



**British Institute of
International and
Comparative Law**

COLLECTIVE REDRESS THE NETHERLANDS



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**British Institute of
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I. General Collective Redress Mechanisms

Within Dutch law, three different Collective Redress mechanisms can be distinguished:

- The Collective Settlements of Mass Claims Acts (WCAM).
- The Collective Redress of Mass Damages Act (*Wet afwikkeling massaschade in collectieve actie*, WAMCA).
- Collective action, on the basis of articles 3:305a-305d Dutch Civil Code.
- Action on the basis of mandate/power of attorney and/or transfer/assignment of claims to a special purpose vehicle.

The aforementioned options may be combined.

In the Netherlands only non-profit entities, either ad hoc or pre-existing, that meet certain criteria can conclude collective settlements under the WCAM. The (spv) entities under the third category do not need to be non-profit. The articles of association of these collective redress entities should identify its goals, one of which may be claiming damages for the benefit or on behalf of certain individuals for a specific case. Accordingly, the requirements for these entities are similar to those laid down in para. 4, points (a)-(c) of the Commission Recommendation. The requirement that the entities prove to the court that they have the administrative and financial capacity to bring a claim is part of a recent Bill making its way through the Dutch Parliament on collective damages actions (discussed below). Other goals could be the obtainment of a declaratory judgement or injunctive relief. Pre-existing entities are not created specifically for an individual case, but rather exist for promoting a general group of interests, which formally encompass the specific case or claim. An example is the Vereniging van Effectenbezitters (Association of Investors), which has acted for the benefit of investors in securities litigations. Another notable example is the Consumentenbond. This is the most prominent Dutch consumer organisation. There are no lists of pre-approved entities authorised to bring claims.

On 1 January 2020, the Collective Redress of Mass Damages Act (WAMCA), providing for a collective compensatory action, entered into force. The WAMCA mechanism applies to events that occurred on or after 15 November 2016.

The most often used legal form for *ad hoc* special purpose vehicles is the foundation or as called in Dutch: *stichting*. The term *special purpose vehicle* will be used to refer to this type of ad hoc legal entities.

ADR

Article 1018a Civil Code of Procedure that facilitates the appointment of mediation in relation to mass disputes.

A. The collective settlement procedure (WCAM) and the collective compensatory action (WAMCA)

1. General description

The Collective Settlement procedure under the Collective Settlements of Mass Claims Acts (WCAM), was introduced in 2005 by the *Wet Collectieve Afwikkeling Massaschade*.¹ The law has been laid down in two codes: the Dutch Civil Code with respect to the material requirements that a collective settlement should address in order to be found fair and reasonable and declared binding by the Amsterdam Court of Appeal and the Dutch Code of Civil Procedure that provides for the procedural rules to follow in order to declare a collective settlement binding. Minor improvements to the WCAM were made in 2013.²

In 2019, the Collective Redress of Mass Damages Act (WAMCA) was adopted and it entered into force on 1 January 2020. The WAMCA mechanism provides for a collective compensatory action and applies to events that occurred on or after 15 November 2016.

¹ WCAM, Dutch Act on Collective Settlements, Law of 23 June 2005, Stb. 340. See articles 7:907-910 Dutch Civil Code, articles 1013-1018a Dutch Code of Civil Procedure

² Act of 26 June 2013), *Staatsblad* 2013, 255, entered into force 1 July 2013, *Staatsblad* 2013, 256.

2. Scope

The WCAM procedure applies to all substantive areas of law, and the same goes for the WAMCA mechanism. Furthermore, an agreement based on the WCAM is also possible with an insolvent party.³

3. Procedure

a. Standing

Under the WAMCA mechanism, the representative organisation must be non-profit, must have full legal capacity to act in court, and the interest of the group that the organization is seeking to protect must be covered by its articles of association. The representative organisation must also demonstrate that a collective action is more effective than individual claims (Article 3.305 of the Dutch Civil Code). Compared to the WCAM, new criterias were introduced: the representative organisation must have sufficient financial resources to bear the costs of the collective action, as well as sufficient experience.

If the parties decide to conclude a settlement, the WCAM procedure will apply. The party or parties compensating the damages or contributing to the settlement fund and an entity representing the victims will conclude a settlement agreement. All the contracting parties then must jointly request the court to declare it binding for all victims that fall under the scope of the agreement.⁴

b. Opt-in; opt- out procedure

The WCAM settlement must describe the group(s) of claimants that is (are) going to benefit from the settlement and the grounds for the claim.⁵ After court approval, the settlement has a binding effect on all victims included in the terms of the settlement, except for those who have declared their wish to opt-out. The opt-out declaration must be made within the time set by the court.⁶ The court sets up the opt out period and conditions to whom to address etc. If the opt out statement doesn't meet those requirements (for example too early or too late, not to the correct address and doesn't meet other requirements set by the court) the opt out is not valid and the member remains bound to the terms of the settlement. The settlement itself does not constitute an admission of fault. The individuals who have opted-out are not bound by the settlement terms and the judge who decides on their case in subsequent individual proceedings is free to ignore the settlement.⁷

Under the WAMCA, the same rules are maintained: the opt-out system applies except for foreign parties to whom the opt-in system applies.⁸ The opt-out declaration must be made within the time set by the court.⁹

c. Competent Court

The WCAM procedure can only be brought before the Amsterdam Court of Appeal.¹⁰

Under the WAMCA, for the Dutch courts to have jurisdiction, the case must have a sufficiently close connection with the Dutch jurisdiction (see below).

d. Participation of foreign plaintiffs

Assuming jurisdiction of the Dutch Court, a foreign representative organisation can participate in the WCAM procedure, as long as it has full legal capacity to act in court. Every victim who is included in one of the categories of the settlement and does not opt-out in time is bound by that settlement, including foreign parties.¹¹ These are not directly parties to the proceedings, but participate through a representative body. In specific cases rules of Private International Law may stand in the way of competence of the Dutch court, if the 'foreign' claim can

³ art. 110 (3) Dutch Insolvency Act.

⁴ art. 1013(1) Dutch Code of Civil Procedure

⁵ art. 7:907 (2) a-c Dutch Civil Code..

⁶ art. 7:908(2) Dutch Civil Code. and art. 1017(3) Dutch Code of Civil Procedure

⁷ Aandelenlease cases, HR 5 June 2009, LJN BH2815, BH2811, BH2822, *Nederlandse Jurisprudentie* 2012/182-184).

⁸ Art. 1018f (5) of the Dutch Civil Code.

⁹ Art. 1018f (1) of the Dutch Civil Code.

¹⁰ art. 1013(3) Dutch Code of Civil Procedure

¹¹ see e.g. Hof Amsterdam 12 November 2010, NJ 2010/683, LJN: BO3908 (Converium).

only be brought before a non-Dutch court. This may apply in particular where the defendant is not located in The Netherlands.¹²

The WAMCA mechanism introduced some limitations following criticisms over the extensive territorial reach of the WCAM. For Dutch courts to have jurisdiction over a claim brought under the WAMCA, the case must have a sufficiently close connection with the Dutch jurisdiction. Under Art. 3.305a sub 3 of the Dutch Civil Code, a sufficiently close relationship exists if:

- the majority of persons whose interests are at stake have their habitual residence in the Netherlands;
- or the party against whom the legal action is directed is domiciled in the Netherlands and additional circumstances suggest a sufficient relationship with the Netherlands;
- or the event(s) to which the legal action relates took place in the Netherlands.

e. Certification criteria

The request in a WCAM procedure will be denied if the representative organisations together are not sufficiently representative of the whole group.¹³ Hence, it is unnecessary for each individual organisation to be representative for the whole group, it is sufficient if it is representative for a subgroup. Furthermore, the Court assesses whether the agreement protects the interests of the group members concerned (art. 7:907 (3) e BW). The same applies under the WAMCA mechanism.

f. Main procedural rules

The WCAM proceedings¹⁴ start with a joint petition by the settling parties to the Amsterdam Court of Appeal to declare the settlement binding on everyone falling within the scope of the settlement.¹⁵ The parties for whose benefit the settlement was concluded, are notified of the settlement and of the oral hearing. A notice will be published in one or more newspapers.¹⁶ It is possible for a foundation or association that promotes the interests of the group of claimants covered by the settlement to make objections against the settlement.¹⁷ Any other ongoing proceedings regarding claims covered by the settlement are suspended during the WCAM proceedings.¹⁸ The court may order additional expert evidence.¹⁹ The court can further hold oral hearings to discuss the way in which the trial is to be conducted.²⁰ The decision should among other things, state whether the agreement is declared binding, and if so, the period during which an opt-out declaration must be made and the way in which it should be made, the period during, and the manner in which, a claim for compensation under the settlement can be filed.²¹ The court can suggest modifications to the agreement.²² In a recent WCAM-ruling, the Amsterdam Court of Appeal ruled that the parties should consider renegotiating certain parts of the settlement.²³ Appeal in cassation is open only to the original petitioning parties jointly and only if the court has rejected the request to make the agreement binding.²⁴

Under the WAMCA mechanism, the representative organisation must submit a statement of claim which will be reviewed by the court. The court will in particular check whether the organisation meets the requirements seen

¹² Kramer, X.E. (2014). [Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries](#). *Pacific McGeorge Global Business & Development Journal*, 27 (2), 235-279.

¹³ art. 7:907(3)f Dutch Civil Code

¹⁴ WCAM proceedings are available only for parties who come to a settlement agreement. When one of the parties is unwilling to settle, one or more of them may request that the competent court holds a pre-trial meeting: art. 1018a Dutch Code of Civil Procedure

¹⁵ art. 1013 Dutch Code of Civil Procedure

¹⁶ art. 1013 (5) Dutch Code of Civil Procedure

¹⁷ art. 1014 Dutch Code of Civil Procedure

¹⁸ art. 1015 Dutch Code of Civil Procedure

¹⁹ art. 1016 Dutch Code of Civil Procedure

²⁰ art. 1013 (8) Dutch Code of Civil Procedure

²¹ art. 1017 Dutch Code of Civil Procedure

²² art. 7:907 (4) Dutch Civil Code

²³ Gerechtshof Amsterdam 200.127.525/1, May 13, 2014, downloadable through: <https://www.rechtspraak.nl/SiteCollectionDocuments/tussenbeschikking%20d.d.%20%2013%20mei%202014.pdf>

²⁴ art 1018 (1) Dutch Code of Civil Procedure

above. The court can decide that individual claims are more appropriate if the number of class members is too low, or if the financial interest is not sufficient.

Res judicata effect

The WCAM settlement obtains binding effect on all victims included in the terms of the settlement, except for the individuals who have declared their wish to opt-out of the settlement. The opt-out declaration has to be made within the appointed time set by the court.²⁵ The settlement itself does not constitute an admission of fault. The individuals who have opted-out are not bound, and the judge who decides on their case is free to deviate from the settlement.²⁶

Evidence/ discovery

In a WCAM-procedure the court may order expert evidence.²⁷ Other evidentiary rules for petition proceedings do apply in principle, but in general no further evidence will be required considering the nature of the proceedings (determining whether the settlement may be declared binding, which does not involve a decision on the actual facts of the case). The court does check whether the amount of compensation is reasonable considering, inter alia, the extent of the damages and other factors. Evidence may only be necessary where another representative body contests the settlement.²⁸ The general discovery mechanism is art. 834a Rv, which allows any party to request (a copy of) materials to which it has a legitimate interest. This article has found a wide application.²⁹

Single or Multi stage process

The WCAM consists of a single-stage process. However, the court can hold pre-trial meetings or a case management conference to discuss the way in which the fairness hearing is to be conducted.³⁰ Furthermore, parties may also request a pre-trial case management conference.³¹

4. Available remedies

The remedies in the WCAM procedure are the remedies that may be part of a settlement agreement. These include, primarily, monetary damages³², but may include also other obligations that require specific performance, as these are compensation of damage in kind.³³ It also may involve other types of remedies, such as declaring contracts null and void.³⁴ Dutch law does allow penalty clauses to aid in enforcement of the obligations of the agreement. In theory cy pres distribution is an option as well, but it has been applied to date only in out of court collective settlements (and not WCAM settlements that require a court approval).

The WAMCA mechanism provides for a collective compensatory action.

5. Costs & funding

In the Netherlands the loser pays rule applies. Also in a WCAM-procedure the court may declare that the costs are to be paid by one or more of the petitioners,³⁵ but there typically each party bears its own costs. Third party funding is allowed and currently unregulated.

²⁵ art. 7:908(2) BW and art. 1017(3) Dutch Code of Civil Procedure

²⁶ Aandelenlease cases, HR 5 June 2009

²⁷ art. 1016 Dutch Code of Civil Procedure

²⁸ art. 1014 Dutch Code of Civil Procedure

²⁹ I.N. Tzankova, I van Maanen, M Rijnhart, 'a Dutch view on discovery: Short and sweet', Defense Counsel Journal, 91(3) 2014, p. 234.

³⁰ art. 1013 (8) BRv

³¹ art. 1018a BRv, see 5.6 above

³² see art. 7:907(1) Dutch Civil Code

³³ 'schadevergoeding in natura', art. 6:103 Dutch Civil Code

³⁴ art. 7:907 (7) Dutch Civil Code

³⁵ art. 1016 lid 2 Dutch Code of Civil Procedure

6. Number of claims

The WCAM procedure has been used eight times since its inception³⁶, with a ninth ruling on the way³⁷. The reason appears to be that there are not very many claims that could fall under the WCAM (as they should involve a significant number of individuals), while those that could, may also be settled via an out of court collective settlement agreement for the members of participants of the claimant organizations only, without recourse to the specific WCAM procedure, which also causes extra costs and delays the pay out of damages. Furthermore, the WCAM is voluntary in nature and only applies when a defendant is sufficiently motivated to settle.

7. Particularities/ Problems if mechanism is used in cross-border cases

The WCAM procedure is available in cross-border cases, as long as the representative organisations are also sufficiently representative for foreign claimants.³⁸ The WCAM can also be used in cases where only a minority of claimants are Dutch and where the liable party has no ties to The Netherlands, as long as the Court of Appeal is competent to decide all claims under the settlement (Converium). The Converium case provided criteria in which the Court of Appeal could accept jurisdiction. For instance, the special purpose vehicle finds its statutory home in the Netherlands, the execution of the settlement will take place in the Netherlands and the funds will be transferred from a bank account in the Netherlands.³⁹ Foreign parties need to be notified of the proceedings, given the requirements of art. 6 ECHR (Converium case). In itself this makes the WCAM a useful instrument in reaching binding settlements in cross-border cases. However, it has been untested so far whether the WCAM that operates on opt out basis would be recognised and enforced in jurisdictions that view the opt out device as problematic.

8. Critiques

With respect to cross-border cases, the versatility of WCAM has been criticised as it means that a Dutch court can bind a large number of parties without their explicit consent, except if the parties enter the proceedings or, within the appointed period, send an opt-out declaration.⁴⁰ This appears to apply even where the national system of the claimant and/or liable party does not allow for a loss of claim without an individual court procedure.⁴¹ Another point of criticism is the limited grounds and options to appeal a WCAM judgement and the role of the Amsterdam Court of Appeal when reviewing and approving collective settlements. Some argue that the court should take a conservative approach, others believe the court should be acting as guardian of the interests of absent class members.

The WAMCA mechanism introduced some limitations on jurisdiction following criticisms over the extensive territorial reach of the WCAM.

B. Collective action

1. General description

Collective actions, on the basis of articles 3:305a-305d BW (Dutch Civil Code), have been adopted in 1994 (Law of 6 April 1994, Stb. 269). These articles describe the rules according to which an organisation can instigate proceedings for the protection of a group of similar interests. The interests can be idealistic (such as

³⁶ Ilja Tillema, 'Tien jaar WCAM: een overzicht, MvO 2016 3&4, p. 90.

³⁷ Currently the VEB is involved in the WCAM-procedure against Ageas/Fortis, this is to be believed to be the ninth WCAM-settlement.

³⁸ Cf. Rechtbank 's-Gravenhage 30 January 2013, ECLI:NL:RBDHA:2013:BY9850 (Shell), Hof Amsterdam 12 November 2010, NJ 2010/683, LJN: BO3908 (Converium).

³⁹ Paragraph 2.9 of the decision by the Amsterdam Court of Appeal in case no. 200.070.039/01 on November 12th 2010, official sworn English translation is downloadable through:

http://www.converiumsettlements.com/EN/Judgment_12_November_2010.pdf

⁴⁰ Hof Amsterdam 12 November 2010, NJ 2010/683, LJN: BO3908 (Converium)

⁴¹ Halfmeier, Axel, Recognition of a 'WCAM' Settlement in Germany (April 5, 2012). Available at SSRN: <https://ssrn.com/abstract=2026701> or <http://dx.doi.org/10.2139/ssrn.2026701>

and <http://www.nipr-online.eu/pdf/2012-265.pdf>

environmental, animal protection, protection of heritage, artistic goals) or material (such as investment loss). The non-profit entity can't seek monetary damages through the collective action of 3:305a of the Dutch Civil Code.

2. Scope

The aforementioned provisions apply to all kinds of cases.

3. Procedure

a. Standing

The proceedings can only be started by an organisation that has the statutory aim of promoting the interests concerned (art. 3:305b BW); furthermore the interests have to be sufficiently alike in order to be bundled for efficient and effective legal protection. The interests of the claimants must be sufficiently protected and the organization must have tried to reach an agreement out of court before initiating the action. The court does not check materially whether the claim protects the interests of the persons concerned (art. 3:305a(2) BW). Representativeness is not required (see the Plazacasa case). In this case, the defendant argued that the foundation should be declared inadmissible since a majority of the foundations constituency opposed the litigation. The Supreme Court denied the request. The collective action does not exist for the sole benefit of litigating for the benefit of a confirmed majority, but is also available for a minority, who wishes to litigate to remedy infringed rights.⁴² The requirement is met if the interests that are bundled by the claim lend themselves to bundling to ensure an efficient and effective legal proceeding.⁴³ An act cannot form the basis for a collective action if the individuals who are actually touched by the act contest using that act as the basis for the collective action (art. 3:305a(4) BW).

b. Opt-in; opt-out procedure

Formally, in a collective action the procedure binds only the parties to the proceedings e.g. the organization and the defendant. However, the judgment can have consequences for people whose interests are concerned with the decision. These may opt-out from the effect of the judgment by simply (without formal requirements) contesting that effect (art. 3:305a(5) BW). See in particular HR 26 februari 2010, LJN BK5756, NJ 2011/473 (Stichting Baas in Eigen Huis/Plazacasa BV)). This is only relevant when individuals do not wish (for example) to have an injunction regarding acts that they approve of; it does not touch on their individual right to damages as the collective action cannot lead to an award of damages. Given the fact that a judgement in a collective action doesn't have a binding effect on the people whose interests are concerned with the decision and is binding only on the organization one may wonder about the utility of art. 3:305a(5) BW. We are not aware of examples where this provision has been invoked.

c. Competent court

The normal rules of competence apply. Collective actions follow the regular European and national rules on court jurisdiction (main rule is domicile of the defendant).

d. Participation of foreign plaintiffs

There is no limitation regarding nationality; foreign plaintiffs can in principle be part of the proceedings or among the group of interested persons. However, such plaintiffs can make use of the Dutch collective action as long as the articles of association of the respective organization cover the scope of the action and include the interests of the foreign parties. An action regarding consumer protection can be instigated by a foreign organisation for protecting consumer interests as intended in art. 4(3) Directive 98/27/EC⁴⁴.

⁴² r.o. 4.2 ECLI:NL:PHR:2010:BK5756

⁴³ r.o. 4.2 ECLI:NL:PHR:2010:BK5756

⁴⁴ see art. 3:305c Dutch Civil Code. For an example see Rb Breda 9 July 2008, LJN BD6815

e. e. Certification criteria

No certification criteria as such exist, except the aforementioned requirement for standing, that the organisation must according to its statutory description promote interests concerned in the action. Soft law exists in the form of a non-binding 'Claimcode'⁴⁵ with respect to the governance of claim organizations involved in 305a-collective actions. The code prescribes the composition and remuneration of Board and Supervisory Board members, financial reporting, communication with group members etc. It was established in view of potential conflict of interests by fraudulent *special purpose vehicles* and is an example of self-regulation. However, in relatively recent case law the lower court accepted the argument from the defence that the claimant had no legal standing since the organization didn't follow the non-binding Claim Code.⁴⁶

f. Main procedural rules

There is no special procedure for the 305a-collective actions. The general rules of civil procedure apply. The court can decide to refer the case to another court or combine it with another related cases.⁴⁷ A 305a-collective action cannot be initiated if the organisation hasn't tried to resolve the matter out of court first.⁴⁸ To that end it has to send a notification to the defendant that it plans to initiate a collective action and an invite to discuss an out of court settlement. In cross-border cases this provision has been strategically used by defendants to the disadvantage of the claiming organization. The notification and invite for settlement discussions alert the defendant who then subsequently starts a negative declaratory action in a claimant unfriendly jurisdiction, which may cause a stay of the Dutch collective action. The collective action in the Netherland is then subject to a so called 'procedural torpedo'.

g. Limitation Periods

Dutch limitation periods can be suspended collectively by a letter from an organisation that is entitled to start a collective action.⁴⁹ Such a letter or the start of a collective action bars the statute of limitation. The limitation period is suspended until 6 months after the judgment in a collective action has been handed down (art. 3:316 under 2 Civil Code) in which period parties have the opportunity to start individual actions or until 6 months after the WCAM judgement (recent case law: HR 19 mei 1017, ECLI:NL:HR:2017:936)

h. Res judicata effect

The judgment has res judicata only between the parties in the procedure (and/or the claims adjudicated therein). Furthermore, the Hoge Raad has held that a declaration of law in such a procedure may serve as starting point in similar procedures started by other victims (HR 27 November 2009, LJN BH2162 (VEB/World Online), r.o. 4.8.2).. Hence a collective action may be useful as a step towards an individual award of damages.

Evidence/ discovery

The general rules regarding evidence and discovery apply.

Multi- stage process

Collective actions follow a single process procedure.

4. Available remedies

Only an injunction or declaratory judgment can be obtained; damages cannot be obtained, except damages suffered by the organisation

⁴⁵ :http://www.consumentenbond.nl/over/wie_zijn_we/claimcode/

⁴⁶ ECLI:NL:RBOBR:2016:3383

⁴⁷ art. 3:305a (6) Dutch Civil Code

⁴⁸ art. 3:305a (2) Dutch Civil Code

⁴⁹ HR 28 maart 2014, [ECLI:NL:HR:2014:766](https://www.eclinet.nl/casus/HR:2014:766) (VEB NCVB/Deloitte Accountants c.s.)

5. Costs & funding

In collective actions the organization and not the group members is liable for potential adverse cost orders. In collective actions victims have to start subsequent individual actions to establish causation, liability and damages, there they have to fully bear their own costs except where compensation is obtained under the general rules. In collective actions funding is often obtained via contributions from individuals whose interests are at stake or who have an idealistic purpose in supporting the organisation. 305a organizations initiating collective actions do not qualify for Legal Aid.

In collective actions, legal aid is not available and contingency fees are not allowed. Many legal expense insurers have excluded full coverage or have limited coverage of mass claim disputes or collective actions. However, in some rare case they might cover the individual contributions of the client to a collective action.⁵⁰ Furthermore, there are no special funds in place to support collective action. In essence there are only two potential ways: individual contributions (if sufficient number of claimants participate) and commercial funding (but the terms have to be attractive) but in both there is the free rider problem: a positive judgment reached by the the organisation may be used by non-participating claimants in order to start their own procedure and/or reach favourable settlement with the defendant. The free rider problem makes it more difficult to obtain external financing.

6. Lawyers' Fees

The remuneration system for lawyers provides too little incentive to take part in collective redress proceedings. This causes underenforcement, rather than overenforcement.

7. Number of claims

The exact number of collective actions that has been initiated after the introduction of the provisions in 1994 is unknown. However, the collective action has been used in more than 180 cases during 2007-2012, which amounts to roughly 40 procedures per year, according to the published case law at rechtspraak.nl. Research conducted on commercial incentives in collective redress in the Netherlands was also performed on 400 case studies, from which 334 were considered unique.⁵¹ There is no centralised register or account of collective actions in the Netherlands.

8. Particularities/ Problems if mechanism is used in cross- border cases

In theory there are no issues when using the collective action in cross-border cases. In practice, that might be difficult to organize if there is no organization willing and capable to take on the case and finance it.

9. Critiques

Collective action is to be initiated by non-profit entities that meet certain criteria but a representativity is not a requirement. It is suggested that some Claimstichtingen may actually not provide proper service for their clients, even if they meet the statutory requirements. (see further II.3.8.).

Also, multiple collective actions about the same event can take place and it can be confusing for group members and the defendant to choose 'the right' one. Finally, multiple actions might also lead to a so called 'adverse auction' by the defendant: picking up the weakest party to settle with. The flip side of this is that a collective action doesn't bring finality. There is no res judicata and a new organization can stand up, develop new legal arguments and start a new action.

⁵⁰ I.N. Tzankova, *Funding of Mass Disputes – lessons from the Netherlands*, George Mason University School of Law 2012 volume 8, number 3, p. 581

⁵¹ Ilja Tillema, 'Commerciële motieven in privaatrechtelijke collectieve acties: olie op het vuur van de claimcultuur', Aers Aequi mei 2016, p. 341

C. Action on the basis of mandate and/or transfer of claims

1. General description

Collective redress for damages is pursued through mandates and/or transfer of claims to a special purpose vehicle. The individual claimants can either mandate their claim to the special purpose vehicle or transfer their claims to the special purpose vehicle, which thereafter can claim in its own right. Either way, these methods are essentially collections of individual claims. The legal entity is often a stichting (foundation) or (claimstichtingen). Claimants contract with the stichting that they will receive the award minus a share for the stichting. The claimants usually also pay a relatively small fee or 'contribution': the aggregate of all contributions is (with a sufficient number of claimants) sufficient to cover the costs (in particular lawyer fees).

2. Scope

The scope of actions based on mandate and/or the transfer of claims follow the common rules on mandate and transfer. There are no restrictions here on the substantive scope either. There is a general rule that the assignments should not be against Dutch public order

3. Procedure

a. Standing

Standing derives from the standing of the claimants represented, which means that (a) the claimant itself must previously have had standing as being directly harmed, and (b) the claimant must be properly represented, i.e. the entity must have a valid mandate to act in the name of the claimant, or the claim must have been transferred to the entity in a valid fashion. Furthermore, the defendant may request a detailed specification of the individuals represented or the individuals whose claims are being claimed in the procedure.⁵²

b. Opt-in; opt- out procedure

The procedure is a normal court procedure hence the outcome only applies to those who have joined the proceedings (through mandate) or on those who got the claims assigned. However, the judgment may affect other similar claims.⁵³

c. Competent court

The competence of the court is determined by the normal rules regarding competence for the specific case and/or claims. Usually the competence is based on the location of defendant, as that court is competent for all claims regarding the defendant, regardless of the specific situation of claimants (who may be located all over the world). However, it is also possible to base competence on the existence of damage in The Netherlands on other alternative grounds for jurisdiction (Brussels I).

d. Participation of foreign plaintiffs

Foreign plaintiffs can participate on the same basis as Dutch plaintiffs in actions on the basis of mandate and/or transfer of claims if the law governing the mandate or transfer allows that and the mandate or transfer is legally valid according to that law. In specific cases rules of Private International Law may stand in the way of competence of the court, if the 'foreign' claim can only be brought before a non-Dutch court. This may apply in particular where the defendant is not located in The Netherlands.

⁵² HR 27 November 2009, LJN BH2162 (VEB/World Online)

⁵³ HR 27 November 2009, LJN BH2162 (VEB/World Online).

e. Certification criteria

There is no certification. Note that the Claim Code (see B3e) doesn't cover actions initiated by spv's based on mandates or assignment of claims.

f. Main procedural rules

Actions on the basis of mandate and/or transfer of claims follow the general rules of civil procedure. Regarding representation, the stichting may start the procedure in its own name as formal plaintiff, and does not have to stipulate that it represents the material plaintiffs. If it is questioned whether the plaintiff is entitled to claim the requested award, the formal plaintiff must stipulate that it is mandated and if required offer proof of its mandate.⁵⁴ The procedure can, and often is, combined with a collective action on the basis of art. 3:305a BW.⁵⁵

Res judicata effect

The judgment has res judicata effect only between the parties in the procedure (and/or the claims adjudicated therein). Furthermore the Hoge Raad has judged that a declaration of law in such a procedure may serve as starting point in similar procedures started by other victims (HR 27 November 2009, LJN BH2162 (VEB/World Online), r.o. 4.8.2). Hence a collective action may be useful as a step towards an individual award of damages.

Evidence/ discovery

No particular evidence/discovery applies. The general discovery mechanism is art. 834a Rv, which allows any party to request (a copy of) materials to which it has a legitimate interest. This article has found wide application.⁵⁶

Multi-stage process

In itself, the procedure is a single process, as the civil procedure is in general. The court may decide to adjudicate part of the dispute first.

4. Available remedies

All kinds of remedies are available. The usual remedy consists of (material) damages, often combined with a declaratory judgment.

5. Costs & funding

Actions on the basis of mandate and or/transfer of claims are typically financed via individual contracts by the claimants with the *special purpose vehicle*. The contract often stipulates that claimants will receive the award minus a percentage. Increasingly, ad hoc entities receive third party funding from commercial litigation funders or legal expense insurers. However, many legal expense insurers have excluded full coverage or have limited coverage of mass claim disputes They might cover the individual contributions of the client to an spv or to a collective action.⁵⁷

6. Number of claims

A claimstichting to reach an award or settlement seems to be used fairly often when events arise giving rise to mass claims, in the order of some 10-40 per year (based on news reports). However, such a claimstichting does not always start a civil procedure. Furthermore there is no centralised register or account of such stichtingen,

⁵⁴ HR 26 November 2004, LJN AP9665, NJ 2005/41, HR 26 February 2010, LJN BK4995, NJ 2011/474

⁵⁵ e.g. HR 2 December 1994, NJ 1996/246, also HR 2009 VEB/World Online

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https://pure.uvt.nl/ws/files/6973933/Tzankova_Van_Maananen_Rijnhart_A_Dutch_View_on_Discovery_Short_and_Sweet_Defense_Counsel_Journal_July_2014_1205347.PDF

⁵⁷ I.N. Tzankova, *Funding of Mass Disputes – lessons from the Netherlands*, *George Mason University School of Law 2012 volume 8, number 3, p. 581*

hence it is hard to give exact figures. A procedure of such a stichting is not easily searched for in case law databases as no particular legal rules apply. One reason why the stichting is not used more often is that there has to be a significant number of claimants to make it feasible (given the start-up costs), and the stichting or at least the harmful event has to become sufficiently known in order for individual claimants to look for a (or the specific) stichting for making good their claims. However, the existence of such stichtingen seems to have become common knowledge, and in almost every case of mass damage (with relatively small groups) there appear to be plans for starting such a stichting. E.g. events such as fraudulent investment funds, alleged faults of youth protection services, bankrupt banks.

7. Particularities/ Problems if this mechanism is used in cross- border cases

In theory there are no major issues and the spv mechanism can be used in cross border setting, but differing applicable laws on the assignments and on the claims, and large numbers make litigating burdensome and potentially unmanageable absent adequate case management.

8. Critiques

Actions on the basis of mandate and or/transfer of claim has met two main criticisms. First of all, the system is cumbersome insofar as the *special purpose vehicle* has (if asked for proof) to provide the identity of all specific claimants and claims in order to prove its mandate and/or the transfer of valid claims. This is an administrative hassle, while individuals also fear being subjected to undue pressure if their identities are known. Secondly, *special purpose vehicles* (claimstichtingen) are not supervised and may therefore attract unscrupulous individuals who use the *special purpose vehicle* primarily as a means to collect money, while reaching suboptimal results and not providing proper services.⁵⁸ However, that is not limited to actions on the basis of assignment of claims. In fact, it seems more likely to occur under a 305a collective action, because actions on the basis of mandates/assignments require significant investments and one might assume that parties applying that model will not jeopardize the investment by acting questionably.

Although the judgment does not have formal *res judicata* for non-participants, it may in fact serve as a material guidepost for new procedures regarding the same event.⁵⁹ A weakness (but not a critique per se) is the possibility of free riders.

Legislative Proposal of November 16th, 2016.

On 16 November 2016, the Dutch Ministry of Justice presented a new Bill for collective damages actions. The proposal aims to make collective settlements more attractive for all parties involved by improving the quality of representative organizations, coordinating the collective (damages) procedures and offering more finality. It is unclear when or whether the Bill will be passed in its current form, but below are first impressions and a selection of some noteworthy features of the Bill.

1. The proposed regime covers all substantive areas of law, which is a continuation of the status quo. What is new, is that now damages can also be claimed collectively and not only declaratory and injunctive relief. The same requirements apply to all types of actions: injunctive, declaratory or damages. More specifically, under the new regime it will be harder for claimants to file actions for injunctive and declaratory relief (more under 5. and further).
2. Exclusive jurisdiction in the first instance would be with the Amsterdam District Court, but it would be possible to transfer the collective action to another district court if that would be more appropriate in a given situation.
3. There would be a registry for class actions so the public is notified once a class action has been initiated. A system of 'lead representative organizations' would be introduced to streamline the process if there are multiple candidates for the position. There could also be co-lead representative organizations,

⁵⁸ cf. Van Boom 2009, par. 3.5

⁵⁹ See HR 27 November 2009, LJN BH2162 (VEB/World Online) where the Hoge Raad also mentioned that the judgement regarding unlawful behaviour may serve as a starting point in other procedures.

consisting of two or more organizations if that is appropriate for a specific action. Under the current regime it is possible to have multiple competing collective actions, a situation that is perceived as confusing for consumers and burdensome for defendants.

4. Only non-profit entities would be allowed to file the collective action, as under current law. Those could also be ad hoc foundations, but heavy governance requirements would be put in place for their Board and Supervisory Board structure, which would require D&O insurance, guarantees for non-profit background of the Board and Supervisory Board members, a website and communication strategy for the group, the preparation of financial statements etc. This would require a significant financial investment beforehand in the logistical infrastructure of the organization, and it is unclear how this could be funded on a non-commercial basis. There is an exception for matters with an idealistic public policy background. Those ad hoc foundations might be exempted from some of the requirements, but in fact the Bill puts the ad hoc foundations in a disadvantageous position in comparison to pre-existing non-profit organizations.
5. Moreover, the lead representative candidates would need to demonstrate expertise and track record in class actions, have a sufficient number of claimants supporting them in relation to the specific action, and have sufficient financial means. The parliamentary notes specify that the court might ask a neutral third party to review the agreement, which would not need to be shared with the defendant.
6. Opt out seems to be the main rule under the new regime, but this is somehow mitigated. Under the selection test for lead representative organization (see under 5 above), the candidate has to demonstrate that it has a large enough group of claimant supporters. The organization can't operate as an empty shell. This assumes at least some book-building effort beforehand and is therefore at least in part an opt-in. After the lead representative organization is appointed, the whole group will be represented on an opt-out basis.
7. The lead representative organization would need to demonstrate the superiority of the collective action in comparison to individual law suits.
8. The lead representative organization would need to demonstrate a sufficient link with the Netherlands. The Dutch legislator has consulted the Dutch State Commission for Private International Law and the Advisory Commission on Civil Procedure in relation to that requirement. According to the legislature, the test for a sufficient link with the Netherlands is compatible with the Brussels I Regulation, because it does not concern the jurisdictional test but the certification of a civil action, which is a matter of national civil procedure. It aims to exclude situations where the defendant is not based in the Netherlands, the harmful events did not take place in the Netherlands or the majority of the claimants are not domiciled in the Netherlands. In those situations the claimants will still have the option of starting an individual action. This requirement seems to aim to address the recent VEB v BP type of collective actions, where the Dutch Investors' Association VEB initiated a collective action for declaratory relief for all investors who had their BP shares in bank accounts in the Netherlands, following the ECJ's criteria formulated in the Kolassa ruling (C-375/13). The Amsterdam District Court declared on 28 September of this year that it lacked jurisdiction to hear the action, which is questionable in view of the Kolassa ruling. The current proposal aims to eliminate the use of the new Dutch collective actions regime in situations where Dutch courts under Brussels I and ECJ case law would have jurisdiction to hear individual cases for the 'Kolassa type' of claimant, but those would not be able to use the Dutch collective action regime to effectuate their rights.
9. Group members could opt out at the beginning of the certified class action and start an individual proceeding, but those individual proceedings could be stayed at the request of the defendant, at least for one year after the parties opted out. The court would have discretion to allow the stay of the proceedings. This departs somewhat from the systems existing in other jurisdictions (e.g. US and Canada) where claimants who opt out can resume their individual actions with no delays.
10. The collective action tolls the statute of limitation for the whole group represented by the lead representative organization. Parties who choose to opt out need to preserve their individual rights within 6 months after they have opted out. Under Dutch law it is not necessary to start a civil action to preserve one's rights. It is sufficient to send a letter to that effect to the defendant.

11. Under current Dutch law, adverse cost orders are fixed. Under the proposal it would be possible for the lead representative organization to recover the real costs of litigation if parties reach a settlement. The lead representative organization would be liable for any adverse costs if it loses the action.
12. Any settlement reached under the new collective action regime would need to be approved by the District Court. It is unclear whether the new regime aims to limit the extra-territorial application of the WCAM: the Dutch act on collective settlements that has already been used twice for global settlement purposes. Presumably not, if globally settling parties choose to invoke the WCAM directly and not via the Dutch collective action regime. Furthermore there are the specific *Claimstichtingen* (see general part) that instigate proceedings. No specific sector collective redress mechanisms exist in the area of competition or financial market law.

II. Sectoral Collective Redress Mechanisms

A. Consumer law

The general mechanisms for collective redress apply also for consumer collective redress. However, there are a few specific rules for certain elements of consumer law. The general mechanisms apply to the whole of consumer case law. The scope isn't limited within consumer law. For specific interests, there are specific material provisions. Furthermore, there are specific rules for specific parts of consumer law. The procedure follows the same general rules. Art. 6:240 BW specifies (inter alia) that a representative organisation for consumers can start a procedure against unfair general conditions. There are no diverging procedural rules on opt-in; opt-out procedures. As for the competent court. The general rules apply. For a procedure against unfair general conditions on the basis of art. 6:240 BW, the Court of Appeal at The Hague has sole competence.⁶⁰ A provision is included that allows foreign representative consumer organisations or consumer authorities to start proceedings against unfair general conditions.⁶¹

Furthermore, art. 3:305c BW (see above) allows foreign organisations on the list of the European Commission to instigate a collective action, see above. In cases regarding unfair contract terms, there are specific rules regarding the court summons for an association representing companies using certain general contract terms.⁶² The proceedings regarding unfair general conditions are not admissible if the representative consumer organisation did not, prior to the proceedings, give the user of the general conditions the opportunity to change the conditions.⁶³ The *Consumentenbond* (Dutch association of consumers) is fairly active, with multiple court procedures each year, which mostly involve general consumer protection on the basis of art. 3:305a BW.⁶⁴ Furthermore there are the specific *special purpose vehicles* (see general part) that instigate proceedings. No specific sector collective redress mechanisms exist in the area of competition or financial market law.

B. Financial market law

1. General description

No specific collective redress mechanism exists in this area.

2. Case Law

The general mechanisms have been used frequently for redress regarding financial market claims. See for example:

HR 23 December 2005, LJN AU3713, Nederlandse Jurisprudentie 2006/289 (Safe Heaven)

HR 13 October 2006, LJN AW2080, Nederlandse Jurisprudentie 2008/528 (Vie d'Or)

HR 5 June 2009, LJN BH2815, BH2811, BH2822, Nederlandse Jurisprudentie 2012/182, 183 en 184 (Effectenlease)

HR 27 november 2009, LJN BH2162 (VEB/World Online)

Hof Amsterdam 25 januari 2007, NJ 2007, 427 (Dexia)

Hof Amsterdam 29 april 2009, LJN: BI2717 (Vie d'Or)

Hof Amsterdam 15 juli 2009, LJN: BJ2691 (Vedior)

Hof Amsterdam 29 mei 2009, LJN: BI5744 (Shell)

Hof Amsterdam 12 november 2010, LJN:BO3908 (Converium)

⁶⁰ art. 6:241(1) Dutch Civil Code

⁶¹ art. 6:240(6) Dutch Civil Code

⁶² art. 1003-1007 Dutch Code of Civil Procedure, see further art. 6:240-243 Dutch Civil Code

⁶³ art. 6:240(4) Dutch Civil Code

⁶⁴ For a more complete overview, visit the *active case page* on <https://www.consumentenbond.nl/acties/overzicht>

HR 7 November 1997, NJ 1998/268 (Philips/VEB): union of stockholders (VEB)

HR 2 December 1994, NJ 1996/249 (Coopag/ABN AMRO)

C. Product liability law

1. General description

No specific collective redress mechanism in this area exists.

2. Case Law

See in particular the DES-case (HR 9 October 1992, Nederlandse Jurisprudentie 1994/535). In that case, producers of a medicine that was used by pregnant women, and lead to medical problems with the daughters of those women, were found to be joint and severally liable. The claims have finally been settled under the WCAM (see above). The procedure formally only concerned 5 individual claims, however it was intended and viewed as a general example for all other claims regarding DES.

Also HR 30 June 1989, Nederlandse Jurisprudentie 1990/652 and HR 20 September 1996, Nederlandse Jurisprudentie 1997/328 regarding Halcion in which 41 individual claims were involved.

Cf. also HR 29 November 2002, Nederlandse Jurisprudentie 2003/549 (Legionella) which was not about product liability in the strict sense, but about a hot tub on a trade fair that spread legionella disease to fair visitors.

D. Other areas

No specific collective redress mechanisms exist in other areas. There are however examples in case law of the application of general mechanisms to specific sectors. These are listed below. The material legislation for these sectors is described here and below, section IV.2.5.

1. Equality Law

An example is the collective action regarding the exclusion of eligibility of women by a Christian political party (HR 9 April 2010, LJN BK4549), which was based in particular on art. 1 Grondwet (Constitution) as well as art. 25 and art. 26 International Covenant on Civil and Political Rights (ICCPR), while the procedure was a collective action based on art. 3:305a BW.

2. Environmental Law

In environmental law, the collective action of art. 3:305a BW is regularly used by environmental protection organisations. There is extensive case law. See for example:

HR 27 June 1986, NJ 1987/743 (Nieuwe Meer), where a right for collective action was accepted before art. 3:305a BW was adopted and in force.

HR 18 December 1992, NJ 1994/139 (Kuunders) regarding possible pollution in a natural conservation area,

Rechtbank 's-Gravenhage 14 September 2011, LJN BU3538 and Rechtbank 's-Gravenhage 30 January 2013, ECLI:NL:RBDHA:2013:BY9850 regarding liability of Shell for an oil spill in Nigeria. This case is partly a collective action on the basis of art. 3:305a BW by Milieudefensie.

The action of art. 3:305a BW does not lead to damages (except procedural costs of the organisation itself); it aims mainly at obtaining an injunction or declaratory judgment.

See further E. Bauw, E.H.P. Brans, Milieuprivaatrecht, Deventer: Kluwer 2003, par. 7.4.2, p. 316-322. Regarding cross-border cases see p. 383-393.

3. Labour Law

Art. 15 Wet op de collectieve arbeidsovereenkomst (Law on collective labour agreements, stipulates that an organisation that has entered into a collective labour agreement can, in a case where another party or its members acts in violation of obligations under that agreement, claim damages for the organisation as well as damages for its members. Art. 16 adds that immaterial damages can also be recovered, albeit at an amount to determine ex aequo (naar billijkheid).

In overview, art. 15 Wet CAO did not receive much use (Losbladige Arbeidsovereenkomst, Wet CAO, art. 15, aant. 3 (Olbers), referring to M.M. Olbers, SMA 1988, p. 214-215), although in recent years this seems to have changed somewhat, looking at published case law. There are regular cases in which damages are claimed and sometimes awarded by representative organisations, in the order of 1-10 per year are published.

There is Hoge Raad case law on details of these rules:

HR 2 November 1979, NJ 1980/227

HR 18 September 1992, NJ 1993/49

HR 11 April 2003, LJN AF3425

III. Table - Case Law

Year	Court	Subject	Keywords
2014	Hoge Raad 28 March 2014, ECLI:NL:HR:2014:766	General	Collective action, prescription
2013	Hof Amsterdam 12 November 2013, ECLI:NL:GHAMS:2014:4560 (DSB)	Consumer Law	WCAM
2013	Rechtbank 's-Gravenhage 30 January 2013, ECLI:NL:RBDHA:2013:BY9850 (Shell)	Environmental law	Collective action
2012	HR 12 October 2012, LJN BW9243, Nederlandse Jurisprudentie 2012/686	General	WCAM, opt-out, representation
2011	Hoge Raad 28 January 2011, LJN BO5822, Nederlandse Jurisprudentie 2011/59	General	WCAM
2010	Hoge Raad 9 April 2010, LJN BK4549 (SGP case)	Equality	Collective action
2010	HR 26 februari 2010, LJN BK5756, NJ 2011/473 (Stichting Baas in Eigen Huis/Plazacasa BV)	General	Collective action
2010	Hof Amsterdam 12 november 2010, NJ 2010/683, LJN:BO3908 (Converium)	Financial law	WCAM, private international law, jurisdiction
2009	HR 27 november 2009, LJN BH2162 (VEB/World Online)	Financial law	Collective action, mandate/ transfer
2009	HR 5 June 2009, LJN BH2815, BH2811, BH2822, Nederlandse Jurisprudentie 2012/182, 183 en 184 (Effectenlease)	Financial law	WCAM, collective action, mandate/ transfer
2009	Hof Amsterdam 29 april 2009, NJ 2009/448, ECLI:NL:GHAMS:2009:BI2717 (Vie d'Or)	Financial law	WCAM, binding settlement
2007	Hof Amsterdam 25 januari 2007, NJ 2007/427, ECLI:NL:GHAMS:2007:AZ7033 (Dexia)	Financial law	WCAM, binding settlement
2006	HR 13 October 2006, LJN AW2080, Nederlandse Jurisprudentie 2008/528 (Vie d'Or)	Financial law	Collective action
2006	Hof Amsterdam 1 juni 2006, NJ 2006/461, ECLI:NL:GHAMS:2006:AX6440 (DES)	Product liability	WCAM, binding settlement
2005	HR 23 December 2005, LJN AU3713, Nederlandse Jurisprudentie 2006/289 (Safe Heaven)	Financial law	Representative action, mandate/ transfer

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