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CLASS AND COLLECTIVE ACTIONS

Class/collective actions in The Netherlands: overview

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OVERVIEW OF CLASS/COLLECTIVE ACTIONS AND CURRENT TRENDS

1. What is the definition of class/collective actions in your jurisdiction? Are they popular and what are the current trends?

Definition of class/collective actions

The Dutch legal system currently provides for two different collective redress mechanisms:

- A representative collective action.
- A class/collective settlement mechanism based on an opt-out system that resembles the US's class action settlements.

These mechanisms for collective redress can be distinguished from other proceedings, such as proceedings brought on the basis of bundled claims. A bundle of claims, brought by a special purpose claim vehicle, either through a power of attorney obtained from the actual claimants, or by the entity owning the individual claimants, obtained by assignment against a deferred purchase price, is often used to circumvent the current restrictions that apply to the representative collective action.

Representative collective action

The representative collective action is a legal mechanism by which a representative entity, a Dutch *vereniging* (association) or *stichting* (foundation) can initiate proceedings to protect similar interests of an unnamed group of people. Their interests must lend themselves to bundling, which requires a certain level of similarity (commonality test). However, the possible scope of this action is limited. A collective action to obtain a monetary award for damages is inadmissible. When the collective action was **first** introduced, the legislator considered that awarding damages would require the assessment of the facts and circumstances of each individual separately. However a draft bill is currently pending which provides the possibility of claiming damages (*see below, Current Trends*). Under the existing law, the representative entity can submit a claim for a declaratory judgment establishing, for example, the unlawfulness of a defendant's conduct, injunctive relief or specific performance. A declaratory judgment can serve as a stepping stone for claimants to claim damages in separate individual proceedings or to collectively seek a settlement.

A class/collective settlement

Class settlement proceedings allow parties to a collective settlement to jointly request the Amsterdam Court of Appeal to declare the settlement binding on all members of a group unless a member chooses to opt out. Before declaring a settlement binding, the court will assess, among other things, the reasonableness of the agreed compensation.

Use of class/collective actions

Representative collective action. The representative collective action is frequently used and employed for a variety of matters, for example:

- Common interest issues, such as the representation of women in a political party.
- Prospectus liability claims on behalf of investors.
- Collective labour agreements.

The representative collective action is usually used to seek injunctions against conduct that is perceived harmful to the interest of a wide range of persons or to obtain a declaratory judgment. However, a person whose interest has been represented in this action for a declaratory judgment can "opt out" by declaring that he does not want to be bound by the judgment (unless it follows from the nature of the judgment that its effect cannot be excluded with regard to this particular person).

Collective settlements. So far, eight class settlements have been successfully declared binding since the Act on the Collective Settlement of Mass Damage (*Wet Collectieve Afwikkeling Massaschade*) (WCAM) entered into force in July 2005. The collective settlement in the amount of EUR1.3 million with regard to investor claims against Fortis, is currently pending with the Amsterdam Court of Appeal. The most recent settlement that was declared binding related to DSB Bank, a Dutch retail bank that went bankrupt in 2009. The settlement (that binds approximately 500,000 potential claimants with claims for mis-selling financial products) was declared binding on 4 November 2014. The compensation based on this settlement amounts to approximately EUR300 to EUR500 million.

The collective settlement proceedings consist of four phases:

- **First phase.** The first phase concerns the private, non-court supervised and undisclosed negotiation process among parties aiming to reach a settlement. The settlement agreement is ultimately concluded between:
  - the parties that will pay the compensation for the event that has caused damage; and
  - a Dutch foundation (*Stichting*) or association (*Vereniging*) that, under its constituent documents, represents the interests of the class of persons intended to be covered by the settlement agreement.
- It is possible to create a legal entity solely to qualify for the procedure under the WCAM.
- **Second phase.** Once the party held liable and the legal entity agree to a settlement, the process enters into a second phase, where a formal request to declare the settlement binding must be submitted to the Amsterdam Court of Appeal. The court then calls a hearing at which the intended beneficiaries and other "interested parties" can express their objections to the

settlement, possibly preceded by written submissions. The parties initiating the proceedings must notify the intended beneficiaries of the settlement. Depending on the number of interested parties this can be a complex process. Generally, all known interested parties must be notified (with or without the involvement of a bailiff) in writing (in accordance with the applicable bilateral or multilateral treaties, regulations, rules of civil procedure and, specific instructions from the Amsterdam Court of Appeal) and often by means of advertisements in newspapers.

- The Amsterdam Court of Appeal then declares the settlement agreement binding on the parties as well as the members of the class, except in certain circumstances. The most significant of these circumstances includes a finding that the amount of compensation is unreasonable in light of:
  - the overall damage;
  - the possible causes of the damage; and
  - the method and time in which the compensation can be obtained.
- The court's decision cannot be appealed to the Dutch Supreme Court by the members of the class, but only by the (initial) parties to the settlement agreement (and only on matters of law) where the request to declare the settlement agreement binding is dismissed.
- **Third phase.** The third phase allows members of the class to opt out. Once the court declares the settlement agreement binding, the settlement's final terms and conditions must be published as stipulated by the court. For at least one year after the publication, members of the class can submit a claim form to receive compensation under the settlement. Following publication, a period (to be set by the court) of at least three months begins during which members of the class can elect to opt out of the settlement. Opt-outs must be submitted on an individual basis and there is no procedure for filing an opt-out on behalf of a group of persons or entities. It is also possible to agree on a "bust up" provision in the class settlement under which the settlement is terminated whenever more than an agreed number of class members opt out of the settlement.
- **Fourth phase.** The fourth phase relates to payments to beneficiaries. On expiration of the opt-out period, all members of the class are, in principle, bound by the settlement (that is, they become a party to the settlement agreement), unless they could not have been aware of their damage. The payment process can be relatively straightforward, unless the exact amount has to be established under a (complex) formula set out in the settlement agreement.

Collective settlement proceedings: international settlements. In two (*Shell (2009) and Converium (2012)*) of the eight cases handled so far, the WCAM has been applied to a settlement where the vast majority of potential claimants or beneficiaries were based outside of The Netherlands. In particular the Converium case has proved to be significant for international settlements. Also in the *Vedior* case (2009), a large number of beneficiaries were based outside the Dutch jurisdiction.

The Shell case concerned a settlement relating to certain misrepresentations made by Shell about its oil and gas reserves. The settlement was reached for the benefit of all shareholders (other than the US shareholders) who purchased their shares on any stock exchange (other than the New York Stock Exchange (NYSE)) between 8 April 1999 and 18 March 2004. Therefore, the settlement was declared binding on a majority of claimants that were based outside The Netherlands, but one of the defending Shell entities was vested in The Netherlands.

The Converium case concerned the Swiss reinsurer Converium, which had shares listed on the Swiss Stock Exchange and ADRs traded on NYSE. Converium's share price dropped after it announced substantial increases in its loss reserves, leading to a class action in the US. The settlement that was reached in the US excluded non-US shareholders. Potential claims of non-US shareholders were settled in a parallel settlement through the involvement of a Dutch foundation.

The Converium case is significant for several reasons including that the Dutch court assumed jurisdiction, even though:

- The claims were not brought under Dutch law.
- The alleged wrongdoing took place outside The Netherlands.
- None of the potentially liable parties and only a limited number of the potential claimants were domiciled in The Netherlands.

Additionally, the court agreed to much lower compensation for the non-US claimants (compared to the US claimants) due to a lack of remedies for non-US claimants outside the US. Finally, the court considered a 20% fee for the principal counsel was not unreasonable.

Current trends

On 16 November 2016, the Minister of Security and Justice submitted a draft bill to the Dutch Parliament introducing collective claims for damages in The Netherlands. The draft bill was amended on 24 January 2018. The existing restriction which currently applies to collective actions, will be repealed, while stricter requirements for the representative entities bringing collective claims will become applicable. To co-ordinate multiple claims, the bill introduces a court-appointed exclusive representative if various collective damages claims regarding the same events are brought. It also contains an opt-out mechanism for residents of The Netherlands; and contains, as starting point, an opt-in mechanism for claimants residing in other jurisdictions.

The most relevant elements of the bill include:

- The legal entity claiming damages needs to fulfil stricter requirements with respect to its governance, funding and representation.
- A collective action for damages must be sufficiently closely connected with the Dutch jurisdiction.
- Proceedings that have been initiated must be entered into a public register for collective actions. If several collective proceedings are pending regarding the same subject, they will be jointly heard by the court where the first collective proceeding was brought.
- If more than one legal entity brings a collective action for the same event, the district court will appoint an exclusive representative for all parties. All other representative legal entities, however, still remain parties to the proceedings.
- Members of the class residing in The Netherlands for whose benefit the action is brought, can choose to opt-out at the beginning of the proceedings and after a settlement is approved by the court. If too many members of the class opt out, the district court can decide that the claim cannot be brought. Parties that opt out are required to proceed on an individual basis. Members of the class residing outside The Netherlands have the opportunity to opt in and join the proceedings at the beginning of the proceedings and after a settlement is approved by the court.
- The judgment of the district court is binding on all parties that did not opt out or opted in.

Once the draft bill enters into force, one of the objectives and expected consequences of the bill is that the number of class settlements will increase. The draft bill might be subject to further amendments.

Further trends are the increase in the number of follow-on group actions following the decision of the European Commission establishing a competition law infringement. While national substantive and procedural rules (in the Dutch Civil Code (DCC) and the Dutch Code of Civil Procedure (DCCP)) have recently been amended to implement Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Anti-trust Damages Directive), it is expected that this will give private enforcement cases an additional boost.

REGULATORY FRAMEWORK

2. What are the principal sources of law and regulations relating to class/collective actions? What are the different mechanisms for bringing a class/collective action?

Principal sources of law

The principal source of law for representative collective actions and class settlement proceedings are the Dutch Civil Code (DCC) and the Dutch Code of Civil Procedure (DCCP). Representative collective actions are governed by Articles 3:305a to 3:305d of the DCC. Court-approved class settlements are governed by the Act on the Collective Settlement of Mass Damage (*Wet Collectieve Afwikkeling Massaschade*) (WCAM), which has been implemented in Articles 7:907 to 7:910 of the DCC and Articles 1013 to 1018a of the DCCP. Further guidance on the regulations of representative collective actions and class settlement proceedings has been developed in case law.

Principal institutions

Representative collective actions must be initiated with one of the 11 district courts in The Netherlands. Generally, the district court in the place of the defendant's domicile is competent to hear the case. An exception relates to specific claims that protect the interests of consumers. This specific course of action must be brought before the Court of Appeal of The Hague.

Class settlements can be exclusively declared binding by the Amsterdam Court of Appeal.

3. Are class/collective actions permitted/used in all areas of law, or only in specific areas?

Representative collective actions and class settlements (proceedings) are permitted in all areas of civil law.

LIMITATION

4. What are the key limitation periods for class/collective actions?

The limitation period (for an action to compensate for damage caused) is five years. The limitation period begins the day following the one on which the damage occurred and the claimant became aware of the identity of the person responsible for the damage. The limitation period also expires after 20 years following the event that caused the damage. The limitation period can be interrupted by sending a letter to the other party (stating in unequivocal wording that the party is deemed liable and the rights to claim compensation are reserved) or by initiating legal proceedings. In 2014, the Supreme Court held that also a representative association or foundation (*see Question 1*) can, for the benefit of all potential claimants it represents, interrupt the statute of limitations of damages claims by sending such a (pre-litigation) letter to potential defendants.

For competition law related claims the implementation of Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Anti-trust Damages Directive) provides a slightly different provision. Article 6:193s of the Dutch Civil Code (DCC) stipulates:

- A five-year limitation period, which will start to run on the day following the day on which the competition law infringement has ceased and the claimant has become aware, or can reasonably be expected to have become aware, of the infringement, the fact that the infringement caused harm to it and the identity of the infringer.
- A twenty-year limitation period which will start to run the day following the day on which the competition law infringement ceased.

In addition, Article 6:193t of the DCC provides for two grounds on which an extension of the limitation period can be effectuated. The first ground is if a consensual dispute resolution process is started. The second ground is when a competition authority performs an act within the context of an investigation or proceedings with regard to the infringement of competition law.

STANDING AND PROCEDURAL FRAMEWORK FOR BRINGING AN ACTION

Standing

5. What are the rules for bringing a claim in a class/collective action?

Definition of class

A class is a group of natural persons or legal entities that have parallel or shared interests in a broad sense, for instance by sharing a common background or facing the same (harmful) conduct (the commonality requirement).

Potential claimant

Articles 3:305a to d of the Dutch Civil Code (DCC) form the legal basis for various types of claimants to initiate representative collective actions. In practice, only Article 3:305a of the DCC is widely used, which states that an association (*vereniging*) or foundation (*stichting*) with full legal capacity can represent the interests of the parties concerned in a collective action. Certain public legal bodies can also initiate collective proceedings, provided that they represent the similar interests of other persons (*Article 3:305b, DCC*).

A special course of action is available for the protection of consumer rights (*Article 3:305d, DCC*). Foundations or associations with full legal personality capacity can request that the person that violates specific consumers' rights stops performing these allegedly illegal acts.

Claimants outside the jurisdiction

Certain organisations with their registered office abroad but that are placed on the list referred to in Article 4(3) of the EU Directive 98/27/EC on consumer protection also have standing to represent the interested persons for that purpose in The Netherlands (*Article 3:305c, DCC*).

Professional claimants

Professional claimants are not excluded from initiating representative collective actions or class settlement proceedings, but they also need (in line with their articles of association) to promote and protect the interests of the group represented and must be sufficiently representative to obtain standing. However, Dutch law accepts that individual claims can be bundled by individual claimants giving powers of attorney to a claim vehicle, or through assigning the claim to the claim vehicle (*see Question 1*).

Qualification, joinder and test cases

6. What are the key procedural elements for maintaining a case as a class action?

Certification/qualification

The law does not provide for a mechanism to have a class certified. To be allowed to bring a representative collective action, the entity must be sufficiently representative. For this element, particular emphasis is given to the articles of association in which the interests of the group that the entity is promoting must be covered. Otherwise, the entity has not satisfied the condition of representativeness and its claim will be inadmissible. A court will also test whether the legal entity is capable of properly safeguarding the interests it represents. Furthermore, the interests of the class must also be sufficiently similar (the commonality test). This approach to the rules on standing also means that two or more entities can bring separate representative collective actions on the same issue.

Also in the class settlement proceedings, "representativeness" is a key procedural element. "Representativeness" for this purpose can be derived from various factors, for example:

- The number of persons associated with the entity.
- The extent to which the representative organisation has actually promoted the interests of the persons involved and has presented itself as such in the media.
- The acceptance of the organisation among those persons represented.

Minimum/maximum number of claimants

There are no explicit requirements concerning the number of claimants that need to be, or may be, involved.

Joining other claimants

The representative entity initiating a representative collective action against one or more defendants is the only claimant in the proceedings. The persons whose interests are represented are not a party in the proceedings themselves. Other representative entities can initiate representative collective actions against the same defendants. The various procedures can be consolidated at a later date if they are strongly connected.

In class settlement proceedings, initially only the parties to the settlement agreement are parties to the proceedings. However, interested parties that object to the settlement in the course of the proceedings become parties to the proceedings themselves as well.

Test cases

Since 1 July 2012, lower courts can refer to the Supreme Court for a preliminary ruling on certain questions of law. The question must relate to an issue relevant to the resolution of a significant number of claims or cases based on the same factual background. This instrument can also be applied in representative collective actions.

Timetabling

7. What is the usual procedural timetable for a case?

Depending on the complexity of the case, a representative collective action typically takes between one to two years until a final judgment is given in the first instance. An appeal takes about the same length of time. An appeal to the Supreme Court adds another year to the duration of the proceedings. Consequently a case can last three to five years in total.

The timetable to negotiate a class settlement primarily depends on the involved parties, the complexity of the matter and the pressure to aim for a settlement. The class settlement proceedings typically take approximately a year, although the length, to an important extent, is subject to:

- The complexity of the settlement.
- The extent to which persons for whose benefit the settlement agreement is concluded must be notified outside of The Netherlands.
- Whether the Court of Appeal deems that the settlement is reasonable and the interests of the represented entities are sufficiently safeguarded.

In complex matters, the courts are generally willing to work out a feasible timetable with the parties to the procedure during a case management meeting. There is a specific provision that allows parties to request a pre-trial hearing on class settlement proceedings (*Article 1018a, Dutch Code of Civil Procedure (DCCP)*).

Effect of the area of law on the procedural system

8. Does the applicable procedural system vary depending on the relevant area of law in which the class/collective action is brought?

The procedural system laid down in the Dutch Civil Code (DCC) and the Dutch Code of Civil Procedure (DCCP) applies to all representative collective actions and class settlement proceedings.

FUNDING AND COSTS

Funding

9. What are the rules governing lawyer's fees in class/collective actions?

Attorneys' fees in representative collective actions and class settlement proceedings generally do not have to be approved by the court. However, Dutch lawyers are restricted to work on the basis of contingency fees according to the rules of the Dutch Bar Association.

A remarkable decision in this respect was given by the Amsterdam Court of Appeal in the Converium case. In these proceedings, there was an objection that the US class counsel would receive fees out of the settlement amount based on a contingency fee arrangement. The Amsterdam Court of Appeal dismissed the objection that the arrangement was incompatible with Dutch law pointing out that in the context of determining the fairness of a class settlement, the court can take into account customary US fee practices, when US law firms are involved and the legal services provided by them took place predominantly in the US. Consequently the Amsterdam Court of Appeal held that a fee amounting to 20% fee of the settlement amount was not unreasonable.

10. Is third party funding of class/collective actions permitted?

There is no rule preventing alternative funding of litigation other than the bar rules that forbid fee arrangements with an attorney that are entirely contingent on the outcome of the case. However, third party funding arrangements are likely be subject to the scrutiny of the court assessing whether the interests of the entities concerned are sufficiently safeguarded.

11. Is financial support available from any government or other public body for class/collective action litigation?

Legal aid is generally available in The Netherlands for individuals. The Legal Aid Board (*Raad voor Rechtsbijstand*), an independent governing body, decides whether legal aid is granted on the basis of someone's income. In practice it is not usual for legal aid to be granted to representative entities.

12. Are other funding options available to claimants in class/collective actions?

Other funding options are possible but are not currently common practice.

Costs

13. What are the key rules for costs/fees in class/collective action litigation?

The court determines the amount of costs of the litigation to be borne, in most cases, by the losing party. These costs seldom compensate the actual costs and attorneys' fees incurred by the other party. The costs granted by the court are based on certain standard amounts for certain standard activities and on the amount of the claim. There is no possibility of recovering the actual costs of litigation from the unsuccessful party, other than under certain special conditions in cases regarding intellectual property rights or in exceptional cases where the procedural behaviour of the counterparty constitutes an abuse of right.

Key effects of the costs/funding regime

14. What are the key effects of the current costs/funding regime?

The key effect of the current regime is that The Netherlands as a jurisdiction is favoured by claimants for bringing collective and group actions (for an explanation on the distinction, see *Question 1*) particularly in the field of private enforcement follow-on actions. The reasons for this are (among others) that litigation is relatively less expensive in The Netherlands, low adverse cost risks and that third party funding is allowed.

DISCLOSURE AND PRIVILEGE

15. What is the procedure for disclosure of documents in a class/collective action?

The civil procedure does not involve a US type pre-trial discovery or UK type disclosure. However, parties are under a general obligation to state their case truthfully. This can include the disclosure of certain documents in their custody that are relevant to the case. The court can also order the disclosure of certain information. If parties fail to do this, the court can draw adverse inferences if it deems appropriate. However, privileged data or documents are protected against disclosure, unless the disclosure has been waived.

The Dutch Code of Civil Procedure (DCCP) also contains a number of provisions under which a party can apply to the court for an order to disclose certain data or documents that are in the custody of a party to the proceedings or a third party subject to a penalty. The most important provisions in this respect are Articles 843a to 843b of the DCCP. Article 843a of the DCCP states that a party to a legal relationship can request that the other party provides copies of documents relating to the legal relationship. Article 843b of the DCCP can be used if a party had an item of evidence but has lost it. The request must relate to a defined category of documents as specified by the claimant. Additionally, the claimant must demonstrate a legitimate interest in the production of the documents. Although obtaining disclosure on this basis is subject to certain requirements, lower courts tend to take a more generous view on well-reasoned applications for the disclosure on this basis.

A request under Article 843a of the DCCP should be denied if the information is subject to legal privilege, or may be denied for compelling reasons (such as for confidentiality or privacy), or if a fair and proper administration of justice is sufficiently secured without disclosure (for example, if the information could reasonably be obtained another way, such as through witness testimony). However, for competition law related claims the implementation of Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Anti-trust Damages Directive) provides a deviation. As to damages claims based on competition law infringements, a request under Article 843a of the DCCP can only be denied for compelling reasons, for example, if the fair and proper administration of justice can be sufficiently secured without disclosure, this fact cannot be a ground for denying a claim under Article 843a of the DCCP. This makes it more difficult to reject a claim under Article 843a DCCP in competition law related cases.

16. Are there special considerations for privilege in relation to class/collective actions?

There are no special considerations for privilege under the law in relation to representative collective actions or class settlement proceedings. According to the generally applicable doctrine, only certain professionals (for example, lawyers, civil law notaries and medical practitioners) can invoke privilege, but privilege cannot be invoked by bankers, accountants or tax advisers. Whether certain information is subject to privilege depends on whether this information was entrusted to a lawyer with a view to obtaining legal advice.

A person called as a witness must appear and give evidence (*Article 165, Dutch Code of Civil Procedure (DCCP)*). However, if that person must observe secrecy by virtue of his office or profession, the person can refuse to testify on information received in that official or professional capacity (*Article 165(2)(b), DCCP*). After the privilege is invoked, the court assesses whether the refusal to testify is justified.

With a request to disclose certain documents or data (*Article 843a, DCCP*) (*see Question 15*), a lawyer can refuse disclosure if the document was provided in the lawyer's professional capacity. The court eventually determines whether the refusal to produce a document is justified.

EVIDENCE

17. What is the procedure for filing factual and expert witness evidence in class/collective actions?

Documents

In principle, all documents can be presented as evidence and consequently the court decides the value of the evidence presented. One exception to this is notarial deeds, which are considered conclusive evidence. However, parties are free to offer counter-evidence against conclusive evidence (unless this possibility is excluded by law).

The party relying on written evidence must submit a copy of it. The court can draw adverse inferences if the copy is not submitted.

Witness evidence

Witness evidence can be submitted through oral examination of the witness. However, it is also possible to submit witness statements in writing, although such written statements are considered to be written evidence. Generally, witness testimonies do not have any special value as evidence. As said, it is up to the court to decide the value of the statement. There is one exception regarding statements of the parties with a view to delivering evidence of their own statements; these can only be considered corroborative evidence.

Parties can request a court to order the examination of witnesses before, or at any stage during, the proceedings. The court can also order the examination of witnesses on its own initiative. Any person can appear as a witness. However, certain persons can excuse themselves from the obligation to testify. These persons are the spouse or former spouse of one of the parties and certain other close relatives, as well as those in possession of privileged material or information acquired in their professional capacity.

If the court deems it necessary it can, at the request of one of the parties or on its own initiative, commission an expert opinion or hear an expert witness. The court is not bound by the expert opinion or testimony. Parties can also submit expert opinions on their own behalf or submit a request to hear an expert that has not been appointed by the court.

DEFENCE

18. Can one defendant apply to join other possible defendants in a class/collective action?

Joining other defendants

A defendant in a collective action that is held jointly and severally liable can submit an application for an order to allow third party proceedings (*vrijwaring*) to be commenced against his joint and several liable co-debtors with a view to taking recourse for an awarded claim. If the court allows these third party proceedings, the defendant in the main proceedings must commence the new proceedings against his joint debtors that then become the defendants in these third party proceedings. They do not become a party in the main action unless these defendants join the defendant in the main action.

Additionally, any sufficiently interested party can submit an application in the main action to be allowed to join either side of the involved parties or intervene and issue an independent claim against both parties. This motion has to be made before, or on the day that, the last written statement is due to be submitted. However, the parties in the main action can contest this application. If the third party can demonstrate that it has an interest that may be affected by the decision in the main proceedings, it can join or intervene. The final decision is made by the court in an interim judgment.

Rights of multiple defendants

Multiple defendants are not restricted in co-operating in their defence. However, multiple defendants can enter into "joint defence agreements" (or other arrangements) that allow sharing of confidential information (without waiver of privilege, including other protections such as a process to be followed if conflicts arise). Multiple defendants can also instruct the same lawyers or experts.

DAMAGES AND RELIEF

19. What is the measure of damages under national law in the field of class/collective actions?

Damages

Currently, monetary damages cannot be awarded in representative collective actions and, therefore, no damages are assessed in these proceedings.

In class settlement proceedings, usually a "damage scheduling" approach is applied, under which compensation is awarded to claimants based on the characteristics of the group that the particular individual claimant is a member of rather than on the basis of their personal characteristics. The court scrutinises the reasonableness of the compensation offered and refuses to declare the settlement binding if it finds that the compensation agreed is not "reasonable". To assess whether the compensation offered is reasonable the court will take into account factors including:

- The extent of the damage.
- The possible cause of the damage
- The ease and speed with which the compensation can be obtained.

It will also take into account that the settlement agreement is the outcome of a negotiation process and, therefore, evidently a concession on both sides.

20. What rules apply to declaratory relief and interim awards in class/collective actions?

Declaratory relief

Typically, collective actions are aimed at obtaining declaratory relief. The representing entity normally aims for a declaration on the liability of the defendant. If the declaratory judgment is granted, the parties whose interests are represented can commence follow-up proceedings to obtain monetary damages.

Interim awards

Parties can address the competent district court in all cases of an urgent nature in which, in view of the interests of the parties, an immediate measure is required (*Article 254, Dutch Code of Civil Procedure (DCCP)*). The main characteristic of these proceedings is that any measure ordered by the court must be of a provisional nature. A court decision in these proceedings does not prejudice the rights of parties in regular proceedings that are pending at the time of the judgment or that are initiated after that. However, in practice an injunction or provisional measure can have irreversible consequences. An appeal against an interim award must be lodged no later than four weeks from the date of judgment.

SETTLEMENT

21. What rules apply to settlement of class/collective actions?

Settlement rules

With class settlement proceedings, the settlement agreement must be concluded between:

- The parties that will pay the compensation for the event that has caused damage.
- A Dutch foundation or association that, under its constituent documents, represents the interests of the class of persons intended to be covered by the settlement agreement.

The legal entity is not appointed by a court and does not have to have been personally harmed by the alleged misconduct in order to have standing.

The settlement does not have to be based on existing, contested or pending legal action. Parties can initiate a private, non-court supervised and undisclosed negotiation process among the representatives of the interested parties. In principle, the court's involvement begins when a settlement agreement has been concluded and the parties request that the court declares the agreement binding on the class of persons it intends to cover.

The settlement agreement can be governed by Dutch or foreign law, at the parties' choice. So far, parties have opted for Dutch law, but, especially if foreign parties are involved, any foreign law (including UK or US law) can in principle be chosen as the applicable law.

Separate settlements

The class settlement proceedings allow flexibility to enter into various settlements among defendants and with regard to a variety of claimants. In practice, it is not uncommon that the defendants contribute in differing ways to the compensation that is provided to one or various groups of beneficiaries. For example, in the Converium case, the settlement that was declared binding by the Amsterdam Court of Appeal on non-US shareholders was less favourable than the settlement that was reached for US shareholders. Based on this damage scheduling, one settlement agreement may consequently actually contain a variety of settlements, whereas parties can also choose to enter into separate agreements for the various elements.

APPEALS

22. Do parties have a right to appeal decisions relating to class actions, such as a decision granting or denying certification of a class action?

With regard to collective actions, all final judgments by a district court (unless expressly stated otherwise in the law or if parties have agreed to avoid or skip an appeal) can be appealed to the competent Court of Appeal. Generally, an appeal must be lodged within three months of the date of the judgment in the first instance. The Court of Appeal conducts a full review of the merits of the case. The decision that the representative entity has no standing can be appealed. The decision that the representative entity has standing can only be appealed if the court grants the right to do so.

Class settlements can be declared binding exclusively by the Amsterdam Court of Appeal in the first and final instance. Cassation is only possible if the Amsterdam Court of Appeal refuses to declare the settlement binding. In that case, petitioners can only appeal to the Supreme Court as a group.

ALTERNATIVE DISPUTE RESOLUTION

23. Is alternative dispute resolution (ADR) available in class/collective actions?

Alternative means of dispute resolution are available for representative collective actions, but are not commonly used. During the negotiation of a private and non-court supervised class settlement, ADR can be a helpful mechanism.

PROPOSALS FOR REFORM

24. Are there any proposals for reform concerning class/collective actions?

On 16 November 2016, the Minister of Security and Justice submitted a bill to the Dutch Parliament introducing collective claims for damages in The Netherlands. The existing restriction in this respect will be repealed, whereas stricter requirements for the representative entities bringing collective claims become applicable (*see Question 1*).

ONLINE RESOURCES

Dutch Government

W *www.overheid.nl/english*

Description. Website of the Dutch government; including statutes, official documents archive and links to all major government institutions and agencies.

Dutch Judiciary

W *www.rechtspraak.nl/english*

Description. Website of the Dutch judiciary; including contact information of all courts and a database of judgments in Dutch.

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Professional qualifications. The Netherlands, lawyer; admitted to the bar as a Supreme Court litigator

Areas of practice. Complex multi-party cross-border disputes, with considerable experience in advising financial institutions and companies in different sectors confronted with cross-border mass claims.

Recent transactions

- Representing Petrobras in its defence in a securities class action submitted by the mass claims vehicle Stichting Petrobras Compensation Foundation allegedly representing a worldwide class of holders of securities (US investors excluded) who claim to have suffered financial loss as a result of the alleged fraud within the Petrobras group during the period 2004 - 2014.
- Representing and advising Vestia, a semi-public corporation with 90,000 properties used for social housing, in proceedings recovering damages suffered due to its derivatives portfolio due to fraud and mismanagement.
- Acting as defence counsel to Trafigura in class action litigation in the Netherlands against more than 100,000 claimants in Ivory Coast.
- Representing Kemira in private enforcement proceedings initiated by the mass claim vehicle Cartel Damages Claims (CDC) as a follow-on to the sodium chlorate cartel.
- Representing LGE, a South Korean listed electronics manufacturer, in its defence against a EUR 2 billion cartel damages claim submitted by Vestel, the leading Turkish manufacturer of televisions and computer monitors. Vestel claims damages allegedly caused by the CPT and CDT cartel. The European Commission imposed fines totalling EUR 1.74 billion to seven CPT and CDT manufacturers. Also representing LGE against claims by the Brazilian manufacturers of televisions and computer monitors Cemaz, IGB Eletronica and Itautec.
- Advising and representing Volvo/Renault in its defence strategy against pending and upcoming class action, following the 2016 European Commission decision imposing fines totalling EUR2.9 billion for colluding for 14 years on truck pricing and passing on the costs of compliance with stricter emission rules.
- Representing the trustees of a Dutch retail bank, DSB Bank, in a EUR5.7 billion bankruptcy in class settlement negotiations with a number of representatives of a class of 570,000 members, leading to a court certified class settlement with a value of several hundreds of millions Euros.

Isabella Wijnberg, Senior associate

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Professional qualifications. The Netherlands, lawyer

Areas of practice. Dispute resolution with a focus on corporate litigation, class actions and complex disputes relating to commercial contract law.

Recent transactions

- Acting as defence counsel to Trafigura in class action litigation in the Netherlands against more than 100,000 claimants in Ivory Coast.
- Representing large charitable organisations in a litigation concerning the allocation of an inheritance of approximately EUR26 million.
- Advising and assisting a large international employment agency in reaching a settlement regarding the termination of their relationship with a global logistics company.

Providing strategy advice to an international bank with regard to its possible exposure to mass-claims.