. M. B. M. LOOS and W.H. VAN BOOM, *Handhaving van het consumentenrecht – Preadviezen Nederlandse Vereniging voor Burgerlijk Recht 2009*, Deventer, 2010, p. 156.

This does not mean that representative action as laid down in Art. 3:305a-c CC has become obsolete. Representative action can and actually does serve as a precursor to collective settlement: the representative action can be used to decide on points of law common to all individual claims. Although the outcome of such a declaratory judgement procedure does not officially constitute a binding precedent for individual claims, in practice the power of such a judgement is convincing. Thus, the successful use of the representative action can in fact further negotiations for a mass settlement.

The Amsterdam Court will have to judge the settlement and what benefits it confers on individual claimants. In doing so, it will assess whether the settlement is a 'fair deal' for all parties concerned, especially for the victims. For example, the Court will reject the settlement if (*inter alia*) ([11]):

- the amount of the compensation awarded is not reasonable, having regard to, *inter alia*, the extent of the damage, the ease and speed with which the compensation can be obtained, and the possible causes of the damage ([12]);
- the interests of the persons on whose behalf the agreement was concluded are otherwise not adequately safeguarded;
- the foundation or association does not sufficiently represent the interests of persons on whose behalf the agreement was concluded.

The method and procedure for calculating damages, the amounts, the forms, standards, protocols, and so forth, are deliberately not provided for in the Act ([13]). The need for damage scheduling and categorising the injured individuals obviously depends on the nature of the mass damage event ([14]). Parties can and will agree on some form of abstract damage scheduling that diverges from the *restitutio in integrum* ideals of the law of damages ([15]). In practice, individual claimants may receive less compensation than they would have obtained individually – the settlement may be a trade-off between a certain sum and the uncertainty of litigating individual claims. In

([11]) Art. 7:907 CC.

([12]) Note that the Court should also prevent the compensation scheme forwarded by the settlement from overcompensating the injured individuals; see Art. 7:909 (4) CC.

([13]) As said, Art. 7:909 (4) CC indicates that the injured individuals may not be evidently overcompensated, but undercompensation as such seems possible, especially in light of the uncertainty that the tortfeasor is actually liable.

([14]) Van Boom, pp. 171-92, p. 186.

([15]) Van Boom, pp. 171-92, p. 180.

theory, it may be possible that certain claimants receive more compensation than they would be entitled to individually, a situation that is inherent to the nature of a settlement: some may gain, others may lose.

*c. Advantages of collective action*

Among the advantages of this type of procedure is that there are no direct costs for individual claimants and the work is undertaken by the representative organisation ([16]). Moreover, there are easy options to opt-out if victims do not want to be bound by the contract that led to very low procedural risks. Note that victims who are unknown to the organisation at the time of settlement can possibly also benefit from the settlement. Furthermore, once a settlement is reached, the WCAM procedure offers a speedier redress for multiple parties than individual court claims would ([17]).

It has also been said that there is an advantage in terms of bargaining power, as the tortfeasor will be more willing to reach a collective settlement ([18]). In addition, It is regarded as highly likely that the tortfeasor will correctly execute the damage settlement ([19]). The alleged tortfeasor benefits from the settlement if and to the extent that individual claimants do not opt out of the mass settlement; therefore, there is some pressure on the tortfeasor to propose a settlement that is optimally beneficial to the individual claimants so that they do not feel the need to opt out and pursue their claims individually. For this reason, the settlement can be expected to be reached 'in the shadow of the law'. The main benefit for the tortfeasor in dealing with all cases in one go is to achieve efficient closure of the entire episode; therefore, the tortfeasor will have to weigh the uncertainties in terms of the number of outstanding and dormant claims, the expected number of claimants opting out, and thus the expected net costs of the settlement ([20]). However, if the tortfeasor does not expect that individual claims will go to court independently – for example, because the claims are for individually insignificant small sums – the chances that a settlement is actually reached voluntarily may be slim.

As far as attorney remuneration is concerned, the Dutch model is a far

([16]) STUYCK, p. 11.

([17]) LOOS, p. 41. However, procedures at the Dutch ADR body, the *Geschillencommissie* (Complaints Board) are generally even faster.

([18]) LOOS, p. 2.

([19]) STUYCK, p. 11.

([20]) From the number of people opting out, he can calculate the remaining risk of further claims.

cry from the USA-type class action. Dutch attorneys do not gain excessively from the mass settlement; currently, members of the Dutch bar are not allowed to operate under a contingency fee arrangement, and therefore the hourly fee model is used.

*d. Costs of the procedure*

Among the procedural costs are those of notifying interested parties, the costs of professional support, and the costs of publishing the Court declaration ([21]). The Court decides who bears the procedural costs (Art. 1016(2) CC). This can be any of the contracting parties ([22]). While consumer associations generally bear the costs for the individual consumers, it stands out that in fact consumer organisations are regularly created *ad hoc* to negotiate the settlement, and are then financed by a low membership fee ([23]).

As to the costs before the court proceedings, it is up to the parties to agree upon arrangements concerning these. Details for the execution of the settlement and the procedure as to awarding damages are set out in the contract itself (Art. 7:907(2)(e) and (3)(b) and [c]). Generally, the tortfeasor will be charged with the costs of this phase. All in all, the negotiation phase that precedes the court procedure will be used to reach consensus on who will bear what costs.

Note that initially the costs of negotiations have to be borne by the parties themselves. Unlike in certain other countries, Dutch consumer associations are not lavishly supported by state subsidies. Hence, their resources to initiate representative actions and to negotiate mass settlements are limited. These consumer associations may be wrung dry in the negotiations process itself, and any strategy aimed at litigating their way towards a settlement will fail. Associations are hardly ever eligible for public legal aid; therefore, the expenses are financed by membership fees ([24]). Moreover, Dutch rules on cost shifting are such that the prevailing party can only partially shift court fees and attorney fees to the losing opponent ([25]). Consequently,

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([21]) Loos, p. 6.

([22]) Stuyck, p. 11.

([23]) Consumers who are not members of the consumer organization, and who benefit from the settlement that is declared binding on all consumers, do not really bear any costs. In the Dexia case, for instance, Dexia had to pay the costs of notifying interested parties and of the appointed expert, cf. Loos, p. 7.

([24]) Loos, p. 38.

([25]) Tuil M. L., *The Netherlands' in Vogenauer*; Tulibacka M. and Hodges C., *Funding and Costs of Civil Litigation: A Comparative Perspective* (Civil Justice Systems), pp. 401-420.

the financial incentives for consumer associations are geared towards responsive amicable settlement.

*e. Position of individual claimants*

Individuals can be heard during the court hearing. They can also oppose the settlement. While the Court can give parties the opportunity to modify the settlement during the procedure, it has no powers to oblige them to make certain modifications (Art. 7:907 (4) CC) ([26]). During the petition procedure, interested third parties will also be given notice to appear at the hearing.

While the individual has the opportunity to oppose – at his own expense – the settlement, the position of individual claimants during the court procedure seems to be weak. Should individuals want to intervene in the procedure, they would have to be responsible for their own costs ([27]).

If the court decides that the settlement is of general benefit, and it thus declares the settlement binding, the only solution for individuals who do not want to be bound to the settlement is to opt out. The interested persons entitled to compensation under the settlement automatically become party to a contract without their explicit consent (Art. 7:908 (1) CC). Instead, the initiative is on them to opt out of the contract if they deem it unfavourable (Art. 7:908 (2) CC) ([28]). By opting out, they basically withdraw from the contract. This must be done individually and in writing ([29]).

Naturally, if the settlement is unfavourable for the injured individuals, they may choose to opt out ([30]). This may affect the alleged tortfeasor, in the sense that he experiences that too few individuals are still 'on board'. To ca-

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([26]) Stuyck, p. 10.

([27]) Stuyck, p. 11.

([28]) Van Boom, pp. 171-92, p. 184.

([29]) The parties to the settlement shall specify in their petition and the Amsterdam Court will confirm in its decision the addressee of the opt-out notification (Art. 7:907 (2) (f); Art. 7:908 (2) CC). Note that the possibility to opt out only exists once the settlement has been declared within a period set by the court of at least three months as of the date of publication.

([30]) In Art. 7:908 (3) CC, it is provided that the Court's declaration that the agreement is binding shall have no consequences for an injured individual who could not have known of his loss at the time of the public announcement if, after becoming aware of the loss, he has notified the administrator of his wish not to be bound. This allows for an extension of the opt out-period, although the administrator of the fund has the power to provoke a decision on the part of the injured individual by giving notice in writing of a period of at least six months, during which that person can state he does not wish to be bound. After this period has lapsed, the right to opt out expires.

ter for this eventuality, the joint power to cancel the settlement was conferred on the parties to the contract. Under specific circumstances set out in Art. 7:904 (4) CC, parties to the settlement have the power to cancel the contract for lack of a substantial number of participants.

It stems from the design of the WCAM procedure that if the representative stops the negotiations, an individual can still individually sue the tortfeasor, or even initiate new settlement negotiations with a new representative body. The individual does not have any right of appeal against the declaration by the Amsterdam Court; if he disagrees, he should exercise his opt-out right. Joint petitioners can appeal in cassation against the decision by the Amsterdam Court (Art. 1018 (1) CCP). The Supreme Court may then quash or affirm the Amsterdam Court decision on points of law ([31]).

*f. Potential conflict with other procedures*

It stems from the design of this mechanism that negotiations take place between one representative association or foundation or a joint group of associations on the one hand and the tortfeasor(s) on the other. Furthermore, any foundation or association that was not party to the settlement – but that does represent the interests of the injured individuals involved and has full legal capacity – can join the procedure to give its opinion on the petition and to file a defence against it (Art. 1014 CCP) ([32]). In this instance, they can express why the Court should not declare the contract binding. Typically, it will be plaintiffs that cannot enjoy compensation for not being recognised as victims ([33]). The Court has the possibility to refuse to declare the settlement binding due to a lack of representativity. It is, however, not among its powers to declare the contract binding on them as well.

A different type of conflict exists between the collective procedure pursuant to the WCAM 2005 and individual settlements. The special design of the WCAM is concerned with the collective settlement process. The contractual nature of the settlement is emphasised by the fact that the WCAM 2005 is part of Book 7 (special contracts) of the Civil Code. Theoretically, the settlement contract can be concluded at any stage of the conflict, and, strictly speaking, there is no need for a preliminary court procedure in which the tortfeasor is considered liable in tort. He may well enter the settlement precisely with the purpose of avoiding being held liable. The settle-

([31]) See further details at Van Boom, pp. 171-92, p. 186.

([32]) See Art. 1014 CCP; See further details at Van Boom, pp. 171-92, p. 182; Loos, p. 3.

([33]) Stuyck, p. 10.

ment contract can thus serve the purpose of avoiding court procedure on the liability issue. Indeed, the very nature of a settlement is that it aims at ending or preventing uncertainty or dispute regarding the legal relationship between the alleged tortfeasor and the injured individuals (34).

The contractual form of the settlement allows the parties to include specific clauses in the settlement that are not covered by the Act, such as clauses on choice of law and forum, on board approval condition, on confidentiality issues, and on dispute settlement, as well as on modification or termination – for example, if the Amsterdam Court denies or the Supreme Court voids the binding declaration (35).

### 3. – *Some remarks on strengths and weaknesses of the WCAM model*

In order to contribute to a discussion of the possible design of a class action, it can be helpful to identify some of the strengths, weaknesses, and gaps relating to the WCAM. While the WCAM 2005 is certainly not perfect, it is overly described as a 'meaningful step forward' when it comes to improving legal responses with regard to compensating victims of mass damage cases (36). The Act in practice is of high relevance for securities litigation, even though the intention of the legislator was primarily to design a mechanism for the settlement of events causing mass personal injury (particularly the DES case) (37).

In one of the WCAM-approved settlements, the grapes were especially sour for individuals who did not opt out but who later turned out to have been entitled – had they opted out – to more compensation than they obtained through the settlement. A specific group of claimants who opted out of the settlement were in fact granted higher compensation in their subsequent individual court cases (38). This unintended effect is a disincentive for associations to engage in settlement negotiations, and must be avoided at any cost. Therefore, the legal position, validity, and extent of individual claims needs to be charted meticulously before any collective settlement is agreed. The Dutch legislature is considering amendment of the law to ensure that

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(34) Art. 7:900 CC.

(35) Van Boom, pp. 171-92, p. 180.

(36) See e.g. Croiset van Uchelen, *Handhaven of bijschaven? De effectiviteit van de WCAM*, Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR) 2008, 805.

(37) T. Arons and W. H. Van Boom, *Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from The Netherlands*, in *Eur. Business Law Rev.*, 2010, pp. 857-883, p. 866.

(38) Van Boom, pp. 171-92, p. 190.

issues of law are brought before the Supreme Court in a special procedure on preliminary rulings. This new procedure – if enacted – would improve the basis of any subsequent settlement.

If we look at the current situation under the WCAM, the behavioural incentives of three main players are at stake: first, there are the incentives for the individual to opt out; second, the incentives for the consumer association to take up negotiations in the first place; third, the incentives for the tortfeasor to cooperate in the settlement negotiations. The current design shows inherent limitations. Individuals might be inclined to opt out if they realise that they will be granted more compensation in an individual case. In fact, if the majority of claimants choose to opt out, the entire settlement will collapse. Apparently, by not opting out of the settlement, the injured individuals prefer a certain and comparatively swift payout to an uncertain procedure ([39]).

For consumer associations, it is clear that to engage in this type of proceedings is very costly in the negotiation phase, particularly because many expenses have to be advanced. Only if they obtain a positive settlement outcome will associations have the opportunity of recouping these costs ([40]).

The success of the voluntary negotiations depends strongly on the tortfeasor's incentives to engage in them: no one can force him to agree to a settlement. If the best alternative to a negotiated collective settlement is to advance with all individual claims in individual court cases, the willingness to settle may depend on the tortfeasor's assessment of the number of claims, the likelihood of success of such claims, the legal cost, and the expected losses involved. Moreover, it seems that less easily observable factors can come into play as well, such as political pressure and risks to repu-

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([39]) Van Boom, pp. 171-92, p. 189 mentions a related matter. Another issue is a serious risk of *free rider behavior* on the part of consumers. The law does not require consumers to become a member of a representative association in order to profit from settlements negotiated by such associations. Thus, rational choice theory predicts that informed consumers will wait for the negotiations by the tortfeasor and the representative organization to result in an advantageous settlement, and then decide whether to obtain the compensation offered by the settlement or to opt out. Such behavior would not cost the consumer anything and might only benefit him. It would render the representative activities of consumer foundations and associations a 'public good', leaving these organizations without private funding. In practice, however, it seems that *most* Dutch consumers (are they perhaps not fully informed?) are more than willing to donate contributions voluntarily to associations and foundations that negotiate a settlement in the interest of *all* injured consumers.

([40]) Cf. Loos, p. 35.

tation (41). Furthermore, the cases that have come up so far have involved large-scale damage at the individual level. Successful cases involving trifling damages are unlikely to occur, as there is no underlying threat that individual consumers would start a lawsuit that could convince the tortfeasor to negotiate (42). The gap this mechanism leaves is thus to be found mainly where the tortfeasor has no incentives to arrive at a settlement. Hence, the WCAM does not explicitly address the issue of widespread scattered losses (43).

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(41) Van Boom, 171-92, p. 180.

(42) Cf. Loos, p. 16.

(43) On this type of damage, see, e.g., Van Boom, *De minimis curat praetor: redress for dispersed trifle losses*, in *Journal Comp. Law*, 2009, pp. 171-185.