



New Act broadens possibilities for class actions in the Netherlands

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When it comes to class action-type suits, the Netherlands has historically been ahead of the curve in Europe. Since the early '90s, there has been an option to file collective actions, similar to the "class-action lawsuit" in the United States. In 2020, the Netherlands introduced new legislation, the Act on Redress of Mass Damages in a Collective Action (Wet Afwikkeling Massaschade in Collectieve Actie, or WAMCA). This act makes it possible not only to establish liability but also to obtain compensation of damages in collective actions. The WAMCA introduces American-style class actions in the Netherlands and (also) makes filing a class action in the Netherlands even more attractive for foreign injured parties.

NEW ACT: WAMCA

Group damage may be the result of a one-time event, for example an explosion, fire, or plane accident – something in which a large number of people suffer damage at the same moment. But group damage can also be the result of a series of identical events, with the damage generally arising over an extended period of time and the victims generally being spread out over a wider geographic area; this could be damage caused by a defective product, for example, or by financial mismanagement.

The Netherlands has long had the op-

tion for special interest groups to launch a collective action on behalf of a group of injured persons to seek a declaratory judgment that the alleged responsible party is liable towards these injured persons. Until recently, however, the claim in such collective actions could not extend to collective damages. This meant that after the defendant's liability was established in a collective action, the injured parties had to initiate individual proceedings to claim damages or try to reach a collective settlement. A collective settlement could be declared generally binding on the basis of the Act on Collective Settlement of Mass Damage (Wet Collectieve Afwikkeling Massaschade, or WCAM).

A collective settlement has certain advantages of efficiency, but it is also voluntary in nature. Because of that voluntary aspect, the Netherlands has now instituted the Act on Redress of Mass Damages in a Collective Action (Wet Afwikkeling Massaschade in Collectieve Actie, or WAMCA).

The most significant change that the WAMCA makes is that a special interest group filing an action on behalf of a group of injured persons can now seek damages in the collective action, thus establishing both the liability of the party causing the damage and the compensation in a single lawsuit.

ADMISSIBILITY REQUIREMENTS FOR THE SPECIAL INTEREST GROUP

Under the WAMCA, the special interest group must be a nonprofit organization, be sufficiently representative, and represent a suitably large group of aggrieved parties. The interest group must also fulfill a number of other conditions, including having (1) a supervisory body, (2) a suitable and effective mechanism for the participation or representation of the persons involved in the claim in the decision-making process of the interest group, (3) adequate financial resources to bear the costs of the collective action, (4) adequate experience and expertise to be able to conduct a collective action, and (5) a publicly accessible web page presenting specific information relating to the structure and working method of the interest group.

Also, the court also reviews whether the case is fit to be dealt with through collective action proceedings. This review of the claim is similar to the "motion to dismiss" stage of litigation in the U.S. The questions of law and fact to be answered (regarding the various claims of the various persons involved) must be sufficiently similar. In addition, the group of represented persons must be sufficiently large. Furthermore, the persons represented

individually and jointly must have a sufficiently large financial interest. If the interest group does not meet these requirements, the collective action will be inadmissible.

INTERNATIONAL DIMENSIONS

Unlike the scope of the collective redress under the recent EU directive ((EU) 2020/1828), collective actions in the Netherlands are not restricted to consumer cases. All types of actions may be brought under the new collective action system, including securities claims, product liability claims, and climate change claims. This unrestricted application of the collective actions system makes the Netherlands an attractive jurisdiction.

Under the WCAM, the Amsterdam Court of Appeal accepted broad international competence in declaring a collective settlement generally binding. It is sufficient that the paying party is in the Netherlands or that the rights of non-Dutch injured persons are closely interwoven with the rights of Dutch injured persons.

On this basis, the Amsterdam Court of Appeal assumed international jurisdiction in the Shell case (2009), in which the injured persons were domiciled in 105 different countries, as well as in the Converium case (2012), in which the parties causing the damage were not seated in the Netherlands and over 98% of the injured persons had its residence outside the Netherlands. With these decisions, the Court of Appeal made the WCAM an attractive venue for settling international mass claims on a class-wide basis. The question is whether foreign courts will respect a decision by a Dutch court. This may differ from country to country and from case to case, but will no doubt be a complicated question every time. Recognition within the EU would appear to be possible, but this will presumably depend on the way in which the foreign aggrieved parties are informed of the WCAM suit and the existence of any other litigation on the matter in the EU.

The WAMCA introduces what is referred to as the “scope rule.” A special interest organization can only start a collective action if the claim has a sufficiently close connection with the Netherlands. This connection will generally be deemed to be present if one of the following three conditions is met:

- The majority of the injured persons are Dutch residents who have their domicile in the Netherlands.
- The defendant resides in the Netherlands and additional circumstances suggest a sufficient relationship with the Netherlands.
- The damage-causing event occurred in the Netherlands.

This scope rule is stricter than the corresponding admissibility requirement in international WCAM cases. In combination with the opt-in system for foreign injured parties in WAMCA cases (see below), this limits the international scope of the Dutch collective action. This limitation, presumably, has to do with the fact that WCAM cases involve a voluntary settlement between the parties involved, whereas in a collective action a decision is made by the court.

However, the scope rule is still broad. A sufficiently close relationship with the Netherlands is soon deemed to exist, making the collective action in the Netherlands an attractive option for foreign injured parties, also because of a number of other factors, such as the fact that the courts can still assume jurisdiction in cross-border cases, can apply foreign law if necessary, are accustomed to working in English, and have now the ability to determine collective compensation.

EXCLUSIVE REPRESENTATION, OPT-OUT AND OPT-IN (FOREIGN AGGRIEVED PARTIES)

An interest organization has to register its collective action in a central register within two (business) days after filing the summons. After registration, there is a waiting period of three months during which other interest organizations may file alternative collective actions related to the same event(s). The collective action of any other interest organizations must then be filed in the same court as the original collective action. The various collective actions will be consolidated.

If the court grants standing to multiple interest organizations, it will appoint the most suitable organization as an “Exclusive Representative.” This is comparable to the “lead plaintiff” in the U.S. This exclusive representative will litigate the collective action on behalf of all persons represented and the other interest organizations. The court also decides on the scope of the collective action and determines for which persons the exclusive representative will act. Persons who are considered not to be part of this so-called “precisely specified group” (“class”) are excluded from the collective action.

Injured parties residing in the Netherlands have the option to opt out. Their interests will, in theory, be represented (by default) by the exclusive representative unless they indicate that they do not wish to be part of the group of represented persons. The court determines the opt-out period, which is at least one month.

An opt-in system applies to non-Dutch injured persons. They have the option of voluntarily joining the Dutch collective ac-

tion and be represented in the proceedings by the exclusive representative. The court has the authority, by way of exception, to determine that the opt-out system also applies to foreign injured parties that are relatively simple to identify.

COLLECTIVE SETTLEMENT OR RULING OF COLLECTIVE COMPENSATION OF DAMAGES

After the court appoints the exclusive representative, it will set a term for the parties to try to reach a settlement. If the court approves the settlement agreement, the collective settlement will be declared generally binding. The injured parties then have a second opt-out term, once again of at least a month.

If no collective settlement is reached or the court rejects the settlement, the proceedings will continue. The court may dismiss the collective claim, establish liability, or award damages if requested to do so. In this last case the court may use a compensation scheme with different amounts of compensation per category of injured persons. If the court opts for damage scheduling, it can order the parties to make a proposal for collective compensation. The court has to ensure that the amount of compensation is reasonable and that the interests of the injured parties represented are otherwise sufficiently protected.

The court’s ultimate ruling is binding on all Dutch injured parties who have not made use of the opt-out option(s), and on all foreign injured parties who have previously opted in. The court’s judgement can be appealed.



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