February 6, 2012

Collective Redress in the Netherlands

This memorandum provides a detailed overview of the collective redress landscape in the Netherlands.

Section I discusses the various mechanisms and court procedures that are being used for collective actions in the Netherlands, including claims bundling, collective actions by foundations or associations representing multiple parties (which are currently permitted for all types of court claims except damages), and the Dutch Act on Collective Settlements of Mass Claims (Wet Collectieve Afhandeling Massaschade, hereafter "**WCAM**").

Section I also discusses several pending initiatives. One initiative that could have a significant impact on the litigation landscape in the Netherlands is a recent motion adopted by the Second Chamber of the Dutch parliament (the "Motie Dijksma") which proposes to enable foundations and associations to lodge mass damages claims. Amendments to the WCAM have also been proposed.

Section II addresses the issue of "Forum Shopping" and discusses recent WCAM mass settlement agreements that were declared binding by the Amsterdam Appeals Court vis-à-vis companies and individuals not domiciled in the Netherlands (including the *Shell* case). The most significant WCAM case, so far, is the *Converium* case, where on January 17, 2012 the Amsterdam Appeals Court assumed wide jurisdiction over worldwide[1] mass settlement cases.

Section III discusses costs and funding issues. While contingency fees are prohibited in the Netherlands, the use of "Third Party Litigation Funding" is unrestricted, including in collective proceedings.

Finally, we conclude in Section IV that the landscape for collective redress in the Netherlands is quickly evolving and identify the main issues that are likely to require attention in order to manage the risk of lawsuit abuse.

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[1] Excluding U.S. residents.

I. COLLECTIVE ACTION MECHANISMS

1. Claims Bundling

Pursuant to general rules of Dutch civil procedure and civil law, damages claims can be sold to a third party and "bundled" by that third party, which can commence proceedings in his or her own name as owner of those claims.[2] The practice of claims bundling is not uncommon in the Netherlands, but cases are often settled out of court.

An important pending case is the bundled claim submitted before the Amsterdam Court against Air France/KLM and Martinair, both of which were investigated by the European Commission in respect to a cartel in the air cargo sector.[3] The claim has been brought by a litigation vehicle in its own name, having obtained about 150 claims (through a "cession" or assignment) from parties which have allegedly suffered loss as a result of the cartel, such as customers of the defendant airlines. It appears that the Amsterdam Court is currently dealing with preliminary procedural issues, including jurisdictional issues such as the inclusion of multiple plaintiffs and defendants who are not based in the Netherlands.

This practice of claims bundling appears to be growing. The outcome of pending cases (including the *Air France/KLM* case) will be an important factor in assessing how far this practice may grow.

2. Court-Based Collective Actions

i. Overview of the Procedure

Article 3:305a of the Dutch Civil Code ("**DCC**") permits a foundation[4] or association[5] that is authorized by its articles of association to represent the interests of third parties (a "**Representative**

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[2] Provided that the cession document contains sufficient information to identify the cessor and to identify the exact nature of the claim that is the subject of the cession. See Supreme Court, November 27, 2009, Worldonline, LJN:BH2162.

[3] Appeals are pending before the General Court of the European Union against the decision taken by the European Commission imposing fines on these companies (Case T-62/11 *Air France-KLM v. Commission* and Case T-67/11 *Martinair Holland v. Commission*).

[4] A "foundation" (Dutch term: "*stichting*") is defined in Article 2:285 DCC as a legal entity, established by a legal act (i.e., a notarial deed), which has no members and uses its funds to achieve a purpose set out in the Articles of Association. A foundation may be set up especially for the purpose of participating in a collective action or settlement. In the *Shell* case, for example (see page 9), a foundation called Shell Reserves Compensation Foundation was set up to represent investors who sought compensation and to distribute settlement amounts to those entitled to it under the terms of the court-approved settlement agreement (see https://www.royaldutchshellsettlement.com/Default.aspx).

A further example is Stichting Investor Claims against Fortis, the purposes of which are set out on its website and include obtaining compensation from Fortis, a European banking company (see http://www.investorclaimsagainstfortis.com/about_us.php). That particular foundation is funded by a consor-

Association") to submit a collective claim to protect "similar interests" of multiple third parties ("other persons")[6] if the Representative Association has tried and failed to achieve the required result through negotiations. To establish jurisdiction to make a claim, a Representative Association need not have its own direct *financial* interest in the claim. Its interest in the claim can be to pursue the objectives set out in its articles of association, and therefore in practice its role can be limited to defending the rights of the "other persons" that it represents.

Representative Associations (foundations or associations) must be not-for-profit legal entities.[7] They are legally independent and are not owned by any person (including the persons that established them). However, foundations and associations are permitted to obtain funds from third parties to achieve the purposes set out in their Articles of Association. As set out in more detail in Section III.3, there is no statutory prohibition on obtaining funds from third party litigation funding ("**TPLF**") entities or law firms. In other words, a TPLF entity or law firm cannot own a Representative Association, but it can provide funds to a Representative Association, e.g., to fund a court case.

Article 3:305a does not currently permit claims for damages, but there is political pressure for that to change, as explained in more detail below. Any other form of relief may be sought, such as declaratory relief on questions of liability, specific performance of a contract, rescission of a contract, annulment of a legal act or injunctive relief. The procedure has been used regularly, mainly in shareholder actions. The Dutch bank, ABN AMRO, for example, was the defendant in a collective shareholder action seeking an injunction to prevent the company from selling its U.S. branch.[8] Shareholders have also used the procedure in attempts to force companies to take particular action, such as producing documents or convening shareholder meetings.

The collective claim procedure of Article 3:305a can be used to establish the liability of a defendant.[9] A judgment establishing liability can then be followed by individual damages claims, by a "bundled claim" case (see discussion on "Claims Bundling" at Section I.1 above), and/or a court-

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tium of law firms representing investors (see http://www.investorclaimsagainstfortis.com/frequently_question.php).

A final example is the Stichting Converium Securities Compensation Foundation, which was established to obtain compensation for losses allegedly suffered by shareholders in Converium (formerly named Zurich Re) as a result of alleged misstatements and omissions concerning the company's financial condition.

5 An "association" (Dutch term: "*vereniging*") is defined by Article 2:26 DCC as a legal entity with members, which aims to achieve a specific purpose different from the purpose set out in Articles 53(1) and (2) (i.e., to provide for material needs of its members). An association may not distribute profits to its members. The Dutch Association of Shareholders ("Vereniging van Effectenbezitters") was a party to WCAM settlements in the *Vie d'Or* case and in the *Converium* case.

6 Such "other persons" can be individual consumers, but also companies.

7 See footnotes 4 and 5, above.

8 Supreme Court, July 13, 2007, LJN: BA7970.

9 See the Worldonline case, Supreme Court, November 27, 2009, LJN:BH2162, in which the Court established liability of Worldonline International NV, ABN AMRO NV and Goldman Sachs International for insufficiently informing potential investors that the CEO of Worldonline had sold her shares before the IPO of Worldonline. See also Supreme Court, July 8, 2011, Stichting Via.Claim v. Fortis Bank (Nederland) B.V. and Euronext Amsterdam N.V., LJN:BQ4830.

approved collective settlement (see discussion on Court-Approved Collective Settlements at Section I.3 below).

ii. Regulation of Associations and Foundations Taking Collective Actions

A committee of well-respected judges and lawyers has recently published a "Claim Code" as a form of voluntary self-regulation for Representative Associations that wish to submit collective actions pursuant to Article 3:305a of the DCC. The Claim Code, enforceable since July 1, 2011, is short (not to say sparse) in terms of content. It contains some useful commentary on the requirement that associations and foundations must be properly run, not-for-profit entities (see sub-section (i) above). According to the Claim Code, the not-for-profit status of a Representative Association that wishes to submit a collective action must be evident from its articles of association, the way in which it operates and how it is governed. This aims to limit the possibilities for commercially-driven use of not-for-profit legal entities (i.e., foundations or associations) to bring collective actions.

The Claim Code has been criticized for several reasons.[10] From a legal perspective, it has been noted that the Claim Code constitutes guidance only and courts are not bound by it, and there are no statutory sanctions for non-compliance. With regard to its contents, it has been noted that the Claim Code does not regulate the use of TPLF by Representative Associations. There are no limits to such funding, and no requirements for transparency in relation to the use of TPLF or other sources of funding. There are no limits either on the way Representative Associations can prepare for court cases or how they can advertise such cases to persons they might claim to represent. The limitations of the Claim Code became apparent in the first WCAM case in which it was tested (the *Converium* case, discussed below at Section III.3).

iii. Prospective Developments

On November 8, 2011, the Second Chamber of the Dutch Parliament adopted a motion submitted by the opposition parties (the "Motie Dijksma") to amend the DCC by creating the possibility for "representative organizations" to submit mass damages claims if the potential defendant does not wish to settle (in other words, to delete the sentence in Article 3:305a of the DCC that prohibits collective damages claims). The government has been invited to propose, by February 1, 2012, a step-by-step plan to implement this reform by January 1, 2013. There is significant pressure to follow up on this motion. On December 7, 2011, the Parliament called for an interim report, and on December 14, 2011, the Minister of Economic Affairs responded by announcing that inter-departmental consultations were taking place between several ministries, and that he would aim to inform Parliament about the results before February 1, 2012.[11] On December 13, 2011, the Second Chamber unanimously adopted a motion calling for "*effective instruments which, in case of proven cartels,*

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[10] See, for example, an online article published at http://www.ftm.nl/original/class-action-hero-jurjen-lemstra.aspx which quotes the chairman of Finvestor (a company specialized in "selling unselleable securities") and a board member of the Stichting Hypotheekleed (a Dutch foundation defending the interests of mortgage holders) who both suggest that the Claim Code was written to serve the interests of a prominent Dutch claims lawyer who was one of the Code's authors.

[11] Letter of the Minister of Economic Affairs of December 14, 2011, Second Chamber 2011-2012, 33000 XIII, no. 144. Despite the intentions to present a plan by February 1, 2012, a delay of several weeks is expected.

ensure that consumers are enabled to claim the damages they have suffered." This motion referred specifically to cartels concerning beer, bicycles, detergent, sanitary equipment and telecom services.[12]

The proposal to permit collective damages claims raises many questions which go to the foundations of Dutch civil and procedural law. Therefore, it is unlikely that there will be a change in the law by January 1, 2013. Some of the relevant questions were raised and discussed in 1991 when the law introducing Article 3:305a was first proposed. It was proposed that all types of collective claims should be permitted except for collective damages claims. (This was eventually adopted in the form described at Sub-section (i), above).[13] The following arguments were used by the then Minister of Justice to reject collective damages claims:

- The basic notion underpinning damages claims is that damages need to be paid as compensation to the persons who actually suffered the relevant loss, and not to any type of representative entity.

- Damages can occur in many forms, and this variety is difficult to cover in a single court claim. A right to collective action would therefore have to be accompanied by measures to deal with this variability. Any such measures would necessarily be so cumbersome as to annul the advantages of a collective action.

- There are many legal and technical complications. For example, the total damages to be awarded would have to be quantified and also apportioned among the class of persons entitled to compensation. The extent of the compensation due would differ from person to person, and there would be questions of "own fault," as well. This would mean that, generally, individual circumstances would make a collective claim inappropriate.

- Collective damages claims would also require a mechanism to make it possible to oblige interested individuals to submit the necessary information to the court. However, such an individual method is contrary to the very idea of a collective claim. Moreover, a representative organization which wants to represent the interests of persons with claims for damages can already achieve that purpose by other means (i.e., by bundling claims in the manner described in Section I.1, above).

- The proposal would already permit a representative organization to assist a class of individuals by lodging a claim for a declaratory judgment which could then be followed by individual cases claiming damages on the basis of that declaratory judgment, and therefore a mechanism for bringing collective damages claims is not necessary.

The original proposal for Article 3:305a did provide for one situation in which collective damages could be claimed, namely, where the claim was brought in respect of loss suffered by members of a claimant association. According to the then Minister of Justice, the above-mentioned

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[12] Motion Van Bemmel of December 8, 2001, Second Chamber 2011-2012, 24095, no. 303.

[13] See Second Chamber 1991-1992, 22 486, no. 3, pages 29-30.

obstacles could be overcome in that specific situation.[14] However, even this limited possibility was removed from Article 3:305a following the adoption of a parliamentary motion which explained that "*the question whether and to what extent a person against whom a tort has been committed has been thereby harmed, can only be answered individually, and therefore it is generally unsuitable for a collective claim. In addition, if there is a situation in which damages can be claimed on behalf of specific persons, the existing rules provide sufficient possibilities already.*"[15]

The arguments against collective damages claims set out above, which were raised when Article 3:305a was first proposed, still have force today. Nonetheless, political pressures to make available a mechanism for mass damages claims are significant and are unlikely to fall away substantially in the near future.[16]

3. Court-Approved Collective Settlements (the WCAM procedure)

i. Overview

The Dutch Act on Collective Settlements of Mass Claims (Wet Collectieve Afhandeling Massaschade, referred to here as the "**WCAM**") was adopted on May 23, 2005.[17] The WCAM applies to settlement agreements concerning compensation for mass damages concluded between: (i) a party allegedly responsible for a loss-causing event (the "**Compensating Party**") and (ii) a "**Representative Association**" as defined above (i.e., a not-for-profit association or foundation authorized by its articles of association to represent third parties). Such settlement agreements can be submitted to the Court of Appeals in Amsterdam, which can declare the agreement binding upon all "interested persons" (i.e., the natural and/or legal persons allegedly entitled to compensation, hereafter "**Class Members**" or the "**Class**"). The Class Members must all have suffered loss caused by "an event" or the "same event" and will each be bound by the settlement agreement unless they elect to opt out. To date, six collective settlement agreements have been declared generally binding pursuant to the WCAM. The facts underlying the two most recent cases (*Shell* and *Converium*) and their jurisdictional scope are described below (see pages 14-16).

ii. Features of the WCAM procedure

Voluntary nature of the procedure: Article 3:305a generally permits a Representative Association to lodge a collective claim (see section I.2.i, above). However, a collective claim lodged pursuant to the WCAM can be submitted to the Court only after a settlement concerning the payment of com-

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[14] Two examples were provided for cases to be pursued by an association on behalf of its members: victims of a faulty medicinal product and victims of an airplane disaster. It was noted, however, that such actions would require proper establishment of the damages, and standing would have to be proved. Such an action could not be lodged if the compensation would be different in each individual case. See Second Chamber 1991-1992, 22 486, no. 3, page 31.

[15] See Second Chamber 1991-1992, 22 486 no. 15 (amendment Soutendijk/Korthals).

[16] Reference is made to the Motion Van Bemmel, see footnote 9 above.

[17] State Gazette 2005, 340.

pensation for the benefit of multiple injured parties has been agreed to between the Compensating Party and the Representative Association.

Representative Associations: A Representative Association which acts under the WCAM procedure may be set up especially for that purpose.[18] Such entities are regulated by the general provisions of Dutch law applying to associations and foundations (see I.2.i, above). Since its adoption on July 1, 2011, they have been expected to comply with the self-regulatory Claim Code, which states, among other things, that they should operate on a not-for-profit basis and provide a minimum level of transparency about the way they are governed (see I.2.ii, above). Since the WCAM procedure is voluntary, however, a Compensating Party is free to refuse to engage in settlement discussions with a particular Representative Association should it so wish (for example, if it did not comply with the Claim Code).

The settlement operates on an "opt-out" basis: The WCAM permits the Amsterdam Court of Appeals to give binding effect to a settlement with respect to an entire group (or several groups) of persons. The Class must be defined in the settlement agreement with sufficient clarity. For example, in the *Shell* case the Class was defined as all persons who purchased shares of a particular type within a particular period of time in countries outside the United States.

Once the agreement has been declared binding by the Court, the Class Members are unable to claim compensation via another avenue unless they have exercised their right to opt out. In order to protect the rights of Class Members, the Court will determine in considerable detail how they must be informed about the case and its result (publication in newspapers; publication on websites; individual letters; bailiff notifications; etc.), in accordance with the relevant treaties for notification of hearings and judgments. The Court will designate, in its judgment, a person to whom opt-out notifications must be sent. Any Class Member who opts out retains the freedom to bring a claim individually against the Compensating Party.

The oversight role of the Court: The settlement agreement will only be declared binding if the Court of Appeals deems the compensation for which it provides reasonable, both in terms of the amount and how it will be made available to Class Members (e.g., it must be accessible in practical terms so it might be reasonable for the agreement to require the Compensating Party to provide a bank guarantee in respect of the total compensation). In carrying out the "reasonableness" test, the Court may go into considerable detail on the behavior and degree of liability of the Compensating Party vis-à-vis the Class Members. The Court may consider legal opinions on settlements in other jurisdictions such as the U.S., and has done so in recent cases. Absent evidence to the contrary, the Court will assume that the settlement is the result of reasonable negotiations, and it will not assume that the settlements are *a priori* unfair because the Class Members may be in a weaker position.

The *Dexia* case provides one example of a settlement which the Court approved. The procedure was conducted on behalf of purchasers of certain financial products (lease equities) from Dexia which came to owe Dexia money when stock prices crashed. It was alleged that Dexia had not properly communicated the risks associated with these investments and Dexia entered into settlement negotiations with a Representative Association. They eventually concluded a WCAM agreement pursuant to which Dexia would waive 80%-100% of the sums due from certain catego-

[18] See the examples cited at footnote 4.

ries of Class Member, and the Court ruled that this was a reasonable compromise. In addition, the fact that both Dexia and the Representative Association were able to agree voluntarily might suggest that it was a fair outcome for all concerned. While the case does not illustrate the basis on which the Court might find a settlement unreasonable, the manner in which the Court analyzed the settlement does demonstrate that it will look into the substance such agreements.

The substantive scope of the procedure: The agreement must relate to compensation for loss suffered by multiple persons caused by "an event" or "similar events." The WCAM was set up in response to a request from a foundation defending the interests of the "DES-children" in a product liability case concerning Diethylstilbestrol, a drug which had been prescribed to pregnant women. Therefore, one example of "similar events" is the taking of a medicinal product by multiple patients resulting in similar adverse effects. However, it is clear that many other types of loss can be the subject of WCAM settlements (e.g., losses suffered by shareholders or purchasers of financial products as a result of misrepresentations by the seller).

Damages scheduling: The settlement agreement must contain information regarding the Class Members (description of the group, nature and seriousness of losses, etc.) which is used for "damages scheduling." This is a procedure whereby that information is used to define different categories of Class Member corresponding to different levels or types of estimated loss. Each category will be allocated a level of compensation that will be available to Class Members who fall within that category. This means that the compensation owed to each Class Member can be calculated simply by determining within which category each falls rather than incurring the cost of assessing loss on an individual basis. An example can be found in the *Dexia* case (see above), where different levels of compensation were set for different types of financial products.

iii. Advantages and disadvantages

From the point of view of Class Members, the WCAM makes it possible to avoid long and costly judicial procedures, which may or may not result in an award of compensation (and currently such an award is not possible via the court-based collective action procedure under Article 3:305a of the DCC). Once the agreement is made binding, it is ensured that the Class Members will receive real compensation within a reasonable time frame.

From a Compensating Party's point of view, relying on this procedure avoids having to deal with an uncertain number of individual claims in multiple jurisdictions (assuming the opt-out rate is not so low as to eliminate that benefit). It also provides a Compensating Party with certainty regarding its financial obligations towards the Class Members (again, assuming a low opt-out rate). In addition, it allows a Compensating Party to seize the initiative by commencing settlement discussions. In the *Shell* case, for example, Shell itself decided to engage in a collective settlement and to compensate certain investors in respect to a decline in share prices, which followed a change to publicly available information concerning its oil and gas reserves.

Some commentators have contended that, from the point of view of society as a whole, the WCAM procedure involves lower costs and reduces the number of civil trials, while providing adequate protection for consumers' interests at the same time. On the other hand, there are relatively few cases upon which these broad conclusions can be drawn, and, as the various proposals for reform of the WCAM procedure demonstrate (see below), the WCAM is continuing to evolve. It

remains to be seen whether the procedure is socially beneficial once there is a larger body of case law with the procedure in a settled form.

A report commissioned by the Dutch Ministry of Justice, delivered to the Parliament in 2010, concluded that the WCAM had functioned well since its inception and provides a framework to avoid polarization and escalation of disputes. The report, entitled "*The Dutch Collective Settlements Act and Private International Law*,"[19] nonetheless recommended a number of changes, including expansion of the role of the judge in the early stages of cases (e.g., identifying legal questions, arranging pre-litigation meetings and appointing mediators, etc.). A more detailed overview of this proposal is set out below.

Whilst some features of the WCAM broadly resemble the U.S. class action system (e.g., to some degree it operates on an opt-out basis), there are several fundamental differences. Unlike in the U.S., the parties must first reach an agreement with each other out of court. The Compensating Party is not *ordered* to pay compensation by the Court and the Representative Association must be a not-for-profit legal entity. This aims to avoid U.S.-style attorney-led cases and "blackmail settlements." However, the proposed expansion of the Article 3:305a procedure to permit court-based claims for damages could undermine that aim. The recent growth in TPLF is also a cause for concern and has prompted a legislative proposal to introduce a new test which must be satisfied by claims brought by Representative Associations. This new test is intended to restrict the activities of commercially-driven Representative Associations (see below).

iv. Prospective developments

The WCAM procedure has been undergoing significant changes recently, and further changes are expected.

There is a proposal pending before the Dutch Parliament to amend the WCAM to allow for the submission of requests for a "preliminary ruling" to the Supreme Court on questions of law that arise in the context of WCAM procedures, such as jurisdictional issues. It is expected that such a reform would be enacted some time in 2012.[20]

On December 22, 2011, the Dutch government submitted a second proposal to amend the WCAM.[21] It contains four material changes which, if adopted, would have significant implications

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[19] The report was carried out by the Private International Law and Comparative Law Department of the Erasmus School of Law, Erasmus University Rotterdam and written by Dr. Hélène van Lith. An English summary is available at http://wodc.nl/onderzoeksdatabase/internationaal-privaatrechtelijke-aspecten-van-de-wet-collectieve-afandeling-massaschade-wcam.aspx?cp=44&cs=6837. A copy of the full report is available on the European Commission's website at http://ec.europa.eu/competition/consultations/2011_collective_redress/saw_annex_en.pdf.

[20] Parliamentary document 32612, see https://zoek.officielebekendmakingen.nl/behandelddossier/32612. The proposal was adopted by the Second Chamber of the Dutch Parliament on September 28, 2011 and is now awaiting adoption by the First Chamber.

[21] The full title of the proposed law is: "*Amendment to the Civil Code, the Code of Civil Procedure and the Bankruptcy Law to further facilitate the collective settlement of mass claims (Law to amend the Act on Collective Settlements of Mass Claims) (Wijziging van het Burgerlijk Wetboek, het Wetboek van Burgerlijke Rechtsvordering en de Faillissementswet teneinde de collectieve afwikkeling van massavorderingen verder te vergemakkelij-*

for the parties involved in WCAM settlements and the circumstances in which the procedure may be used:

- A new sentence would be added to Article 3:305a(2) of the DCC. The new sentence would specify that a Representative Association has no standing if its claim does not sufficiently protect the *interests* of the persons it claims to represent. According to the Explanatory Memorandum, this test has been added to discourage "entrepreneurial lawyering" and to discourage Representative Associations that act out of "purely commercially driven motives."

  The effectiveness of this new test, focusing on whether the claim sufficiently protects the interests of the persons represented (the "claim test") against financially-driven collective action, remains to be seen. In a draft proposal dated February 2011, the government proposed a different and stricter test, focusing on the interests of the litigation vehicle itself rather than on its claim. The original wording required that a Representative Association itself (e.g., as evidenced by its articles of association) must be sufficiently representative of the interests of the persons it claims to represent, given the circumstances of the case (i.e., a "litigation vehicle test").[22] According to the Explanatory Memorandum accompanying the final proposal (December 22, 2011), it was not necessary to have a "litigation vehicle test" since the "claim test" would ensure that the interests of persons purportedly represented were in fact properly represented. However, the Explanatory Memorandum does refer to the Claim Code (discussed at Section I.2.ii, above) which contains a litigation vehicle test, of sorts. In other words, the Explanatory Memorandum suggests that if a Representative Association is not sufficiently representative, then it will be possible to argue that its claim cannot be sufficiently representative. However, the Explanatory Memorandum is not sufficiently clear on the issue of how a Representative Association's credentials as a representative should be assessed. At page 12 of the Explanatory Memorandum, it is mentioned that the two central questions in relation to this issue are (a) whether the Class Members will benefit from the collective claim if it is awarded, and (b) the extent to which it can be trusted that a Representative Association has "sufficient knowledge and skills to conduct the procedure." Clearly, it would be difficult to disqualify a properly organized but financially driven Representative Association on the basis of these considerations (see also the discussion on the "representativeness" of the main Representative Association in the *Converium* case at Section III.3, below).

  On a positive note, the Explanatory Memorandum stresses that collective claims are not appropriate if the claims can be pursued individually equally well. If the collec-

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ken (Wet tot wijziging van de Wet collectieve afwikkeling massaschade))," Parliamentary document 33 126, see https://zoek.officielebekendmakingen.nl/dossier/33126.

[22] For WCAM settlement procedures, Article 7:907(3)(f) of the DCC already provides a "litigation vehicle test": the Court of Appeals must reject a WCAM settlement "*if the association or foundation … is not sufficiently representative with regard to the interests of those for whom the agreement has been concluded*." In the original proposal to amend the WCAM, the aim was to introduce the same litigation vehicle test in article 3:305a DCC (which applies to all collective civil claims), and make that test more specific by requiring that the foundation or association must be sufficiently representative "*given the circumstances of the case*."

tive claim offers no advantage over individual claims, then a collective claim constitutes an abuse of procedure, according to the Explanatory Memorandum (page 13).

- In recent WCAM cases, different categories of Class Member have been represented by different Representative Associations. For clarity, it has been proposed to enshrine this possibility in law by stating that a WCAM settlement can be concluded by "one or more" Representative Associations.[23] This is not problematic in cases where clearly defined categories of person are represented by different Representative Associations (for example, in one of the WCAM cases on financial products, the spouses of the persons who purchased the relevant financial products were represented by a separate Representative Association). However, the Explanatory Memorandum leaves open the possibility of multiple Representative Associations per category, and does not rule out multiple Representative Associations vying for the same "clients."[24] Nor does it contain a U.S.-style mechanism for appointing a "lead plaintiff."

- It is proposed that it should be possible to follow the WCAM procedure in bankruptcy cases. A bankruptcy trustee would be able to settle a mass claim against the bankrupt company by means of a WCAM settlement procedure, bypassing the normal procedure of assessing individually notified claims. The judge overseeing the trustee would have to assess whether the WCAM settlement would put the Class Members at an advantage vis-à-vis other creditors.[25]

- Additionally it is proposed that judgments of the Amsterdam Appeals Court declaring the WCAM settlement binding would no longer be appealable to the Supreme Court. Such an appeal would be possible only if the Amsterdam Appeals Court refused to declare the settlement binding.[26] This proposal is intended to reduce uncertainty concerning the legal effects of WCAM settlements.

In addition, the December 22, 2011 proposal contains a number of procedural changes:

- The final settlement agreement and other documents regarding the compensation available would be published on the internet in order to better reach all Class Members.[27] This proposal is seen as especially relevant to settlements where residents of different jurisdictions are involved (see below).

- There would be a clarification of the judge's power to determine how Class Members residing outside of the Dutch jurisdiction are to be notified of the settlement agree-

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[23] Amendment to Article 7:907(1) of the DCC.

[24] An example of this situation can be found in the recent bankruptcy of a Dutch bank, DSB. Several claims foundations were established, each claiming to represent consumers that suffered loss in the bankruptcy.

[25] Amendments to Articles 26, 110, 138, 179, 180, 183 and 186 of the "Faillissementswet" (Bankruptcy Code).

[26] Amendment to Article 7:908(1) of the DCC.

[27] Amendment to Article 1013 §4 and 1017 §2 of the Dutch Code of Civil Procedure ("**CCP**").

ment and the declaration making it binding upon them (in the event no procedure is prescribed under the applicable International or European law).[28]

- The judge would be entitled to hold a "preliminary hearing" to discuss the procedure that the concerned parties would follow, and make suggestions and decisions in that regard.[29] This could, for example, be a first hearing involving only the lawyers for the Compensating Party (or Parties) and the lawyers for the Representative Association(s). Such a hearing could be requested by the parties or could be ordered by the Court.

- The Representative Association and/or the Compensating Party would be entitled to request a pre-trial meeting (before any legal steps towards a collective settlement have been taken) when an event occurs damaging a significant group of persons, in order to "test the possibilities of a settlement agreement."[30] All parties would have to appear before the Court if such a pre-trial meeting were requested, or face the sanction of having to pay the other parties' costs.

- All individual procedures regarding the same subject matter as a settlement under the WCAM procedure would be suspended automatically upon a request for the settlement agreement to be declared binding (unless the individual claimant had opted out).[31]

- The level of the individual compensation payments to be made following a WCAM settlement (i.e., allocating individual Class Members into the appropriate damage scheduling categories set out in the WCAM settlement agreement) could be done by one of the parties if the WCAM settlement agreement so provided, and if the Class Members were able to dispute the level of their compensation before an independent committee.[32]

4. Consumer Authority Settlements

Article 2.6 of the Law on Enforcement of Consumer Protection (Wet handhaving consumentenbescherming) of November 20, 2006, declares that the WCAM procedure applies to mass settlement agreements concluded between the Dutch Consumer Authority, which is a not-for-profit state body, and a Compensating Party. Such settlements must relate to infringements of consumer

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[28] Amendments to Article 1013 §5 and Article 1017 §3 of the CCP.

[29] Amendment to Article 1013 §8 of the CCP.

[30] Amendment to Article 1018a of the CCP. According to the Explanatory Memorandum, this pre-trial meeting could be used to assist the negotiations, i.e., by having the judge express a view on the wording of certain provisions on which the parties cannot agree.

[31] Amendment to Article 1015 of the CCP.

[32] Amendment to Article 7:907(3)(d) of the DCC.

protection laws which fall within the responsibility of the Consumer Authority. These laws include national legislation implementing seventeen (17) EU laws, including the EU Directives on unfair trade practices (2005/29), e-commerce (2001/31) and internal market services[33] (2006/123). After reaching a settlement, the Consumer Authority and/or the Compensating Party can submit the agreement to the Court of Appeals in Amsterdam to have it declared generally binding for all consumers who are deemed to have suffered similar loss caused by the Compensating Party and that have not opted out.

II. FORUM SHOPPING

This section discusses jurisdictional issues that have been raised in the WCAM cases.

1. Jurisdictional Scope of the WCAM Procedure

The Court of Amsterdam has declared WCAM settlement agreements collectively binding in six cases: *DES*,[34] *Dexia*,[35] *Vie d'Or*,[36] *Shell*,[37] *Vedior*[38] and *Converium*.[39] In four of these cases, as discussed below, the Court asserted extraterritorial jurisdiction over interested persons domiciled outside the Netherlands where a settlement agreement had been concluded for their benefit.

The ***Shell*** case (also referred to on pages 7 and 8, above) concerned a "worldwide" settlement. It provided compensation for investors residing in over 100 jurisdictions, but not investors residing in the United States. Moreover, one of the companies which was party to the settlement agreement – Shell Transport and Trading Company Ltd – was domiciled in the UK.

In the ***Vedior*** case, a €4.25 million settlement was reached to compensate investors who sold their Vedior stock on the day rumors started to spread about merger talks between Vedior and Randstad. The Association of Shareholders alleged that Vedior published the news too late, so that the investors who sold Vedior stock early in the day were denied the benefit of the higher share price that could be obtained after the news broke. The *Vedior* settlement included both Dutch and foreign investors including U.S. residents.

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[33] This law is intended to facilitate the establishment of businesses in the service sector in the EU and the provision of cross border services. It does so by imposing certain obligations on EU Member States, including obligations to provide information and to remove discriminatory requirements.

[34] Amsterdam Court of Appeals, June 1, 2006, LJN: AX6440.

[35] Amsterdam Court of Appeals, January 25, 2007, LJN:AZ7033.

[36] Amsterdam Court of Appeals, April 29, 2009, LJN:BI2717.

[37] Amsterdam Court of Appeals, May 29, 2009, LJN: BI5744.

[38] Amsterdam Court of Appeals, July 15, 2009, LJN:BJ2691.

[39] Amsterdam Court of Appeals, November 12, 2010, LJN: BO3908 (interim judgment), and Amsterdam Court of Appeals, January 17, 2012 (final judgment).

In the ***Vie d'Or*** settlement, 500 out of 10,000 Class Members were not domiciled in the Netherlands.

However, in the ***Dexia*** case (also referred to on page 7, above), a different approach was taken and around 4,000 foreign Class Members – mainly domiciled in Belgium – were excluded from the settlement agreement.

The most recent judgment, and the most interesting one, is the ***Converium*** case which deals with a settlement between two Swiss companies, Scor Holding (Switzerland) AG and Zürich Financial Services Ltd, and two Representative Associations in the Netherlands. It concerned alleged misrepresentations in relation to the financial situation of the companies. The Representative Associations acted on behalf of about 12,000 known Class Members from outside the U.S., including (only) 200 known Class Members resident in the Netherlands, 8,500 residents of Switzerland, and 1,500 residents of the UK.[40]

2. The Jurisdictional Basis for "Worldwide" Settlements

The Court has addressed the question of extraterritorial jurisdiction in some detail in the *Shell* case and in the *Converium* case.

In the ***Shell*** case, six Shell group companies themselves initiated the procedure. The Court established jurisdiction over 751 Class Members domiciled in the Netherlands by qualifying them as "persons sued" (even though they would, in a regular procedure, have been the plaintiffs) within the meaning of Article 2 of EU Regulation 44/2001 (the "**Brussels I Regulation**") which provides that "*persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*"[41]

The Court based its jurisdiction over the 120,000 Class Members living outside the Netherlands but within the EU on Article 6(1) of the Brussels I Regulation, which provides: "*A person domiciled in a Member State may also be sued where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*" Therefore, in order to establish jurisdiction, the Court had to qualify both the Class Members domiciled in the Netherlands *and* the Class Members domiciled outside the Netherlands as "defendants." The Court also had to qualify the requests to declare the WCAM settlement agreement binding as "claims" against the 120,000 Class Members domiciled outside the Netherlands, which claims were sufficiently "closely connected" with similar "claims" against the 751 Class Members domiciled in the Netherlands.

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[40] See the interim judgment of November 12, 2011. It follows from the final judgment of January 17, 2012 that 204 Dutch residents and 12,014 persons residing outside the Netherlands were summoned to appear at the hearing.

[41] The Dutch version of the Brussels I Regulation differs from the English version. Whereas the English version mentions "persons *sued*," the Dutch version mentions "persons *summoned*" (to appear before a court).

With regard to Class Members domiciled outside the EU, Iceland, Norway and Switzerland,[42] the Court established jurisdiction on the basis of Article 3 of the CCP which contains general jurisdictional rules for procedures commenced by petition and confers jurisdiction upon Dutch courts if the domicile or habitual residence of *any* petitioner or *any* of the Class Members is located in the Netherlands. Given that in the *Shell* case five out of six petitioners were domiciled in the Netherlands, the Court deemed it could rely on this rule.

The *Shell* case has not been appealed before the Supreme Court (this is logical, given that it was a settlement requested by all parties). However, the Court's reasoning with regard to Articles 2 and 6(1) of the Brussels I Regulation has been criticized in legal literature, since a WCAM case is not in reality a case "against" the Class Members (they are not "sued" and it is difficult to qualify them as "defendants" against whom Shell had a "claim").[43]

The Amsterdam Court of Appeals took a potentially significant step further in the ***Converium*** case. In its interim judgment of November 12, 2010, it found an *alternative* basis for jurisdiction in Article 5(1) of the Brussels I Regulation, which provides: "*A person domiciled in a Member State may, in another Member State, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question.*" The Court provisionally found that, since the WCAM agreement is an agreement concluded under Dutch law, and must be executed in the Netherlands (by means of the payout), Article 5(1) could confer jurisdiction.

The Court clearly expressed that it was seeking a basis to establish jurisdiction to permit worldwide settlements that complement U.S. settlements. Given that the U.S. Courts have denied jurisdiction in "foreign-cubed" cases, and U.S. settlements can only cover claims with a sufficient link to the U.S., there was, according to the Court, a "demand" for courts that could declare settlements generally binding for the rest of the world. The Amsterdam Court stated clearly that it wanted to satisfy that demand.

The Court's reasoning under Article 5(1) of the Brussels I Regulation has been severely criticized in Dutch legal literature.[44] In the *Converium* case, all parties concurred that an "agreement" binding the parties would not come into existence unless and until the Court declared the settlement agreement generally binding. Commentators have also noted a tension between the Court's approach and case law of the Court of Justice of the European Union which requires a strict interpre-

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[42] For persons domiciled in EU Member States, the Brussels I Regulation applies. For persons domiciled in Iceland, Norway and Switzerland, which are members of the European Free Trade Association ("EFTA") but not the EU, the 2007 Lugano Convention applies. This Convention applies between the EU Member States and the EFTA States (with the exception of Liechtenstein) and contains a set of rules which are broadly equivalent to those of the Brussels I Regulation.

[43] See pages 30-41 of the report, commissioned by the Dutch Ministry of Justice, entitled "*The Dutch Collective Settlements Act and Private International Law*" (also referred to at page 8 and footnote 19, above).

[44] See, for example, the annotation of J.S. Kortmann in *Jurisprudentie Ondernemingsrecht* 2010, no. 46, at page 460; B. de Jong, "Een nieuw exportproduct" ("a New Export Product"), *Ondernemingsrecht* 2010/17, pages 141-142; and the report Commissioned by the Dutch Ministry of Justice and written by Van Lith et al, which is cited in the previous footnote.

tation of Article 5(1), and does not permit application of that article to the pre-contractual phase.[45] The Amsterdam Court's approach would, in theory, allow WCAM settlements to be declared generally binding even in the absence of any parties domiciled in the Netherlands.[46]

In its November 12, 2011 interim judgment, the Amsterdam Court of Appeals invited all parties involved to submit their views on the jurisdictional issues. However, there were no comments that changed the Court's views: the January 17, 2012 final judgment does not revisit the jurisdictional issues.

The *Converium* judgment has triggered concern from industry in the Netherlands. The Dutch industry association VNO/NCW issued a press release noting that the judgment would "open the floodgates" for mass claims litigation in the Netherlands, and called for decisive government action against aggressive claims organizations.[47]

It also remains to be seen whether courts outside the Netherlands would uphold the supposedly binding nature of a WCAM settlement in the event that a Class Member outside the Netherlands who failed to opt out subsequently commences an individual claim in a non-Dutch court.

3. Trends and Developments

Although the Amsterdam Court's judgments asserting international jurisdiction over foreign interested parties have not been appealed to the Supreme Court, the *Shell* case and especially the *Converium* case still raise important questions related to the cross-border use of the WCAM procedure. Reference is made again to the report: "*The Dutch Collective Settlement Act and Private International Law*"[48] and the criticisms summarized in Sub-section 2, above.

In relation to the basis for jurisdiction over persons domiciled in the EU, the study found that "*the application of the provisions and concepts currently used in the Brussels I Regulation is problematic and requires further clarification in relation to collective settlements under the WCAM.*"[49] In relation to non-EU

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45 Including Case C-189/08 *Zuid-Chemie BV v Philippo's Mineralfabriek NV/SA*, ECR I-6917; and Case C-334/00 *Fonderie Officine Meccaniche Tucconi SpA v Heinrich Wagner Sinto Machinerfabrik GmbH (HWS)* [2000] ECR I-7357.

46 One caveat must be made: in the *Converium* case, the Amsterdam Court of Appeals assumed jurisdiction on multiple grounds, including a connection between claims relating to Dutch residents and claims relating to residents of other countries. It remains to be seen whether the Amsterdam Court of Appeals would also assume jurisdiction in a case with no Dutch residents.

47 www.vno-ncw.nl/Publicaties/Nieuws/Pages/Justitie_moet_in_actie_komen_tegen_agressieve_claimvehikels_2161.aspx?source=%2fPages%2fDefault.aspx

48 This report, commissioned by the Dutch Ministry of Justice and written by Dr. Hélène van Lith, is referred to at pages 8 and 14, above.

49 See Concluding Remarks at page 60 of the report.

domiciled persons, however, the study concluded that the international jurisdiction rule contained in Article 3 of the CCP is suitable in the context of the WCAM procedure.

In relation to the notification of a WCAM procedure to Class Members domiciled outside the Netherlands, the study concluded that international and European laws applicable to the Netherlands do not prohibit cross-border notification of the right to opt out of a settlement and that the WCAM is therefore suitable for cross-border disputes. However, these international and European instruments contain some gaps (for instance regarding the notification of Class Members whose place of residence is not known).

The proposed amendments to the WCAM described above (see pages 11-12) would introduce changes to make cross-border disputes easier and to fill those gaps (e.g., the use of the internet would be promoted as a means of publishing settlement agreements and related documents and judges would be given new powers to decide how Class Members domiciled abroad should be notified of the procedure). Accordingly, those proposals appear to encourage further use of the WCAM procedure in cross-border disputes, though whether that is the deliberate aim of the proposals and whether they will be adopted in their current form, remains to be seen.

III. COSTS AND FUNDING

Litigation costs in the Netherlands are perceived to be moderate: comparable to those in Germany and much lower than in the United Kingdom. There is a legal aid scheme allowing each consumer access to a lawyer paid by the government if the consumer has insufficient income. In addition, legal assistance insurance is widely available. Because of these factors, there is no strongly perceived *need* for third party litigation funding. Access to justice is not traditionally regarded as a problem. This climate may change in the coming years, in conjunction with the political pressure to permit mass damages claims. Such cases are costly to bring and would not fit easily into existing schemes.

1. Lawyers' Fees

In principle, agreements between lawyers and their clients setting out how lawyers will be paid are subject to the doctrine of freedom of contract. However, that freedom is somewhat restricted by professional rules of conduct. A general rule regarding the calculation of lawyers' fees can be found in the Bar Association's Code of Conduct (Rule 25, Clause 1) which provides: "*When determining his fees, the lawyer is obliged to charge a reasonable fee, taking into account all the circumstances of the case.*" Other rules which are relevant to lawyers' fee structures are as follows:

i. U.S.-Style Contingency Fees

The Dutch Bar Association's Code of Conduct (Rule 25, Clause 3) provides that "a *lawyer may not agree to charge a proportionate part of the value of the result obtained.*" Accordingly, U.S.-style contingency fees are not permitted subject to an exception for debt collection matters in relation to which the Bar Association has set out appropriate rates in the form of an advised tariff.

ii. Success Fees

The Dutch Bar Association's Code of Conduct (Rule 25, Clause 2) provides that "a *lawyer may not agree that he will only charge for his services upon obtaining a specific result.*" Thus, agreements which provide for a lawyer to receive no fee at all unless a specific result is obtained are not permitted.

In three disciplinary decisions of the Disciplinary Appeals Tribunal, certain other forms of success fee have been deemed acceptable and not contrary to Rule 25 (e.g., charging fees at a higher hourly rate if the case is successful but otherwise charging a lower rate). This means that success fees are permissible as additions to basic fees, but lawyers cannot work on a "no win, no fee" basis.

iii. Lawyers' Fees in WCAM Settlements

WCAM settlement agreements can provide for payment of the fees of the plaintiff's lawyers (i.e., the lawyers on the side of the Representative Association(s) and Class Members). The amounts involved can be substantial. The American Lawyer reported that the *Shell* settlement provided for a payment of U.S. $47 million to the plaintiffs' counsel.[50]

In the *Converium* case, the Compensating Party argued that withholding a 20% fee for the three plaintiff law firms (20% of U.S. $58 million) from the settlement fund was "unreasonable" given that the plaintiff firms had already received a success fee in the U.S. settlement. The Court rejected this argument on the basis of three documents related to the U.S. litigation that had preceded the Dutch case: (i) the Order of the U.S. District Court awarding attorneys' fees and expenses, which stated that the fees were "fair and reasonable and consistent with awards in similar cases" (i.e., similar cases in the U.S.); (ii) an American study by Messrs. Eisenberg and Miller concerning attorneys fees in U.S. class action settlements, which showed that 20% was not disproportional; (iii) a "Lodestar calculation" showing that the three plaintiff firms had spent 65,000 hours on the (global) case, which would represent U.S. $24.4 million in fees. The judgment does not show whether the Court evaluated whether part of the work and the fees were specific to the U.S. case and not relevant to the Dutch case.

In other words, the Court applied U.S. standards of reasonableness in a European jurisdiction where litigation costs are a fraction of those in the U.S.

2. The "Loser Pays" Principle

In Dutch civil litigation, the "loser pays" principle generally applies, though with some qualifications. The losing party is not required to pay all the lawyers' costs incurred by the winning party. Court-ordered lawyers' fees depend primarily on the complexity of the case, measured by the number of procedural acts performed in the course of the proceedings.

Each procedural act is worth one point (minor acts are worth 0.5 points). There are eight levels of points, with the applicable level depending on the value of the claim. At Level 1, a point is worth €384 (with a maximum of five points). At Level 8, a point is worth €3,211 (with no maxi-

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[50] http://www.law.com/jsp/article.jsp?id=1202431105422.

mum limit as to the number of points).[51] The court calculates the costs to be awarded to a successful party by multiplying the number of points accumulated by its lawyers by the value of a point at the applicable level.

The main exception to this approach arises in cases concerning intellectual property disputes. To implement EU legislation relating to the enforcement of IP rights (Directive 2004/48/EC), Article 1019h of the CCP was introduced. According to this provision, the successful party has the right to recover the costs incurred by its lawyers in the case and in some cases awards have exceeded €100,000.

In summary, while the "loser pays" principle does generally apply in Dutch litigation, the award of costs to the winning party will enable it to recover only a small percentage of its actual costs.

3. Third Party Litigation Funding (TPLF)

TPLF involves third parties with no prior interest in litigation providing funding towards the costs of that litigation in return for a share of the proceeds. There is no statutory prohibition against TPLF in the Netherlands, nor is there a regime of safeguards to prevent funders, whose only reason for being involved in litigation is to generate profits, from taking control of claims away from claimants. In fact, the established practice of "claims bundling" (see Section I.1, above) allows claims to be purchased outright by litigation vehicles which can then pursue them as they see fit in return for a portion of any damages recovered. Although a person who has purchased a claim is no longer a third party (in the strict sense), claims bundling is for practical purposes also a form of TPLF.[52]

Concerns have been expressed about the potential for third parties to exploit the WCAM procedure by treating it primarily as a means for generating profits rather than compensating injured persons. A particular area of concern is the possibility of "entrepreneurial lawyering," which refers to the possibility of law firms funding and promoting collective procedures in order to extract fees.

Unfortunately, existing mechanisms for preventing this kind of abuse are not sufficient. One measure designed to prevent collective proceedings being used to generate returns for commercially-driven third parties is the requirement, in Article 3:305a of the DCC, that the legal entities which may serve as Representative Associations must operate on a not-for-profit basis. Since July 1, 2011, this requirement has supposedly been reinforced by the (voluntary) Claim Code. However, the scope of these safeguards is simply too narrow, since they do not address who may fund a Representative Association or the terms on which funding may be provided. Accordingly, it is possible and entirely lawful for a Representative Association to be established specifically for the purpose of initiating a collective procedure and for it to be controlled, and funded, by parties which <u>are</u> profit-

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[51] Tariffs applicable on January 1, 2006: the amounts are adjusted at irregular intervals.

[52] See Case Associates' "*Third Party Litigation Funding in Europe*" (December 9, 2011) which characterizes this form of TPLF as "active funding." This is contrasted with "passive funding," whereby the conduct of a claim remains with the original claimant and its lawyers (e.g., the form of TPLF which occurs in England and Wales) (pages 5-6).

making, provided the Representative Association itself fulfils the not-for-profit requirement set out in Article 3:305 of the DCC and is organized in a sufficiently professional way.

A clear illustration of the limitations of the Claim Code can be found in the final judgment of the Amsterdam Court of Appeals in the *Converium* case. The Court accepted the "representativeness" of the main Representative Association (the "Stichting Converium Securities Compensation Foundation") participating in the settlement on the following grounds:

- Even though the Representative Association had no Supervisory Board (as required by the Claim Code), provision had been made for appropriate (other) forms of oversight, namely by participants and by an independent accountant.

- The Representative Association had sought and found support from 29 foreign organizations which also represented the interests of shareholders and institutional investors. These included the European interest organizations and various interest groups and institutional investors from countries in which most of the known non-U.S. shareholders were resident, namely Switzerland and the UK. Certain interest groups and investors had expressed their support by concluding agreements with the Representative Association.

- The representativeness of the Representative Association was not disputed, and no other organization which sought to protect the interests of the non-U.S. shareholders was known.

- Finally, the Court attached importance to the fact that the Representative Association had carried out activities to publicize the settlement agreements, and to discuss these agreements at major international investor conferences.[53]

In the *Converium* case, it appears that a large part of the costs of the litigation on the Representative Association's side was initially borne by the law firms involved. However, it is not clear from the judgment whether these law firms received third party funding, nor is it clear whether the "expression of support" for the Representative Association by interest groups and investors included a financial element.

It is clear at any rate that the Amsterdam Court of Appeals will investigate whether a Representative Association is professionally organized, but the Court will not investigate the financing of Representative Associations or plaintiff law firms which are involved in the settlement process. In the context of WCAM settlements, the effects of this may be limited since the Compensating Party currently has the choice of settling the case or not. However, if the plans to introduce the possibility for mass damages claims do materialize (see Section I.2.iii, above), the issue of TPLF will become crucial.

It is hoped that the risk of opportunistic, profit-driven attempts to pursue compensation on a mass scale will be addressed by the proposed reforms to the WCAM procedure discussed at Sec-

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[53] This raises the question of whether litigation vehicles can somehow create their own representativeness by advertising a case and promoting participation in it.

tion I.3.iv, above. These reforms would, among other things, prevent a Representative Association from bringing a claim unless that claim sufficiently protects the interests of the Class Members on whose behalf it would be brought. Although this test focuses on the claim to be brought rather than the Representative Association attempting to bring it, the accompanying Explanatory Memorandum regards the test as being broad enough to require scrutiny of the Representative Association as well. However, the proposal has only recently been published and further detail will be required before the sufficiency of the new test can be fully appraised. The more certain approach would be for Representative Associations to be subjected to binding regulations which prohibit them from using TPLF or at least subject their funding arrangements to safeguards and controls.

IV. CONCLUSION

There are three main mechanisms for collective redress in the Netherlands. First, there is the practice of "claims bundling," whereby multiple claims are purchased by a litigation vehicle and pursued in its own name in return for a share of any recovery. Second, there is a court-based collective action which cannot currently be used to seek damages but may result in a declaration of liability which could support further litigation or settlements. Third, there is the WCAM procedure by which collective settlements may be declared binding on an "opt-out" basis. The WCAM procedure is particularly significant since past cases have seen it used to achieve settlements which purportedly bind Class Members domiciled in multiple jurisdictions.

In legal terms, this landscape is changing rapidly. It is imperative that the implementation of effective safeguards against abuse keeps pace with legislative developments and with the tendency of third parties to find new ways of promoting and funding litigation as a means of generating profits rather than delivering justice. A number of issues currently provide cause for concern; namely, (i) the legitimate status of "claims bundling," (ii) the possible introduction of court-based collective actions seeking damages, (iii) serious flaws in the regulation of Representative Associations, and (iv) the absence of effective safeguards against the risk of abuse posed by TPLF. While the use of the WCAM procedure to achieve "worldwide" settlements may be appealing in some circumstances, questions remain over the efficacy of the procedure as a mechanism for such settlements and whether the possibility of such settlements might encourage litigious activity which might not otherwise have taken place.

The U.S. Chamber Institute for Legal Reform continues to monitor these issues closely and to identify opportunities to share its views and experience with policymakers and stakeholders.