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International Class Action Settlements in the Netherlands


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Introduction

Collective litigation, and court-approved collective settlements on an opt-out basis, have been part of the Dutch legal system for many years. Collective opt-out settlements can be achieved independent of other litigation, or as part of a wider collective litigation.

An independent settlement procedure is enshrined in the Act on the Collective Settlement of Mass Claims, which entered into force on 27 July 2005 (known as the "**WCAM**"). It allows a paying party and a claim organisation to jointly petition the Amsterdam Court of Appeal (the "**Court**") to have a settlement agreement declared binding on an opt-out basis.

The Resolution of Mass Damage in Collective Action Act (known as the "**WAMCA**") amended the collective action regime, and created a specific settlement option within it. It went into effect on 1 January 2020, creating a specific opt-out regime while also allowing monetary damages to be claimed. Furthermore, it introduced stricter admissibility criteria for claim organisations and streamlined the procedure with the appointment of an exclusive representative. Pertinently, it encourages and facilitates collective settlements by providing for its own opt-out-based settlement mechanism.[1]

Since the WAMCA's settlement provisions are largely based on WCAM legislation and have yet to be used in practice, this chapter will be limited to the WCAM. In particular, we will focus on the application of the WCAM in international settlements.

Over the years, the WCAM has proved its value in both entirely Dutch as well as cross-border cases. Since the US Supreme Court's decision in *Morrison v. National Australian Bank*,[2] the international relevance of Dutch law to class action settlements has increased. Indeed, ever since "foreign cubed class actions" became a problem in the United States,[3] the Netherlands has offered a serious alternative for the certification of class action settlements involving non-US investors in non-US securities, listed on a non-US stock exchange.

In part because of this development, important international class action settlements have materialised through the Dutch jurisdiction in recent years, most recently through a settlement in the *Ageas* case approved in July 2018, where a Belgian company reached settlement with current and former shareholders across the globe. Before that, on 29 May 2009, the Amsterdam Court of Appeal declared the international settlement in the *Shell Reserves* case binding under the WCAM. Although that ruling was the first of its kind to truly reflect an international application of the WCAM, one of the two Shell entities settling the matter was Dutch (the other was a UK entity).

It is not a requirement that all or most potential claimants are located in the Netherlands for the Court to approve a settlement. In its interim decision of 12 November 2010 and its final decision of 17 January 2012, the Court assumed jurisdiction and declared an international collective settlement binding in a case where none of the two potentially liable parties were Dutch (they were both Swiss), and where only a limited number of the potential claimants were domiciled in the Netherlands.[4] This approach was confirmed in the 16 June 2017 interim decision in *Ageas*, where the potentially liable party was Belgian and some, but not all, potential claimants were domiciled in the Netherlands.[5]

In this chapter, we first outline the WCAM system, including the option of having the proceedings conducted in English. We then discuss different issues within the framework as set up by the WCAM and the Court's case law on the same subject. The various issues include: jurisdiction; notification; representativeness; reasonableness; and international recognition.

The WCAM System

The WCAM's main aim is to enable parties to a settlement agreement to jointly request the Court to declare the settlement agreement binding. The agreement must have been concluded between one or more potentially liable parties, and one or more foundations or associations representing one or more groups of persons for whose benefit the settlement agreement was concluded (the "**beneficiaries**"). The Netherlands Authority for Consumers & Markets can also initiate WCAM proceedings by taking a position similar to that of a representative organisation (article 2.6 (2) Consumer Protection Enforcement Act). If the Court declares the settlement agreement binding, the agreement will bind all persons covered by its terms, unless such a person decides to opt out in writing within a certain period after the binding declaration. The opt-out period is determined by the Court, but is at least three months.

Before deciding on the binding declaration, the Court will test, among other things, the representativeness of the foundations and associations representing the beneficiaries, as well as the reasonableness of the settlement.

Notification of the beneficiaries is crucial, both at the litigation stage, where the aim is to obtain a binding declaration, and after the binding declaration has been issued. The binding effect of a settlement agreement is only regarded as acceptable if the beneficiaries have been properly notified at both stages, and thus have had an opportunity to object and to opt out.[6]

Thus far, the Court has issued nine final decisions within the framework of the WCAM, namely in:

- *DES* and *DES II* (regarding personal injury allegedly caused by a harmful drug);
- *Dexia* (regarding financial loss allegedly caused by certain retail investment products);

- *Vie d'Or* (regarding financial loss allegedly suffered by life insurance policy holders as a consequence of the bankruptcy of a life insurance company);
- *Vedior* (regarding financial loss allegedly suffered by shareholders as a consequence of late disclosure of takeover discussions); and
- *Shell*, *Converium*, *DSB Bank* and *Ageas*[7] (see below).

In each of these cases, the Court declared the settlement agreements binding. It found the settlements reasonable and confirmed the representativeness of the foundations and associations representing the persons in the suit.

Shell, *Converium* and *Ageas* are cases with substantial international scope. These cases concern financial loss suffered by shareholders and allegedly caused by misleading statements by the company in a certain period. The paying parties in the settlement were foreign entirely (*Converium* and *Ageas*) or in part (*Shell*, where one of the Shell entities involved was Dutch and the other was English). The majority of the shareholders in these cases were not residing in the Netherlands either.

On 1 July 2013, an amendment to the WCAM came into force, providing that the WCAM can also be applied to settlements reached if the liable person is declared bankrupt in the Netherlands.[8] On 4 November 2014, the first settlement agreement in a bankruptcy situation was declared binding by the Court in *DSB Bank*. In *DSB Bank*, some 100,000 customers had potential damages claims on the bankrupt estate, because DSB Bank had violated its duty of care towards them. The settlement that was brought to court provides for an arrangement that intends to compensate all of DSB Bank's customers for the possible violation of its duty of care. To this end, various categories of damages were included in the settlement agreement. The criteria for each category determine which category applies to a beneficiary. In two interim decisions, the Court held that the settlement complies with formal requirements and is deemed adequate in most respects.

The Court raised questions as to the reasonableness of the compensation amount and indicated what amendments would be necessary for the settlement to pass this test. Accordingly, parties submitted an amended settlement which was declared binding by the Court. The Court's integral approach to review in *DSB Bank* could, in the light of the settlement's function, be viewed as an alternative to elements of the regular Dutch bankruptcy proceedings. Whether the Court will also adopt this approach in other cases remains to be seen.

On 23 May 2016, Ageas and a number of claim organisations submitted a request to the Court to declare the global settlement agreement, with respect to all civil proceedings related to the former Fortis group for the events that occurred in 2007 and 2008, binding. The Court eventually approved a revised settlement after it had handed down two interim decisions. In its first interim decision, the Court criticised a mechanism that would lead to a disparity in damages compensation depending on whether the shareholder was active (participated in proceedings before a Dutch or Belgian court or was registered with a claim organisation) or inactive. In its final decision, the Court tested the level of costs compensation for active shareholders and found that, although actual costs for active claimants would vary, the uniform compensation mechanism proposed was reasonable (with one exception that it found too limited).

The Amsterdam Court of Appeal is the relevant court for WCAM applications. The Netherlands Commercial Court is part of it and, subject to certain conditions, allows proceedings to be conducted in English.

Jurisdiction in International WCAM Settlements

From an international perspective, one of the most important issues in both *Shell* and *Converium* was whether the Court had jurisdiction. Since 10 January 2015, this matter has, in principle, been governed by Council Regulation (EC) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 12 December 2012 (the "**Brussels *Ibis* Regulation**")[9] and the Lugano Convention,[10] depending on whether it can be said that the person "to be sued" is domiciled in a European Union ("**EU**") Member State, or in Norway, Switzerland or Iceland (the "Lugano" countries).

The Brussels I*bis* Regulation and the Lugano Convention are substantively applicable if the litigation concerns a "civil or commercial matter". In both *Shell* and *Converium*, the Court ruled that the WCAM procedure is a "civil and commercial matter" as referred to in the predecessor of article 1 of the Brussels I*bis* Regulation and the Lugano Convention. Apart from that, it ruled that for the purpose of the application of these international instruments, the shareholders should be regarded as the persons "to be sued" as referred to in the predecessor of article 4 section 1 of the Brussels I*bis* Regulation and article 2 section 1 of the Lugano Convention.

On that basis, the Court first assumed jurisdiction with regard to the shareholders domiciled in the Netherlands. The Court then assumed jurisdiction with regard to the shareholders domiciled outside the Netherlands, but within the EU, Switzerland, Iceland or Norway, as their potential claims were "so closely connected" to the claims of the shareholders domiciled in the Netherlands that it was "expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings" (see article 8 section 1 of the Brussels I*bis* Regulation and article 6 section 1 of the Lugano Convention).

Finally, the Court assumed jurisdiction with regard to the shareholders who were not domiciled in the Netherlands, or in any other EU Member State, Switzerland, Iceland or Norway. This decision was based on the fact that five out of six petitioners in *Shell*, and two out of four petitioners in *Converium*, were domiciled in the Netherlands. This ground for jurisdiction was based on article 3 of the Dutch Code of Civil Procedure (the "**DCCP**"). That article provides that, in these types of proceedings,[11] Dutch courts have jurisdiction if at least one of the parties requesting the binding declaration, or one of the defendants, is domiciled in the Netherlands.

One could ask whether the Court might be regarded as an inappropriate forum if there is hardly any substantive connection between the case and the Netherlands. During the legislative process resulting in article 3 DCCP, the Minister of Justice stated that if the formal criteria of this provision were met, the provision would not allow the Dutch courts to decline jurisdiction on the basis of the *forum non conveniens* doctrine.[12]

The decision that the parties for whose benefit the settlement agreement has been concluded are actually the persons "to be sued" under (the predecessor of) article 4 of the Brussels I*bis* Regulation and article 2 of the Lugano Convention, appears to be the right one. Indeed, these persons are the ones that may be bound by the binding declaration. They need to be notified of the request for the binding declaration, so that they may file objections to the request. This implies that they are the potential defendants in the litigation. However, this approach has been criticised in a report commissioned by the Dutch Ministry of Justice.[13]

The Court's decision on international jurisdiction in *Converium* implies that even if the case is not substantively connected to the Netherlands, but a minority of the parties "to be sued" – i.e. the shareholders or, in a product liability case, the alleged victims of a defective product – are domiciled in the Netherlands and one of the parties to the settlement agreement is a Dutch entity – for example, a Dutch foundation representing the interests of the alleged victims – the Court will assume jurisdiction.

It should be noted that the Court in *Converium* also held as a separate and autonomous ground for jurisdiction that the settlement agreement to be declared binding has to be executed in the Netherlands. Consequently, the Court also assumed jurisdiction on the basis of the predecessor of article 7 sub 1 of the Brussels I*bis* Regulation and article 5 sub 1 of the Lugano Convention.

In an academic publication, the former deputy president of the Court, W.J.J. Los, explained that there are policy reasons for which the Court believes it should assume jurisdiction in international cases involving binding declarations of settlement.[14] In its interim decision in *Ageas*, the Court confirmed the approach it had taken in *Shell* and *Converium*.[15]

Notification in International WCAM Settlements

Notification of the persons for whose benefit the settlement agreement is concluded is crucial, both during the litigation aimed at obtaining a binding declaration and after the binding declaration has been issued. The WCAM provides for direct notification of beneficiaries known to the petitioners, as well as for public notification, through announcements in newspapers, of beneficiaries whose identity is unknown to the petitioners. Insofar as foreign, unknown beneficiaries are concerned, the Court may order announcements in relevant foreign newspapers, as is demonstrated in *Shell* and *Converium*.

Direct international notification, insofar as EU-domiciled persons are concerned, is generally governed by Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast), which mostly applies since 1 July 2022 (the "**Notification Regulation**").[16] Although the Notification Regulation takes as a starting point that service of documents is effected through the intermediary of central authorities appointed by each Member State, it provides in article 18 that each Member State will be free to directly serve judicial documents on persons residing in another Member State by postal services; namely, a registered letter with acknowledgment of receipt or an equivalent. Article 19 allows for electronic means of service under certain conditions.

If beneficiaries reside outside of the EU, notification must be effected pursuant to applicable treaties; most notably, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the "**Service Convention**"). The Service Convention takes as a starting point that documents are served through the intermediary of central authorities. Depending on the country involved, certain formalities must be fulfilled. Normally, the central authority of the state receiving a request for service will require a translation of the notification in the language of the receiving state. Under Dutch law, a failure to prove that all requirements under the Service Convention have been met may cause the Court to refuse to issue a default judgment against the defendant. It may also result in the Court requiring that the notification process be repeated.

The WCAM provides that notification, both during litigation and after the binding declaration, may take place by regular mail. The Court may provide otherwise at the litigation stage. In *Dexia*, grounds 5.2 through 5.4, the Court allowed for all persons, in the Netherlands and abroad, to be notified by regular mail only. Insofar as the procedural safeguards of these persons were violated because they were not notified in accordance with the Notification Regulation, the Service Convention and similar instruments, these persons could invoke that circumstance if Dexia were to enforce the binding declaration against them, according to the Court. But the Court held, on the other hand, that these persons could invoke the binding declaration themselves, in which case they were bound by it. This liberal approach by the Court has been criticised by some legal scholars on the basis that it violates applicable international rules (such as the then applicable version of the Notification Regulation).

As of *Shell* and *Converium*, the Court took a more stringent approach, requiring the petitioners to follow the applicable versions of the Notification Regulation, the Service Convention and similar instruments.[17] The reason may be that *Shell* and *Converium* were much more international in scope than *Dexia*. In *Dexia*, all beneficiaries, being contractual counterparties of Dexia, were known and the vast majority were domiciled in the Netherlands. In *Shell* and *Converium*, the majority of the shareholders were not known, as they were holding bearer shares or shares through nominee accounts. Moreover, the majority of the *known* shareholders were not domiciled in the Netherlands, but in the UK and Switzerland.

Particularly in *Shell*, the notification process was an extensive task: more than 110,000 notices in 22 different languages were sent out to shareholders located in 105 different countries. In addition, a notice was published in 44 different newspapers worldwide. In *Converium*, the notification process was similar to the one in *Shell*, sending out more than 12,000 notices and publishing a notice in 21 different newspapers worldwide. In addition, the notice was placed on five different websites and circulated through two different newswires. In both cases, the Court scrutinised whether this notification process had been carried out in accordance with all applicable national and international rules, and decided that it had passed the test.

The Court followed this approach in its later cases *DES II* and *DSB Bank* too, even though these cases were less international in scope than *Shell* and *Converium*. In *Converium*, the Court ruled that the notification of the binding declaration could take place by regular mail or by email, except for the shareholders residing in Switzerland, for which the Service Convention had to be followed.

In *Ageas*, the Court took the same approach but also allowed foreign and domestic shareholders registered with the claimant organisations with whom the settlement had been reached, to be notified of proceedings via email, and only required more formal notification for those shareholders for whom a confirmation of receipt was not obtained.[18]

Representativeness in International WCAM Settlements

The requirement of representativeness of the parties representing the beneficiaries has not been specified in the WCAM. The Explanatory Memorandum to the WCAM states that representativeness can be derived from several factual circumstances and that it is not advisable to deem any one circumstance decisive. The following circumstances are mentioned as potentially relevant:[19]

- the other activities of the representative on behalf of the persons involved;
- the number of persons involved;
- the acceptance of the representative by these persons; and
- the extent to which the representative has actually acted on behalf of the persons involved and has presented itself as a representative in the media.

In *Dexia*, the Court applied these criteria meticulously. It looked at the statutory objects of the foundations and associations involved and the number of participants or members. It also looked at the activities that these foundations and associations were involved in apart from filing the WCAM request – such as their websites, mailings to beneficiaries, activities in the media – and at earlier activities in the field of litigation in connection with the issues that were covered by the settlement agreement. In *DES*, the Court applied the same standards, albeit in a less elaborate manner.

Insofar as international considerations are concerned, the Dutch government, when introducing the WCAM to parliament, initially appeared to believe that settlements for the benefit of non-Dutch persons were inappropriate for a binding declaration as a matter of principle. The government based this on the ground that a Dutch foundation or association cannot "normally" be expected to be representative for a group of foreign claimants.[20] However, the government seems to have retreated from the position that foreign beneficiaries cannot benefit from a binding declaration under the WCAM.[21] Indeed, its more recent activities, such as the commissioning of a report on the private international law aspects of the WCAM and the paragraph on aspects of private international law in the Explanatory Memorandum to the WCAM amendments, show that the government is fully aware of the WCAM's international significance.[22] Under the new WAMCA collective action, it is less likely that beneficiaries not domiciled or resident in the Netherlands will be bound to a settlement agreement on an opt-out basis; however, the legislature has left the international scope of the WCAM untouched.

For international cases, it is particularly relevant that the Court in *Dexia* held that *each* petitioner does not have to be representative for *all* persons involved. The Court held that it is sufficient if the *joint* petitioners are sufficiently representative regarding the interests of the persons for whose benefit the settlement agreement was concluded, provided that each of them is sufficiently representative for a sufficiently large group of these persons (see *Dexia*, ground 5.26).

In *Shell*, a Dutch foundation was created which had the sole purpose of representing the interests of all non-US shareholders affected by the alleged misrepresentations by Shell. This foundation sought and obtained the support of participants and supporters, such as shareholder organisations in relevant foreign countries and institutional investors. In the WCAM petition, all beneficiaries were represented by this foundation – backed up, so to speak, by its participants and supporters and the Dutch Shareholders' Association (the "**VEB**"). The Court accepted these two parties as being representative. The text of the decision suggests that the Court very much looked at the articles of association of the foundation and the VEB, and abstained from scrutinising the actual activities of these entities.

In *Converium*, the shareholders were represented in a similar manner as in *Shell*, and the Court also accepted the Dutch foundation and the VEB as being representative. In both cases, the Court repeated the *Dexia* ruling in that it is not required that each petitioner be representative for *all* persons involved (see *Shell*, ground 6.3). A similar formula was employed in *Vedior* (grounds 4.20 and 4.21) and *DSB Bank* (grounds 6.2.3 and 6.2.4). In *Converium*, the Court added to this ruling that there is insufficient reason to set the extra requirement that each petitioner is sufficiently representative for a group of a sufficient size of beneficiaries (final decision, ground 10.2).

The Court followed the same approach in its interim decision in *Ageas* and confirmed that the formal requirement of representativeness was also met in that case. However, the Court criticised a distinction made in the compensation between "active" and "non-active" claimants, and fees payable to some of the claimant organisations. The Court allowed the parties to present an amended agreement.[23] The amended agreement that the Court ultimately approved struck out the distinction for purposes of damages compensation. There was still a distinction, but this related to uniform costs compensation for active claimants. While the Court found that the compensation structure for the claimants was reasonable, it found that the additional remuneration for "active" claimants was not reasonable insofar as it concerned the members of one of the claimant organisations.

These claimants paid only a membership fee to the (non-profit) organisation and the organisation itself would also receive a €25 million remuneration under the settlement agreement (grounds 5.52–5.59). On the same basis, the Court found that this particular organisation was inadmissible because it was insufficiently representative for non-active claimants. However, it did consider the other organisations sufficiently representative and, on balance, found that the settlement as a whole should be approved.[24]

Reasonableness in International WCAM Settlements

The WCAM provides that the Court will refuse the binding declaration if the compensation awarded in the settlement agreement is not reasonable, having regard, among other things, to the extent of the damage, the ease and speed with which the compensation can be obtained, and the possible causes of the damage. In *Converium*, the Court ruled that all circumstances are relevant, including those circumstances which occurred after the determination of the amount of compensation or after the conclusion of the settlement (final decision, ground 6.2). In *DSB Bank*, the Court also took into consideration that it is both in accordance with the law and in the interest of the parties involved that the number of opt-outs is as limited as possible (final decision, ground 4).

"Reasonableness" of the settlement has many aspects. The first aspect discussed here is the reasonableness of the criterion used to determine whether a person is included in the group of beneficiaries. Will the Court test whether the circle of persons covered by the settlement agreement is reasonably drawn? In *DES* (ground 5.19), the Court held that it will only test whether it is "incomprehensible" that a certain group of potentially eligible persons was excluded from the settlement agreement (in that case, the group of haemophilia patients). The Court applied the same test in *DES II* (ground 6.4.6). This test implies that the Court will not easily decide that a certain group was wrongly included in or excluded from the settlement. Obviously, if a group is excluded from the settlement, the binding declaration will not diminish their rights in any shape or form, that is: the binding declaration cannot be invoked against them; and they still have standing in court, without the need to issue an opt-out statement in time.

The type of exclusion described in the preceding paragraph is different from the situation where a certain group is *included* in the settlement, in the sense that the group is covered by the description of the persons potentially eligible for compensation, but is not awarded anything. In that case, the binding declaration can be invoked against this group and these persons need to opt out in order to still have standing in court. In such case, the Court will fully test whether the limitation is reasonable, instead of just testing whether it is not "incomprehensible".

The concept of "reasonableness" also refers to the *amount* of compensation awarded in the settlement agreement. It is an implied starting point of the WCAM that settlement agreements may differentiate between different groups of eligible parties based on the expected strength of their claim in court.[25] In addition, the Court in *Dexia* held that a settlement agreement is the outcome of negotiations in which all parties have made concessions. The

extent to which they have made concessions will reflect not only the legal strength of the parties' positions (as perceived by them), but also each party's perceived interest in having the matter resolved out of court. As a consequence, a settlement will normally not result in full compensation of the losses as originally presented by the claiming parties. The Court held that this, in itself, does not make a settlement unreasonable (ground 6.6).

The Court also held in *DES* that the absence of a hardship clause in the settlement agreement did not make it unreasonable in the specific circumstances of that case. In *DSB Bank*, the Court initially doubted the reasonableness of drawing a distinction based on the timing of the claimant's complaints (interim decision of 13 May 2014, grounds 7.4.5 and 7.9.4). However, the Court ruled that the settlement based on this distinction was not unreasonable (final decision, ground 4.4.3).

In *Shell* (grounds 6.15–6.17), the Court held on multiple grounds that the compensation granted was not unreasonable. It referred to the broad support with which the agreement had been greeted, both from institutional investors and from shareholders' associations. It also referred to two US scholars' favourable opinions filed by the petitioners, which indicated that the settlement was somewhat better for the shareholders than the average of other settlements in comparable cases. In addition, it referred to the fact that the alleged misleading statements had not given rise to litigation outside the US, which suggests it is uncertain that an award in a non-US court can be obtained that is better than the compensation awarded in the settlement, also taking into account the litigation costs involved.[26]

In *Shell*, no question arose about unequal treatment of shareholders in different jurisdictions, as the shareholders were actually treated equally in all jurisdictions.[27] However, one can imagine international cases in which the settlement agreement differentiates between parties residing in different countries, on the basis that their claims have a different value under the laws that apply in each of their cases. For example: is it reasonable to grant higher compensation to claimants in France than to claimants in Germany because French law provides a stronger position than German law? This would mean that the Court will have to test the "reasonableness" of the settlement partly by having regard to several foreign laws.

In our view, this would not be problematic. The WCAM allows the strength of the claim in court to be taken into account in determining the amount of compensation (see the *Shell* and *Dexia* decisions quoted above). There seems to be no good reason not to apply that principle in international cases. Applying foreign law is something Dutch courts do regularly on the basis of the Rome I Regulation (and its predecessor, the 1980 Rome Convention), the Rome II Regulation and other international instruments. In practice, the application of foreign law may sometimes be problematic because the courts often rely on information about foreign law as provided by the parties. That information is not always comprehensive. In WCAM cases, however, it is to be expected that the parties can provide sound information about foreign law to the Court, as such cases will be prepared, in view of their complexity, with above-average thoroughness. Moreover, if the law in question is the law of a party to the European Convention on Information on Foreign Law, the Court may use that Convention to obtain information.[28]

In *Converium*, just as in *Shell*, the settlement only regarded non-US shareholders. The Court found that the proposed non-US settlement amount was considerably lower than the US settlement amount. However, it held that, despite this difference, the settlement amount was not unreasonable. The Court ruled that the difference between the US and non-US settlement amount was justified, given the fact that the legal position of the US shareholders differed from the legal position of the non-US shareholders. According to the Court, the non-US shareholders were excluded from the US settlement, and it would be very difficult for them to get compensation outside the US, whereas it was improbable that they would get compensation in the US. Also, the non-US shareholders could opt out and start individual proceedings (final decision, grounds 6.4.1 through 6.4.5).

In its first interim decision in *Ageas*, the Court did not yet declare the settlement binding but allowed the parties to present an amended settlement. The Court considered a distinction made in compensation between so-called active and non-active claimants for purposes of damages compensation unreasonable, but did eventually allow a uniform costs compensation for active claimants, as set out above (see "Representativeness…"). In its interim decision, the Court also considered that in case of a capped total compensation, the reasonableness *vis-à-vis* certain shareholders whose loss is more likely (buyers) should be considered in light of the greater part of that amount potentially going to others whose claim is unlikely to succeed (holders). Although the Court emphasised the difficulty holders would have in successfully bringing a claim, it did eventually approve the amended settlement agreement that still compensated holders. The Court also emphasised the importance of clarity in the release obtained by the potentially liable party under the settlement agreement.[29]

In *Converium*, the Court also ruled that the proposed total settlement amount was not unreasonable, despite the considerable lawyers' fee of 20%. The Court found that, considering that most preparatory work had been done by US lawyers, in judging what is a reasonable fee, US standards of what is common and reasonable should be taken into account. The Court found that it was sufficiently established that the fee was not unreasonable according to those standards (final decision, grounds 6.5.1 through 6.5.7).

International Recognition and Enforceability of a WCAM Decision Abroad

Whether the WCAM procedure will prove to be helpful in declaring international settlements binding will ultimately also depend on whether foreign courts recognise and enforce a binding declaration by the Court. The criteria based on which foreign courts decide on recognition and enforcement of a foreign court decision, will differ from country to country. However, insofar as the foreign court is a court of an EU Member State, a solid argument can be made that the decision to declare a settlement binding is a "judgment" as referred to in article 2(a) Brussels I*bis* Regulation.

Such a judgment must be recognised by the courts of other Member States, unless one of the grounds to refuse recognition in article 45 applies. However, these grounds are rather narrow. A ground for refusal that may be relevant in these cases is that no proper service on the defendant took place (article 45 section 1(b)). The Court that must decide on recognition may not review the binding declaration of the Court as to its substance (article 52) unless it is manifestly contrary to public policy in the Member State in which recognition is sought (article 45 section 1(a) Brussels I*bis* Regulation).

In *Shell*, the Court implied that its decision should normally be recognised by the courts in other EU Member States. It does so particularly in ground 5.23, where it discusses the position of a UK shareholder *vis-à-vis* the UK Shell entity after the binding declaration.

In a publication in a Dutch law journal, a German legal scholar, Professor Halfmeier, argues that because of substantial participation by the courts, the WCAM declarations should be treated as "judgments" in the sense of the Brussels I*bis* Regulation and are thus objects of recognition in all EU Member States. He

further argues that the opt-out system inherent in the WCAM procedure does not violate German public order, but is compatible with the fair trial principles under the German Constitution, as well as under the European Human Rights Convention. He therefore considers the WCAM an attractive model for future reform of collective proceedings at European level.[30] The same is argued in a European law journal by a Danish legal scholar, Professor Werlauff.[31]

As previously stated, outside the EU the criteria for recognition will differ from country to country, although it is likely that foreign courts will test the grounds for the Court's jurisdiction and whether public policy in their own jurisdiction is at stake.[32]

Conclusion

The WCAM, in force since 2005, provides an opt-out mechanism that facilitates the implementation of collective settlements. *Shell* is a landmark decision on the international application of the WCAM, as it assumes jurisdiction with regard to all beneficiaries, irrespective of their domicile. The decisions in *Converium* and *Ageas* took the matter a step further, by not requiring any of the potentially liable entities to have its seat in the Netherlands.

However, some connection with the Netherlands appears to be required: one or more beneficiaries should be domiciled in the Netherlands, and one or more petitioners should be Dutch entities. This requirement will often be met in large international cases, since there will often be one or more beneficiaries with domicile in the Netherlands. The requirement that one or more petitioners should be Dutch will be met if the foundation or association representing the beneficiaries is a Dutch entity. Such a foundation or association may be an entity created for the occasion, provided it can meet the representativeness test.

Endnotes

1. For more information on the new Dutch WAMCA rules for collective actions, please refer to *Unlocking the WAMCA: a practical guide to the new collective action regime in the Netherlands*, available at https://www.debrauw.com/articles/unlocking-the-wamca-a-practical-guide-to-the-new-collective-action-regime-in-the-netherlands.
2. No. 08/1191 (US 24 June 2010).
3. At least for the time being. The US Congress may decide to amend the relevant statutes.
4. See Amsterdam Court of Appeal 17 January 2012, JOR 2012, 51 (*Converium*) rendering final its interim decision of 2 November 2010, JOR 2011, 46 (*Converium*) and Amsterdam Court of Appeal 16 June 2017, JOR 2018/10 (*Ageas*). De Brauw Blackstone Westbroek represented Zürich Financial Services Ltd. and Ageas parties involved in these matters. De Brauw Blackstone Westbroek also represented parties in other published cases discussed in this article (such as Shell in *Shell*). However, this contribution is only based on the public record.
5. Amsterdam Court of Appeal 16 June 2017, JOR 2018/10 (*Ageas*). These events relate to, among others, acquisition of parts of ABN AMRO and capital increase in September/October 2007, announcement of the solvency plan in June 2008, and divestment of the banking activities and Dutch insurance activities in September/October 2008.
6. Explanatory Memorandum (*Memorie van Toelichting*) to the WCAM, p. 4.
7. Amsterdam Court of Appeal 5 February 2018, ECLI:NL:GHAMS:2018:368 (*Ageas*).
8. Amendment to the WCAM (*Wet tot wijziging van de Wet collectieve afwikkeling massaschade*).
9. The Brussels I*bis* Regulation is a "rearrangement" of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 22 December 2000 (the "**Brussels I Regulation**"). The Brussels I Regulation will remain applicable to judgments given in legal proceedings instituted before 10 January 2010 (article 66 section 2 of the Brussels I*bis* Regulation).
10. The Lugano Convention is also called the Parallel Convention, as it creates a regime of international jurisdiction and enforcement between the EU countries and Norway, Switzerland and Iceland that is quite similar to the regime between the EU countries based on the Brussels I Regulation. The Lugano Convention has not (yet) been rearranged to reflect the Brussels I*bis* Regulation.
11. The type of proceeding to have a settlement agreement declared binding is a *verzoekschriftprocedure*; that is, proceedings initiated by an application to the Court rather than by a writ served on the opposing party.
12. *Parl. Gesch. Burg. Procesrecht*, Van Mierlo/Bart, p. 90.
13. Hélène van Lith, *The Dutch Collective Settlements Act and Private International Law*, Erasmus School of Law 2010, p. 39. Van Lith has published an updated version of this report under the same title, published by Maklu, Apeldoorn, 2011. The reference in this endnote is to be found in that updated version on p. 45. Explanatory Memorandum to the amendments to the WCAM, p. 2.
14. See W.J.J. Los, *Toepassing van de WCAM, Bespiegelingen over de rol en taak van de rechter*, NVvP 2013, nr. 28.
15. Amsterdam Court of Appeal 16 June 2017, JOR 2018/10 (*Ageas*).
16. Notification requirements have previously been governed by Council Regulation (EC) No. 1393/2007 of 13 November 2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters and Council Regulation (EC) No. 1348/2000 of 29 May 2000 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters.
17. See the minutes of the court session in *Shell* of 12 July 2007, published on the website of the Court.
18. Amsterdam Court of Appeal 13 July 2018, ECLI:NL:GHAMS:2018:2422 (*Ageas*).
19. Explanatory Memorandum, p. 15.
20. Explanatory Memorandum, p. 16.
21. See Memorandum of Reply, Parliamentary Proceedings 2004–2005 I, 29 414, no. C, p. 14.
22. See endnote 13.
23. See endnote 5.
24. See endnote 18.
25. Explanatory Memorandum, p. 12.
26. A few parties jointly objected to the reasonableness of the settlement in the Court. However, that objection referred to one rather technical aspect of the settlement agreement and not to the reasonableness of the settlement as a whole. The objection was refuted by the Court. It is not discussed here.
27. As the *Shell* settlement was in USD, differences may have been caused by exchange rate variations. The Court found that this was not unreasonable, as the USD is internationally accepted and the shareholders were residing in several different jurisdictions.
28. European Convention on Information on Foreign Law, 7 June 1968, ETS No. 062.
29. See endnote 5.
30. See A. Halfmeijer, *Recognition of a WCAM settlement in Germany*, NIPR 2012, p. 176.

31. E. Werlauff, *A Settlement Forum for Stock Quoted Companies and Shareholders Claiming Damage: To Which Extent Does It Create Res Judicata?*, ECL 2013, p. 179.
32. M.H. ten Wolde & N. Peters, *De Wet collectieve afwikkeling massaschade: wat is zij waard in het buitenland?*, NTBR, 2013/2, p. 4. For an analysis of the recognition issues, see Van Lith (2011), pp 105–134.

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