The Dutch Collective Settlements Act and Private International Law

Aspecten van Internationaal Privaatrecht in de WCAM

Dr. Hélène van Lith

Supervisor: Prof. Filip De Ly

Co-Supervisor: Dr. Xandra Kramer

Research Assistant: Steven Stuij LLM

© 2010 WODC, Ministerie van Justitie. Auteursrechten voorbehouden.

The Dutch Collective Settlements Act and Private International Law

Aspecten van Internationaal Privaatrecht in de WCAM

Samenvatting....7

Executive Summary....11

Abbreviations....14

1 Introduction....16

1.1 The Dutch Act on the Collective Settlement of Mass Damage Claims – The WCAM....16

1.2 The WCAM in the International Arena....19

1.3 Research Questions....22

1.4 Methodology....23

1.5 Outline....25

2 International Jurisdiction and 'Collective Settlements' under the WCAM....26

2.1 Introductory Comments on the Relevant Rules on International Jurisdiction....26

2.1.1 The Pan-European Rules on International Jurisdiction....26

2.1.2 The National Jurisdiction Rules of the Dutch Code of Civil Procedure....29

2.2 The Jurisdictional Reach of the Amsterdam Court in the *Shell* Settlement....30

2.2.1 The Basis for Jurisdiction in the *Shell* Settlement....30

2.2.2 No Problems with a Wide Jurisdictional Reach....34

2.3 The Substantive Scope of the Brussels I Regulation and the Lugano Convention....35

2.4 The Brussels I Regulation and the Meaning of 'Defendant' in Collective Settlements 36

2.4.1 The Person to Be Sued under Article 2 Brussels I Regulation....36

2.4.2 Multiple Defendants under Article 6(1)....39

2.5 The Article 6(1) Requirement....40

2.6 Other Possible Jurisdictional Bases....41

2.6.1 The First Approach: The Underlying Obligation....42

2.6.2 The Second Approach: The Contractual Nature of a Settlement Agreement....43

2.6.3 Choice of Forum....45

2.7 The Dutch Jurisdiction Rule of Article 3 Dutch Code of Civil Procedure....47

2.8 The Search for Uniform Jurisdiction Rules for Collective Redress Mechanisms 48
2.9 Comparative Observations on U.S. Jurisdiction Law 50
2.10 Parallel Proceedings 54
2.10.1 *Lis Pendens* 55
2.10.2 Related Actions..57
2.10.3 Comparative Observations 57
2.11 Concluding Remarks...60
3 Notification of Foreign Interested Parties..63
3.1 Notification under the WCAM Procedural Rules 64
3.2 International Instruments Regulating Cross-Border Notification.................................66
3.2.1 The Service Regulation 2007 67
3.2.2 The Hague Service Convention 69
3.3 Cross-Border Notification in WCAM Settlements in Practice 70
3.3.1 Notification of Known Interested Parties with Known Addresses 70
3.3.2 Notification of Unknown Interested Parties and Known Parties with Unknown Addresses 74
3.4 Comparative Observations...75
3.5 Concluding Remarks...77
4 Representation of Foreign Interested Persons...79
4.1 Criteria for Representation..80
4.2 Establishing *Sufficient Representation* for Foreign Interested Persons 80
4.3 Complications and Practical Solutions 82
4.4 Comparative and Concluding Remarks 83
5 International Recognition...85
5.1 Scope of the Recognition Regimes under the Brussels I Regulation............................86
5.2 Categorization of a WCAM Binding Declaration by the Amsterdam Court................87
5.2.1 A 'Judgment' under Article 32 Brussels I Regulation 87
5.2.2 Court Settlements under Article 58 Brussels I Regulation.....................................90

5.2.3 Concluding: The Binding Declaration, Judgment or Court Settlement?.................92
5.3 The Automatic Recognition Regime for 'Judgments' and Its Effects...........................93
5.3.1 The Preclusive Effect of WCAM Settlements Declared Binding 94
5.3.2 Declaratory Proceedings...97
5.4 Grounds for Non-Recognition 98
5.4.1 Default of Appearance and the Protection of the Interested Party 99
5.4.2 Public Policy...101
5.4.3 Irreconcilable Judgments..106
5.4.4 Grounds for Non-Recognition: Conclusion...106
5.5 Outside the Scope of the Brussels I Regulation and the Brussels and Lugano Conventions 108
5.6 The Question of International Recognition in Practice...109
5.7 Concluding Remarks...110
6 Applicable Law..111
6.1 The Law Applicable to the WCAM Settlement..111
6.2 The Law Applicable as to the Reasonableness Test 114
6.3 Possible Laws Applicable to the Underlying Claims in Mass Damage Cases 116
6.4 Overriding and Mandatory Provisions...119
6.5 The Law Governing the Prescription Period and Its Interruption...............................119
6.6 Concluding Remarks...121
7 Conclusions and Recommendations 122
7.1 International Jurisdiction 122
7.2 International Recognition 124
7.3 Cross-Border Notification 126
7.4 Representation 128
7.5 Applicable Law..128
Bibliography 130
Table of Cases...136
Annex I – Members of the Supervising Committee 140

Annex II – List of Interviewees 141

Annex III – Questionnaire (NL) 142

Annex IV – The Dutch Act on the Collective Settlement 145

of Mass Damage Claims – The WCAM 145

Samenvatting

Onderwerp onderzoek en onderzoeksvraag

Dit onderzoeksrapport ziet op de grensoverschrijdende aspecten van collectieve schikkingen die zijn overeengekomen in het kader van de Wet collectieve afhandeling massaschade (WCAM) ten behoeve van buitenlandse benadeelden en vermeende aansprakelijke partijen. De volgende aspecten van internationaal privaatrechtelijk worden in het onderzoek geanalyseerd: internationale bevoegdheid, grensoverschrijdende oproeping, representativiteit van buitenlandse benadeelden, internationale erkenning en toepasselijke recht. De centrale onderzoeksvraag is of de bestaande (nationale, Europese en internationale) regelingen voor elk van deze grensoverschrijdende aspecten voldoende geschikt zijn voor de toepassing van WCAM-schikkingen ten behoeve van buitenlandse benadeelden en vermeende aansprakelijke partijen.

Onderzoeksmethoden

De onderzoeksmethoden voor dit onderzoek zijn drieledig. Ten eerste berust het onderzoek op een uitgebreid internationaal literatuur- en jurisprudentieonderzoek specifiek gericht op de grensoverschrijdende effecten van collectieve systemen van afhandeling van massaschades. Ten tweede heeft er een praktijkonderzoek plaatsgevonden door middel van een vijftiental (face-to-face) interviews met rechters bij het gerechtshof Amsterdam, (vertegenwoordigers van) partijen, advocaten, academici en belangenorganisaties die ervaring hebben met WCAM schikkingen met internationaal privaatrechtelijke aspecten. Tenslotte bevat het onderzoek waar relevant rechtsvergelijkende observaties met betrekking tot vergelijkbare regelingen in het buitenland, in het bijzonder de *class actions* regelingen uit de Verenigde Staten en Canada. Deze rechtsvergelijkende observaties richten zich voornamelijk op de specifieke internationaal privaatrechtelijke problemen die zich hebben voorgedaan bij de uitvoering van de Amerikaanse en Canadese wet- en regelgeving.

De WCAM en het internationaal privaatrecht

Op 27 juli 2005 is de WCAM in werking getreden. De wet is te vinden in de artikelen 907-910 van Titel 15 van Boek 7 van het Burgerlijk Wetboek. Enkele specifieke procesrechtelijke bepalingen zijn in Titel 14 van het Derde Boek van het Wetboek van Burgerlijke Rechtsvordering opgenomen. De wet voorziet in de mogelijkheid om een vaststellingsovereenkomst betreffende de afwikkeling van een groot aantal gelijksoortige vorderingen, gesloten tussen een organisatie die de belangen van schuldeisers van die vorderingen behartigt en de aansprakelijke partij, door het gerechtshof te Amsterdam verbindend te laten verklaren voor de gehele groep van benadeelden. De verbindendverklaring brengt mee dat ook benadeelden die zelf niet betrokken waren bij de totstandkoming van de overeenkomst, hieraan rechten kunnen ontlenen en gebonden zijn. Als een benadeelde echter niet gebonden wenst te zijn aan de overeenkomst staat het hem vrij om binnen een door het gerechtshof vastgestelde termijn aan te geven dat hij gebruik wil maken van de zogenaamde opt-out bevoegdheid. Nadat de verbindendverklaring onherroepelijk is geworden, is het voor een benadeelde die geen gebruik heeft gemaakt van de opt-out

mogelijkheid niet meer mogelijk al dan niet in rechte buiten de overeenkomst om schadevergoeding van de schadeveroorzakende partij te verkrijgen. Voor de verbindendverklaring kunnen de bij de overeenkomst betrokken partijen zich met een gezamenlijk verzoek wenden tot het gerechtshof. Tijdens de behandeling van het verzoek kunnen lopende individuele procedures betreffende vorderingen terzake waarvan de overeenkomst in een vergoeding voorziet, op verzoek van de aansprakelijke partij worden geschorst. Zodra de benadeelde gebruik heeft gemaakt van de opt-out mogelijkheid, kan de individuele procedure worden hervat.

Indien een WCAM-schikking (tevens) is gesloten ten behoeve van buitenlandse benadeelden roept dit echter verschillende vragen op naar de aspecten van internationaal privaatrecht: Heeft het Amsterdamse gerechtshof internationale bevoegdheid om de schikking verbindend te verklaren voor buitenlandse benadeelden? Hoe worden buitenlandse – bekende en onbekende – benadeelden in het buitenland opgeroepen? Op welke wijzen kunnen belangenorganisaties voldoende representatief zijn voor buitenlandse benadeelden? Is een door de Nederlandse rechter verbindend verklaarde overeenkomst ook bindend voor buitenlandse benadeelden die geen gebruik gemaakt heeft van de opt-out mogelijkheid? En welke vragen van buitenlands toepasselijk recht komen aan de orde?

De geschiktheid van bestaande internationaal privaatrechtelijke regelingen
Uit het onderzoek blijkt dat het Amsterdamse Gerechtshof haar *internationale bevoegdheid* om een WCAM schikking verbindend te verklaren over buitenlandse benadeelden heeft gebaseerd op bestaande Europese regelingen, maar dat de gebruikte Europese bevoegdheidsregels en begrippen niet stroken met de begrippen uit de WCAM. Het begrip 'belanghebbende' uit de WCAM en het begrip 'gedaagde' uit de desbetreffende Europese regelingen dienen niet beschouwd te worden als elkaars equivalent. Een forumkeuze ten gunste van het Amsterdamse gerechtshof opgenomen in de WCAM schikking zou een praktische oplossing bieden voor de discrepantie in begrippen tussen de WCAM en de Europese bevoegdheidsregels. De huidige onzekerheid over de precieze invulling van begrippen in de Europese bevoegdheidsregels verdient opheldering van het Hof van Justitie van de Europese Unie door middel van een prejudiciële beslissing. Nieuwe regelgeving op Europees niveau die specifiek de internationale bevoegdheid regelt voor de afwikkeling van massaschade en collectieve acties zou ook aan te bevelen zijn. (zie Deel 2 en Aanbeveling 7.1).

De vraag of buitenlandse benadeelden die geen gebruik gemaakt hebben van de opt-out mogelijkheid gebonden zijn aan een door het Amsterdamse gerechtshof algemeen verbindend verklaarde WCAM schikking is een vraag van *internationale erkenning.* De terminologie die momenteel in Europese regelingen gehanteerd wordt ten aanzien van internationale erkenning van gerechtelijke beslissingen geeft geen duidelijk antwoord op de vraag of een verbindendverklaring van een WCAM schikking als een vonnis of gerechtelijke schikking beschouwd dient te worden. Er worden suggesties gedaan hoe de huidige Europese begrippen kunnen worden verduidelijkt ten aanzien van collectieve schikkingen die pas achteraf door een gerechtelijke instantie verbindend verklaard worden. (Aanbeveling 7.2). Tevens is het

aan te bevelen dat een verbindendverklaring van een WCAM schikking als een beslissing wordt beschouwd in de zin van de Europese regelingen en dient automatische erkenning binnen de EU verzekerd te worden. De gevolgen hiervan zijn tweeledig: 1) Het effect van een verbindendverklaring van een collectieve WCAM schikking door het Amsterdamse hof is hetzelfde in de aangezochte lid - of verdragstaat. Als gevolg hiervan dienen deze Staten het verbindend karakter van de WCAM schikking te erkennen alsmede het feit dat aldaar woonachtige benadeelden die geen gebruik hebben gemaakt van de opt-out mogelijkheid gebonden zijn aan de WCAM schikking, en geen individuele procedure kunnen starten betreffende vorderingen terzake waarvan de overeenkomst in een vergoeding voorziet. 2) Erkenning van een verbindendverklaring kan geweigerd worden als er een beroep is gedaan op één van de weigeringsgronden voor erkenning. Het gaat het met name om de gevallen dat een belanghebbende niet op de juiste wijze is opgeroepen of wanneer erkenning van een verbindendverklaring van een WCAM schikking bijvoorbeeld op grond van diens opt-out karakter – in een concreet geval – kennelijk strijdig is met de openbare orde van de aangezochte lidstaat. (Zie Deel 5).

Bij de *grensoverschrijdende oproeping* voor de terechtzitting voor de verbindendverklaring en van de opt-out mogelijkheid rijst de vraag of de bestaande Europese en internationale regelingen geschikt zijn voor het oproepen van grote aantallen bekende en onbekende benadeelden die buiten Nederland woonachtig zijn. Is betekening per gewone brief, aangetekende post of door middel van een aankondiging in internationale nieuwsbladen of websites een geschikte wijze van oproeping en zijn deze in overeenstemming met beginselen van een eerlijk proces? Het onderzoek wijst uit dat de bestaande Europese en internationale regeling niet ongeschikt zijn voor oproeping van grote aantallen van bekende buitenlandse belanghebbenden, maar dat het zeer arbeidsintensief is en hoge kosten met zich meebrengt. Bovendien wordt de oproeping van onbekende buitenlandse benadeelden niet geregeld door deze regelingen en valt men terug op de bepalingen uit de WCAM. De oproeping van onbekende buitenlandse belanghebbenden wordt echter ook niet expliciet in de WCAM geregeld, maar de wet geeft de rechter genoeg ruimte om andere wijze van oproeping te bepalen. Het is aan te bevelen dat de wet deze ruimte voor het bepalen van de wijze van oproeping voor buitenlandse benadeelden expliciteert in de wet zodat de rechter gedurende een dergelijke regiezitting bepaalde wijze van oproeping kan bevelen of goedkeuren. (zie Deel 3 en Aanbeveling 7.3).

Het *representativiteitsvereiste van buitenlandse benadeelden* is geen zuiver international privaatrechtelijk aspect maar gezien het belang hiervan in WCAM-schikkingen verdienen de verschillende wijzen waarop belangenorganisaties zowel bekende als onbekende buitenlandse belanghebbenden kunnen representeren wel de nodige aandacht. Het verdient aanbeveling om de door partijen gekozen wijzen om te voldoen aan het representativiteitsvereiste door de rechter expliciet te laten beoordelen en goed te laten keuren om voldoende representativiteit voor buitenlandse benadeelden te garanderen. Dit dient in de WCAM te worden verankerd. (Deel 4 en Aanbeveling 7.4).

Wanneer een collectieve schikking overeen is gekomen ten gunste van buitenlandse benadeelden kunnen sommige aspecten door *buitenlands recht* worden beheerst. Zo kan onder andere buitenlands recht de redelijkheid van de hoogte van de toegekende vergoedingen bepalen. Het opnemen van een *damage scheduling* clausule waarin rekening wordt gehouden met de verschillen in redelijkheid naar gelang het toepasselijk recht wordt aanbevolen. Dit betekent wel dat er gedurende de totstandkoming van een WCAM schikking een korte inventaris opgemaakt dient te worden van de verschillende rechtstelsels die van toepassing kunnen zijn. Bovendien bepaalt de rechter of eventuele voorrangsregels van de *lex fori* toepasselijk zijn. (Deel 6 en Aanbeveling 7.5).

Executive Summary

Topic and Central Research Question

This report analyses the relationship between private international law and collective settlements concluded for the benefit of foreign interested parties under the 2005 Dutch Collective Settlements Act or WCAM. It examines aspects of international jurisdiction, cross-border notification, representation of foreign interested parties, international recognition and applicable law. The principal object of the research was to assess the suitability of existing private international law instruments at the national, European and international levels for the application of WCAM in transnational mass damage cases.

Research Methodology

The research was conducted by analyzing both literature and the results of fifteen interviews with professionals directly involved with WCAM collective settlements. The research includes – where necessary – comparative observations in relation to jurisdictions such as the U.S. and Canada that are familiar with collective or group actions based on an opt-out mechanism like the WCAM procedure.

The Dutch Collective Settlements Act and Private International Law

The WCAM came into force on 27 July 2005. It provides for collective redress in mass damages on the basis of a settlement agreement concluded between one or more representative organisations and one or more allegedly liable parties for the benefit of a group of affected persons to whom damage was allegedly caused. Once such a collective settlement is concluded, the parties may jointly request the Amsterdam Court of Appeal to declare it binding. If the Court grants the request, the agreement binds all persons covered by its terms and represented by the representative organization, except for any person who has expressly elected to opt out within a specific period. Any person having opted out retains his right to initiate individual proceedings against the defendant. While the proceedings regarding the binding declaration are pending, any other proceedings concerning claims in respect of which the agreement provides for compensation are suspended at the request of the alleged liable party.

When a WCAM collective settlement is concluded by representative organizations for the benefit of foreign interested parties, various aspects of private international law come into play. These include aspects of international jurisdiction, cross-border notification, recognition, applicable law and representation of foreign interested parties. This research analyses all of these matters but focuses on the applicability of WCAM settlements to transnational mass damage cases involving interested parties domiciled outside The Netherlands.

Private International Law and the Suitability of Existing Instruments

The analyses of the *international jurisdiction* of the Amsterdam ourt to declare binding a WCAM settlement over foreign interested parties establishes that the Court's jurisdiction under the jurisdiction rules of European instruments is ill-founded and based on a 'mismatch'

of concepts such as 'interested parties' and 'persons to be sued'. However, a choice of forum in favour of the Amsterdam Court, incorporated into the settlement agreement, would provide a practical solution. From a European Union policy perspective, the uncertainties surrounding the jurisdiction question in collective settlements may deserve and require clarification through preliminary rulings from the Court of Justice of the European Union. New legislation at the European level specifically dealing with collective redress may also be advisable (see Section 2 and Recommendation 7.1).

Whether a WCAM collective settlement binds foreign interested parties involves the question of *recognition* of a binding declaration of a WCAM settlement by the Amsterdam Court outside The Netherlands. The current terminology employed by European private international law instruments leaves uncertainty as to whether a binding declaration of a WCAM settlement should be considered as a judgment or as a court settlement. Several recommendations are made in order to clarify the ambiguity in the current text of the WCAM with respect to collective settlements concluded before the Amsterdam Court is requested to approve them (Recommendation 7.2). It is furthermore recommended that a decision to declare a WCAM settlement binding as a judgment should be automatically recognized within the scope of European instruments. The consequences are two-fold: 1) The binding effect of collective settlements given by the WCAM on foreign interested parties will be the same as in a Member or Contracting State in which enforcement of the settlement is sought. As a consequence, other Member or Contracting States have to recognize the preclusive effect of the WCAM settlement declared binding by the Amsterdam Court and this prevents re-litigation of the claim settled under the agreement. 2) A binding declaration may not be recognized on the basis of one of the four grounds of refusal of recognition embodied in the European instruments, including when the interested party has not properly been notified or when the WCAM opt-out procedure results – in a concrete case – in the manifest infringement of a fundamental right and therefore violates the *ordre public* of the recognizing State (Section 5).

Cross-border notification to interested parties outside The Netherlands of proceedings in an Amsterdam Court and of the opt-out procedure raises questions as to whether current European and international instruments are well-equipped to notify large numbers of foreign known and unknown affected persons. Is notification by registered mail or by the publication of announcements in daily newspapers and websites still an adequate method of notification and do they comply with fundamental fair trial standards? The research demonstrated that the current European and international instruments are adequate to deal with the notification of large numbers of known interested parties in collective settlements, but that doing so is a laborious task which involves considerable cost. Unfortunately the European and international instruments dealing with cross-border notification do not regulate the notification of unknown interested parties. This is therefore left to the notification provisions of the WCAM. The latter do not explicitly regulate the notification of foreign interested parties, but the Court retains discretion to prescribe the proper method to notify these persons on a case-by-case basis. It is recommended that this discretion is made explicit so that the

Court can, during a pre-trial hearing, order or approve specific methods of notification (see Section 3 and Recommendation 7.3).

Representation of foreign interested parties is not a classic issue of private international law. However, due to its importance in WCAM collective settlements, the question of representation of foreign interested parties was considered in order to determine whether foreign known and unknown interested persons are sufficiently represented. The research concludes by recommending that the Amsterdam Court should explicitly consider and approve the adequacy of the method(s) chosen by the parties to guarantee the sufficient representation of foreign parties and that this may be anchored in WCAM itself (Section 4 and Recommendation 7.4).

When a collective settlement is concluded for the benefit of foreign interested parties, the *law* governing specific issues may be *foreign*. This may be the case with the reasonableness of the agreed compensation and of the validity and interpretation of the settlement agreement. Regarding the assessment of reasonableness, it is recommended to require the inclusion of a damage scheduling clause in the settlement agreement which takes into account differences in applicable law as to the compensation awarded. This implies a brief inventory of applicable laws during the negotiation of the settlement agreement instead of during the court proceedings for a binding declaration. Nonetheless, the Court is left to appreciate the eventually applicable mandatory provisions of the *lex fori* (Section 6 and Recommendation 7.5).

Abbreviations

A

AG	Advocate General

B

BIICL	Britisch Institute of International and Comparative Law

C

CJEU	Court of Justice of the European Union
CMR	Geneva 1956 Convention on the Contract for the International Carriage of Goods by Road
COMI	Centre of Main Interest

D

DCC	Dutch Civil Code
DCCP	Dutch Code of Civil Procedure

E

EC	European Communities
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
EFTA	European Free Trade Association
EU	European Union

F

F.Supp.	Federal Supplement
Fn.	Footnote

H

HCCH	Hague Conference on Private International Law

I

IBA	International Bar Association
ILA	International Law Association
ICLG	International Comparative Legal Guide
IPRax	Praxis des internationalen Privat- und Verfahrensrechts

J

JBPr	Jurisprudentie Burgerlijk Procesrecht
JOR	Jurisprudentie Ondernemingsrecht

L

LJN	Landelijk Jurisprudentienummer

M

MvT	Memorie van Toelichting
MDL	Multi District Litigation

N	
NIPR	Nederlands Internationaal Privaatrecht
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
O	
OJ	Official Journal of the European Communities/Union
O.R.	Ontario Reports
S	
S.C.R.	Supreme Court Reports (Canada)
S.C.C.	Supreme Court of Canada
U	
U.K.	United Kingdom
U.S.	United States
V	
VEB	Vereniging van Effectenbezitters
W	
WCAM	Wet Collectieve Afwikkeling Massaschade
WODC	Wetenschappelijk Onderzoeks- en Documentatiecentrum

1 Introduction

This report summarizes the results of a research project on the private international law aspects of the Dutch Act on the Collective Settlement of Mass Damage Claims (‘*Wet Collectieve Afwikkelingen Massaschade* – WCAM’). This research was commissioned by the Research and Documentation Centre (‘*Wetenschappelijk Onderzoek- en Documentatie Centrum* – WODC’) of the Dutch Ministry of Justice at the request of the Legislation Department, Private Law Sector of the Ministry, and it was carried out by the Private International Law and Comparative Law Department of the Erasmus School of Law, Erasmus University Rotterdam. This report is written by Dr. Hélène van Lith who also conducted the research. Dr. Van Lith was supervised by Prof. Filip De Ly, co-supervised by Dr. Xandra Kramer, and Mr. Steven Stuij provided research assistance. A committee consisting of private international law or WCAM experts,[1] chaired by Prof. Dr. P. Vlas, Professor of Private International Law and Comparative Law at the VU University Amsterdam and Advocate General of the Supreme Court of The Netherlands (Hoge Raad der Nederlanden), supervised this research project.

The report analyses aspects of international jurisdiction, cross-border notification, recognition and enforcement and applicable law in transnational group settlements reached under the Dutch Act involving foreign parties. The study follows the Minister of Justice’s intention to improve and internationalize the WCAM as indicated in his letter to the Dutch House of Representatives.[2] Furthermore, the research is of importance for recent European initiatives in the field of collective redress in mass damages, as its findings may be useful to tackle the cross-border and private international law aspects which may arise in such instruments.[3]

1.1 The Dutch Act on the Collective Settlement of Mass Damage Claims – The WCAM

The Dutch Act on the Collective Settlement of Mass Damage Claims or WCAM entered into force on 27 July 2005.[4] In essence, the Act provides for collective redress in mass damages on the basis of a settlement agreement concluded between one or more foundations or associations representing a group – or ‘class’ – of affected persons to whom damage was allegedly caused and one or more allegedly liable parties. Once a settlement agreement is concluded by the parties, they may then jointly request the Amsterdam Court of Appeal to

[1] See Annex I.
[2] Letter of the Minister of Justice to the President of the House of Representatives of the States General of 28 October 2008 regarding the Evaluation of the WCAM, *Kamerstukken II* 2008/09, 31 762, no. 1.
[3] On 2 April 2008, the Commission adopted the White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2008) 165 final Brussels, 2.4.2008, published by Commissioner Kroes and submitted to the Dutch House of Representatives and to the Senate on 30 June 2008. On 27 November 2008 the Commission adopted the Green Paper on Consumer Collective Redress, COM(2008) 794 final Brussels, 27.11.2008, presented by Commissioner Kuneva. This was followed by a public hearing on consumer collective redress held in Brussels on 29 May 2009, and a period of consultation (from 08.05.2009 to 03.07.2009) by virtue of a consultation paper for discussion on the follow-up to the Green Paper on Consumer Collective Redress.
[4] The WCAM is laid down in Articles 907-910 of Book 7 of the Dutch Civil Code [hereafter DCC] and Article 1013 of the Dutch Code of Civil Procedure or *Wetboek van Burgerlijke Rechtsvordering* [hereafter DCCP].

declare this *collective settlement* binding.[5] If the Court grants the request, the agreement binds all persons covered by its terms and represented by the representative foundation, except for those persons who notified that they do not wish to be bound by the agreement (‘*opt out*’), within a period to be determined by the Court of at least three months following its judgment that gives binding effect to the collective settlement.[6] Any person who decides to opt out of the group settlement is not bound by it and has therefore retained their right to initiate individual proceedings against the alleged responsible party. When too many injured parties have opted out – notified that they do not wish to be bound – the agreement may provide that the responsible party may cancel the settlement agreement.[7] Additionally, as long as the proceedings regarding the binding declaration are pending, other ongoing proceedings concerning claims in which the agreement provides for compensation shall be suspended at the request of the alleged liable party.[8]

The Amsterdam Court declares the settlement binding after evaluating two main aspects of the agreement:

1. the *representation* of the foundation(s) and association(s), as the Court will examine whether the representative foundation or association sufficiently represents the interests of the persons pursuant to its articles of association; and

2. the *reasonableness* of the settlement, as the Court will reject the request for binding effect if the amount of compensation awarded in the settlement agreement is not reasonable.[9]

During the proceedings, the represented affected persons are given the opportunity to be heard on the settlement. This entails a third crucial aspect of the WCAM settlement procedure, namely the *proper notification* of ‘interested persons’ – i.e. persons for whose benefit the settlement agreement was concluded.[10] Notification is required at two stages: first, interested injured persons need to be notified that proceedings for the binding declaration have been initiated in order to give them the opportunity to object to a binding declaration; and second, once the court declares the settlement binding, the interested persons need to be

[5] All WCAM proceedings have been concentrated at the Amsterdam Court of Appeal since Article 1013(3) DCCP went into operation.
[6] See Article 908(2) DCC. See also the International Bar Association’s Guidelines for Recognising and Enforcing Foreign Judgments for Collective Redress 2008 [hereafter IBA Guidelines], which defines *opt-out* actions as procedures in which

> ‘individuals are advised, inter alia, that they must specifically state that they do not want to be part of the collective redress action otherwise any subsequent judgment will be binding on them and on the defendant. In an opt-out action a judgment is intended to be binding on individual claimants who do not personally appear in the action but who do not opt-out of the proceeding (absent claimants).’

[7] Article 908(4) DCC.
[8] Article 1015 DCCP.
[9] Article 907(3) under (f) and (b) DCC, respectively.
[10] Article 1013 DCCP.

informed about the declaration in order for them to decide whether or not they wish to *opt out*.

Article 7:908(3) DCC further states that when an interested person could not have known of his loss at the time of the notice, that person may be given a period of at least six months to notify in writing that he does not wish to be bound by the settlement agreement.

The particular features of the WCAM procedure as a collective redress mechanism can be summarized as follows:

1. The WCAM provides for *collective* or *class settlements* instead of *class actions*.[11] A settlement agreement is reached before and without the intervention of a court.[12] There is no proper action brought to court and there are no 'plaintiffs' or 'defendants', merely applicants who jointly request the binding effect of a settlement for an entire group of affected persons.

2. As a consequence, the procedure is based on the idea of *representative litigation*[13] involving *representative applicants* instead of '*lead plaintiffs*'. Foundations and associations representing the injured persons do not conclude the settlement agreement in order to bind themselves, but in order to bind the group of affected persons which it represents.

3. The alleged victims or injured persons are bound by way of an opt-out procedure instead of an *opt-in* procedure.

The WCAM was evaluated three years after its enactment in 2005. At that time, two significant mass damage cases[14] were settled under the WCAM procedure but these cases involved very few private international law aspects. Amendments to the Act are awaited and will involve supplementary measures to stimulate the parties' willingness to negotiate and facilitate the negotiation of settlement agreements. Proposed modifications involve the incorporation of provisions allowing the court to assist in pre-trial appearances to identify the main points of dispute and encourage parties to seek the help of mediators. Furthermore, a proposal attempts to introduce a procedure for requesting preliminary rulings from the Dutch Supreme Court ('*Hoge Raad*') and is currently under consideration after an internet-

[11] See District Court (*Rechtbank)* Amsterdam of 23 June 2010, LJN: BM9324, § 6.5.3, in which a U.S. class settlement in the *Ahold/U.S. Foodservice* mass case is considered to be similar to a WCAM collective settlement.

[12] The WCAM settlement even differs from the class settlements described in the IBA Guidelines. In the IBA Guidelines a class settlement is described as a judgment for collective redress, granted as a result of a settlement of an action or at the conclusion of the trial. See IBA Guidelines, § 14, at 9.

[13] Ibid., at § 12, at 9. And see Fawcett, J.J., 'Multi-party Litigation in Private International Law', 44 *International and Comparative Law Quarterly* (1995), 4, 744-770, at 744, who indicates that although there may be one plaintiff and one defendant in a *representative action*, there will be numerous other persons, perhaps from different States, who may have the same interest in the proceedings and are represented by one of the named parties.

[14] The *DES* settlement and the *Dexia* settlement will both be discussed in Section 1.2.

consultation round.[15] The proposed modifications also include some technical improvements, among which the amendment of the provisions dealing with the time frame of suspension of individual procedures.

The WCAM has a broad scope of application and can be used for mass damage claims in most areas of law including personal injury, product liability, securities litigation, or mass accident cases.

1.2 The WCAM in the International Arena

When group settlements reached under the WCAM involve one or several foreign elements, such as the existence of foreign interested or injured parties or foreign allegedly responsible parties, it raises important issues of private international law. The number of mass damages with international elements is expected to increase and so is the number of cross-border or transnational group settlements.

Until now, the Amsterdam Court of Appeal has declared five settlement agreements under the WCAM binding, and a sixth one is expected in the near future. Among the five settlement agreements which have so far been declared binding by the Court, several involved foreign elements, but the *Shell* settlement declared binding on 29 May 2009 had by far the most cross-border implications. Since then the WCAM definitively entered the international arena.[16] The six settlement agreements brought before the Amsterdam Court of Appeal will be briefly discussed below.

1. On 1 June 2006, the *DES* settlement – a case for which the WCAM was initially drafted – was declared binding by the Amsterdam Court.[17] The *DES* settlement involved a mass personal injury allegedly caused by defective pharmaceutical products in which the alleged victims were mainly Dutch residents and this case had few cross-border elements.

2. The *DES* settlement was followed by the binding declaration of 25 January 2007 of the *Dexia* settlement agreement regarding financial damage allegedly caused by failure to warn about the risks of certain securities lease products.[18] It was concluded between, on the one hand, Dexia Nederland Bank N.V. (part of the Dexia Group with its head office located in Belgium) and, on the other hand, the Lease Loss Foundation, the Eegalease Foundation, the Dutch Consumers' Association

[15] See the proposed 'Prejudiciële vragen aan de Hoge Raad' (*Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet op de rechterlijke organisatie in verband met de invoering van de mogelijkheid tot het stellen van prejudiciële vragen aan de Hoge Raad in zaken van massaschade en andere massavorderingen*), available at http://www.justitie.nl/onderwerpen/wetgeving/prejudiciele-vragen-aan-de-hoge-raad/.

[16] See also in general Boom van, W., and Arons, T., 'Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands' 21 *European Business Law Review*, (2010) 5, *forthcoming.*

[17] *DES*, Court of Appeal Amsterdam of 1 June 2006, *NJ* (2006), 461.

[18] *Dexia*, Court of Appeal Amsterdam of 25 January 2007, *NJ* (2007), 427.

(*Consumentenbond*) and the Dutch Investors' Association (*Vereniging van Effectenbezitters – VEB*). It was estimated that around 400.000 persons allegedly suffered losses from the purchase of the Dexia products, of which around 4000 were expected to reside outside The Netherlands and the majority of whom were residing in Belgium. The *Dexia* settlement explicitly identifies the group of interested persons – or 'class members'– for whom the settlement was reached by stating that the agreement was concluded only for the benefit of persons who purchased the securities lease product in The Netherlands.[19] This was done in order to exclude non-Dutch residents, but more in particular to exclude Belgian residents. Under the stricter and more protective Belgium consumer laws that applied to Belgian residents, the securities lease purchase agreement was thought to be prohibited, which would have led to a much higher compensation for Belgian purchasers. A separate agreement was therefore reached with that particular group and was excluded from the WCAM settlement.

3. A third settlement, known as the *Vie d'Or* settlement, was concluded between the auditors and the public supervisory authorities of an insurance company and life insurance policy holders who claimed to have suffered financial damage due to the company's bankruptcy. This settlement was declared binding by the Amsterdam Court on 29 April 2009.[20] The settlement was concluded for the benefit of around 11.000 interested parties of which only 500 were expected to be resident abroad in other European countries, in the U.S. and Thailand.

4. From an international perspective, the fourth settlement involving Shell as the alleged responsible party concerned the binding declaration of a settlement for the benefit of a considerable number of foreign residents. The representative foundations and associations that concluded the settlement agreement with Shell, represented numerous shareholders residing world-wide who suffered financial injury allegedly caused by misleading statements concerning Shell's oil and gas reserves. In 2004, Shell Petroleum N.V. and the Shell Transport and Trading Company Ltd[21] announced the restatement of a large number of its oil and gas reserves, which led to a considerable fall in the price of Shell's shares. On 11 April 2007, a US$ 352.6 million settlement for the benefit of non-U.S. shareholders was reached providing for compensation for shareholders who both resided and purchased the shares outside the U.S. between April 1999 and March 2004. The Shell Group negotiated and concluded the settlement with the representative foundations and associations

[19] See Article 7(i) of the *Dexia* settlement (on file with the researchers).
[20] *Vie d'Or*, Court of Appeal Amsterdam of 29 April 2009, *NJ* (2009), 448.
[21] Hereafter the Shell Group.

representing the ‘non-U.S. class’: the Shell Reserves Compensation Foundation – a Dutch foundation specially set up and financed by Shell to represent the interests of non-U.S. shareholders, the Dutch Investors’ Association (VEB), and two Dutch pension funds, ABP and PGGM. The settlement was declared binding by the Amsterdam Court of Appeal on 29 May 2009 by virtue of the WCAM. The shareholders represented by the representative foundations and associations are thus bound by the terms of the settlement agreement and have the obligation to release all claims against Shell in relation to the reserves’ re-categorization.[22]

In the U.S. several securities class actions were filed, including two securities actions filed by European-based institutional investors. These securities actions were consolidated before the federal District Court for the District of New Jersey. At the joint request of the petitioners, the Amsterdam Court of Appeal was requested to stay its proceedings on the binding declaration of the settlement until the New Jersey court ruled on its jurisdiction over non-U.S. shareholders. The Amsterdam Court accepted to hold its decision partly because the *Shell* settlement prescribed that in the event U.S. courts would assert jurisdiction over non-U.S. persons, the settlement shall be null and void in order for the non-U.S. persons to join the U.S. class action. Nonetheless, the New Jersey court refused jurisdiction over the non-U.S. plaintiffs on 13 November 2007, and denied their claims on 5 December 2007, on the grounds that Shell did not engage sufficient conduct in the U.S. for the District Court to have (subject matter) jurisdiction over foreign plaintiffs.[23] The WCAM settlement also prescribes that if the U.S. class action settles on more favourable terms than the WCAM settlement for the non-U.S. shareholders, the latter will be amended to include those more favourable terms. As indicated, this case involved important private international law issues, especially relating to international jurisdiction.

5. Shortly after the *Shell* case, the Amsterdam Court declared binding the € 4.25 million *Vedior* settlement on 15 July 2009.[24] The settlement relates to damage allegedly caused by insider trading with regard to Vedior shares. The *Vedior* settlement also intends to bind foreign interested parties, including U.S. residents, but involves considerably less foreign interested parties than in the *Shell* settlement.

6. A request for a sixth binding declaration is expected to be brought to the Amsterdam Court. The settlement concerns a securities fraud action in

[22] *Shell*, Court of Appeal Amsterdam of 29 May 2009, *NJ* (2009), 506.
[23] *In re Royal Dutch Shell Transport Securities Litigation*, U.S. District Court, District of New Jersey, 522 F.Supp.2d 712 (2007), *721*.
[24] *Vedior*, Court of Appeal Amsterdam of 15 July 2009, *JOR* (2009), 325.

which Converium Holding AG – a Swiss based reinsurance company – made false statements and omitted material facts regarding its financial condition and that those alleged misstatements had the effect of artificially inflating the price of Converium shares. This settlement on its way to being concluded is known as the '*Converium*' settlement and may be concluded for the benefit of foreign investors who purchased Converium shares on the SWX Swiss Exchange. The settlement is said to be concluded between the successor of the alleged responsible party, SCOR Holding (Switzerland) AG, and the representative associations: the Dutch Investors' Association and the *ad hoc* founded Stichting SCOR Securities Compensation Fund.[25] This foundation represents the interests of non-U.S. shareholders allegedly suffering loss, of which merely 3% is resident in The Netherlands. This leads to several questions involving, for instance, the jurisdictional reach of the Amsterdam Court to declare the settlement binding for the remaining 97% of shareholders located outside The Netherlands and claiming to have suffered loss from the fraud; whether the representative foundations fulfil the representation requirement; and whether these foreign interested parties are bound by the binding declaration outside The Netherlands.

1.3 Research Questions

The principal focus of the present research relates to settlement agreements reached under the WCAM procedure in transnational mass damage cases involving interested parties domiciled outside The Netherlands. The import of foreign collective redress mechanisms is merely relevant where they have an impact on WCAM procedures. As far as the transnational WCAM settlements that have been declared binding by the Amsterdam Court are concerned, the present study will deal with the following research questions:

1. With respect to the issue of *international jurisdiction*: Should the existence of foreign elements in a mass damage case preclude the Amsterdam Court from declaring the settlement binding? Is the existence of foreign elements in a WCAM procedure a reason to limit the jurisdictional reach of the Amsterdam Court to declare binding the group settlement agreement and, if so, in what way should such a limitation take place? Should the WCAM procedure be available only when the alleged responsible party is established in The Netherlands or should it otherwise be limited for instance to mass damages which occurred in The Netherlands? If such limits were to be imposed, would the WCAM procedure still be an effective method for collective redress in cross-border mass damage cases largely transcending Dutch borders, with persons affected residing abroad and potentially world-wide?

   Do the ordinary rules on international jurisdiction derived from European and national instruments satisfy the specific needs of group settlements under the WCAM

[25] See http://www.scorsecuritieslitigation.com/index.html.

procedure? If not, at which level (national, European or international) should international jurisdiction be regulated, and which jurisdiction criteria should be used? Should such jurisdiction rule be of an exclusive and compulsory nature or should some room be left for *forum shopping*? How should the Amsterdam Court assess its jurisdiction when parallel proceedings are pending in other States? Must the Court always suspend proceedings or should the Court be given a certain degree of discretion in deciding whether it will continue its own proceedings?

2. With respect to the *cross-border notification*: Are existing instruments regulating cross-border notification suitable for notifying *foreign known* and *unknown affected persons* and do they comply with fundamental fair trial considerations? Is registered mailing or publication of announcements in daily newspapers and websites an adequate notification method? If not, how should foreign interested persons, especially those whose address is unknown, be notified?

3. In terms of the *representation* criterion for representative associations and foundations with respect to foreign interested parties: When does a representative association sufficiently represent the interests of foreign affected persons to fulfil the representation requirement under the WCAM, and thus validly bind them to the settlement agreement concluded for their benefit?

4. Regarding the *recognition* of the binding declaration of a WCAM settlement by the Amsterdam Court: If a WCAM group settlement is declared binding by the Amsterdam Court, will or should a foreign court recognize and enforce the group settlement? Does this preclude a foreign interested person from initiating individual proceedings?

5. With respect to issues of *applicable law*: Which law governs questions of reasonableness of the agreed compensation and of the validity and interpretation of the settlement agreement?

The main research question concerns the question whether existing instruments regulating each of these aspects are suitable for transnational group settlements reached under the WCAM involving one or several foreign elements such as the existence of foreign interested or injured parties or foreign allegedly responsible parties. If the answer is negative, which of these aspects of private international law need specific regulations and at what level (national, European or international) should such a regulation be realized?

1.4 Methodology

The present research applied the following three research activities.

First, this research is primarily based on *literature analysis* in the field of private international law and focusses on the private international law aspects of the collective settlements under the WCAM. Such analysis was conducted using several sources available for legal research, including (academic) publications in national and international journals, legislation in the

field of private international law at national, European and international level and case law from national courts and the Court of Justice of the European Union (CJEU).[26]

Subsequently, research was conducted on the basis of a *series of interviews* with professionals directly involved with the WCAM collective settlements. The objective of those interviews was to obtain additional information on the experiences with the WCAM collective settlements in practice, to identify and evaluate perceived problems and to assess suggestions to improve the functioning of WCAM collective settlements involving foreign parties and cross-border aspects. The executive researcher conducted interviews with 17 professionals, including lawyers, board members of representative foundations, judges and bailiffs.[27] Fifteen practitioners expressed their views by way of face-to-face interviews, one through telephone inquiry and one by way of a written response to the questionnaire. A first round of interviews took place in the first half of December 2009, and a second smaller round in the first half of January 2010. The interviews were held on the basis of a questionnaire formulated in consultation with the supervising committee of the research project which was appointed by the Ministry of Justice. The questionnaire was sent to the interviewees prior to the face-to-face interviews and it contained a series of fourteen open-ended interview questions covering all aspects of private international law.[28] The interviews were conducted on a non-disclosure basis in order to obtain information about the practice of WCAM proceedings without interviewees holding back information for fear of disclosure. Thus, interview statements are reported in a non-traceable way and personal opinions are expressed in this report only with express consent from the interviewee.

Finally, this research also includes *comparative observations* on the law of countries which have instituted collective or group actions based on an *opt-out* mechanism similar to the collective settlement procedure under the WCAM. The main reason for choosing the comparative approach as part of the present research is that solutions may have been found to similar problems encountered. The comparative element of the research does not consist of a full comparative analysis, but where relevant and as far as available, the private international law of the U.S., Canada, as well as the European jurisdictions[29] of Denmark[30] and Portugal will be included by way of comparative observations.[31] After a brief inventory of legal systems, these countries have been selected as their collective redress mechanisms are based on an *opt-out* procedure. The particular feature of an *opt-out* procedure causes specific

[26] Before the entry into force of the Treaty of Lisbon on 1 December 2009, the Court was named European Court of Justice (ECJ). For the sake of clarity, the Court will be called the CJEU even when at that time it was still known as ECJ.
[27] A list of interviewees is included in Annex II.
[28] The Dutch questionnaire is included in Annex III.
[29] In Belgium a legislative initiative for Collective Redress was presented to the House of Representatives (*Kamer voor Volksvertegenwoordigers*/*Chambre des Représentants*) on 29 May 2009, which consists of a combination of an *opt-in* and *opt-out* procedure at different stages of the action (Draft Article 1237/7).
[30] New Danish rules on class actions entered into force on 1 January 2008 (Act No. 181 of 28 February 2007) and are enshrined in Part 23a of the Danish Administration of Justice Act. For a more detailed description, see the explanatory notes to the Bill No. L41 – 2006-07, which can be found at www.ft.dk.
[31] Although enshrined in the Portuguese Constitution (Articles 52 and 60 – constitutional revision 2005), the *Acção popular* or 'civil popular action' was regulated for the first time by Law 83/95 of 31 August 1995.

problems with respect to the cross-border notification and international recognition and enforcement of collective settlements. The comparison is carried out with respect to their private international law provisions and will not entail a comparison of the substantive law on collective redress mechanisms. In that respect, it should be noted that hardly any sources are available in relation to Denmark and Portugal.

The study does not assess the private international law complications on a sector-specific basis but will horizontally consider the problems for all fields of law involved.

1.5 Outline

As indicated in Section 1.4, the report analyses the five main implications of cross-border collective settlements under the WCAM in the field of private international law.

Section 2 deals with aspects of international jurisdiction when a collective settlement under the WCAM is concluded for the benefit of foreign interested parties, or one or more applicants are established outside The Netherlands. It analyses jurisdiction grounds that have been applied until now by the Amsterdam Court of Appeal and explores other possible jurisdiction rules that may be available. Problems arising out of parallel procedures and related actions in the event collective procedures or individual actions are instituted in other States concerning the same cause of actions will also be analysed. The section will examine whether there is a need for additional regulation or whether current jurisdiction rules are satisfactory in dealing with transnational group settlements.

Section 3 provides an overview of the practical implications of cross-border notification of foreign interested parties and scrutinizes problems that occur when applying the European Service Regulation and The Hague Service Convention.

Section 4 explains the functioning and importance of the representation requirement with respect to foreign interested parties.

Section 5 deals with the effect of the *opt-out* character of WCAM procedures respecting the international recognition and enforcement of binding declarations of group settlements under the WCAM, in relation to which particular attention will be given to the binding effect and *res judicata* of any such declarations.

Questions of applicable law with respect to settlement agreements concluded for the benefit of foreign interested parties will be dealt with in Section 6, by examining whether different standards may or should apply when, among others, the reasonableness of the settlement and the agreed compensation is evaluated.

The final part of this study, Section 7, formulates some conclusions and recommendations.

2 International Jurisdiction and 'Collective Settlements' under the WCAM

Article 1013(3) DCCP prescribes that the Court of Appeal in Amsterdam has exclusive competence to declare WCAM settlements binding as a matter of territorial jurisdiction. However, this article does not establish international jurisdiction of the Amsterdam Court in relation to foreign interested parties or other cross-border elements in a WCAM settlement.

Until now all five WCAM settlements have been declared binding by the Amsterdam Court.[32] The Court intends to bind all interested persons, including those residing outside The Netherlands, as the Court does not exclude certain (groups of) persons for whose benefit the settlement agreement was reached. It has therefore asserted extraterritorial jurisdiction over these foreign interested parties when a settlement agreement had also been concluded for their benefit.[33]

2.1 Introductory Comments on the Relevant Rules on International Jurisdiction

2.1.1 The Pan-European Rules on International Jurisdiction

The International jurisdiction of Dutch courts is primarily regulated by a couple of pan-European instruments allocating judicial powers among the courts of the Member States of the European Union (EU) and of the remaining European Free Trade Association (EFTA) States:

1. the Brussels I Regulation 44/2001 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, currently in force in all the EU Member States;[34]
2. its predecessor, the 1968 Brussels Convention;[35]
3. the 'parallel' Lugano Convention 1988[36] which has almost identical provisions to the Brussels Convention for the purpose of Switzerland and Iceland;[37] and

[32] As explained in Section 1, Introduction.

[33] In the *Dexia* settlement a certain category of foreign interested persons was excluded from the settlement agreement.

[34] Council Regulation on Jurisdiction and the Enforcement of Judgments of Civil and Commercial Matters (EC) No. 44/2001 of 22 December 2000, OJ 2001 L 12. The Regulation also applies to Denmark, despite the fact that Denmark opted out of Title IV of the EC Treaty transferring the Area of Home and Justice Affairs under the Community's legislative control. A parallel agreement between the EC and Denmark was concluded so that Denmark would equally apply the Brussels mechanism as of 1 July 2007; see the Council Decision 2006/325/EC of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters extending the provisions of the Brussels I Regulation to Denmark (OJ 2006 L 120/22).

[35] The Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 was first published in French in OJ 1972 L 299/32 and in English in OJ 1978 L 304/36 [hereafter Brussels Convention]. The Convention entered into force in 1971 between the original six EC Member States. Several modifications brought on by the subsequent Accession Conventions led to the publication of a consolidated version of the Brussels Convention. It is published in OJ 1998 C 027/28 and corrected by OJ 2000 C 160/1.

4. the new revised Lugano Convention 2007 with similar provisions to the Brussels I Regulation, currently in force between the European Community and Norway.[38]

When one of these instruments applies, its set of uniform jurisdiction rules will replace national jurisdiction rules. Their scope is therefore of crucial importance.

The Brussels I Regulation entered into force on 1 March 2002 and replaces the Brussels Convention for legal proceedings instituted and applies to legal acts formally drawn up after that date, but the Brussels Convention continues to apply to overseas territories of the Member States, which are excluded from the Regulation.[39]

The structure and the majority of the jurisdictional rules of the Brussels I Regulation are to a certain extent identical to the Brussels and Lugano Conventions. The primary focus of this study will therefore be the Brussels I Regulation.

Each of these instruments is characterized by its particular feature of a ‘double convention’: not only do they regulate the international jurisdiction of courts, they also eliminate barriers to the free movement of judgments by regulating the recognition and enforcement of judgments within the EU and EFTA borders. The jurisdictional question is therefore linked to the question of recognition and enforcement of foreign judgments.

The Brussels I Regulation determines jurisdiction over disputes arising out of international relationships and requires the existence of an ‘international element’, but the scope is not limited to ‘intra-community relations’.[40] Following the substantive scope of Article 1, the Brussels I Regulation applies to ‘civil and commercial matters’. This concept should be interpreted autonomously[41] and should not extend to revenue, customs or administrative matters, or to the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession, insolvency proceedings, social security and arbitration. The jurisdiction rules of the Brussels I Regulation apply according to the Regulation’s territorial scope established in Article 2 when the defendant is domiciled in one of the EU Member States, or with respect to the Lugano Conventions, when the defendant is

---

[36] The Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters enacted for the States of the European Free Trade Association (EFTA) was signed on 16 September 1988, published in OJ 1988 L 319/9.

[37] This is also the case for Norway in relation to proceedings started or judgments to be recognized before 1 January 2010. See below.

[38] A new Lugano Convention was signed on 30 October 2007 in Lugano to replace the 1988 Lugano Convention and to align it with the modifications of the Brussels I Regulation. The official text of the revised Lugano Convention is published in OJ of 21 December 2007 L 339, at 3. On 18 may 2009 the European Community ratified the revised Lugano Convention with effect for all its Member States with the exception of Denmark. On 1 July 2009 the Kingdom of Norway ratified the revised Convention and the latter entered into force between the European Community and Norway on 1 January 2010. The Lugano Convention 2007 will enter into force for Switzerland on 1 January 2011. The ratification of Iceland is still outstanding.

[39] See Recital 22 and Article 68 Brussels I Regulation, following Article 299 EC Treaty.

[40] C-365/88 *Hagen v. Zeehaghe*, [1990] ECR I-1845; C-281/02 *Owusu v. Jackson*, [2005] ECR I-1383, para. 25; and the official Expert Report of Jenard, P., ‘Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968’, OJ 1979 C 59 (1979), at 8 [hereafter Jenard Report].

[41] See Case 29/76 *LTU v. Eurocontrol*, [1976] ECR 1541, para. 5.

domiciled in one of the three EFTA States. As a consequence, all persons, whether EU nationals or not, domiciled in the EU[42] are subject to the same set of jurisdiction rules set out in the Brussels I Regulation[43] and may be sued in the courts of other Member States only by virtue of those rules.[44] National jurisdiction rules are not applicable to defendants domiciled in Member States but will still apply to defendants domiciled in third States according to Article 4(1) Brussels I Regulation.[45] One of the exceptions to the general territorial scope rule that is relevant for this research is that when parties have validly agreed on the prorogation of jurisdiction for a specific Member State court, only one of the parties, either the plaintiff or the defendant, should be domiciled in a Member State.[46]

Article 2 also enshrines the general jurisdiction rule of the Brussels I Regulation and confers to the court of the defendant's domicile *general jurisdiction* over the dispute, which means that the court's jurisdiction is not limited to the specific nature of the claim. Only in well-defined situations which are exhaustively listed in the Brussels I Regulation, the defendant may or must be sued in the courts of another Member State.[47] Derogation from the Regulation's main rule of defendant's domicile is permitted among others by special jurisdiction rules as well as prorogation of jurisdiction by way of a(n) (implicit) choice of forum clause.[48]

Special jurisdiction rules embodied in Articles 5-7 provide the plaintiff with an alternative competent forum besides the court of the defendant's domicile. Special jurisdiction asserts jurisdiction limited to and concerning the specific nature of the claim, such as claims involving contractual matters or matters relating to tort and claims involving multiple defendants. Articles 8-21 replace the main rule of Article 2 in order to protect the weaker party in matters relating to insurance claims, consumer contracts and employment contracts. Prorogation of jurisdiction, whether expressly by agreement in accordance with Article 23 or tacitly by a voluntary appearance of the defendant according to Article 24,[49] equally derogates from the main rule of the defendant's domicile and is based on the parties' consent. Additionally, the Brussels I Regulation regulates when a court has to declare it has no jurisdiction at its own motion and stipulates when a court should stay proceedings in the event of parallel proceedings and related actions.[50] The Brussels I Regulation contains a closed set of jurisdiction rules of mandatory nature. Declining jurisdiction in favour of

[42] Or EFTA State.
[43] Or Lugano Conventions.
[44] According to Article 3(1) Brussels I Regulation.
[45] By virtue of Article 4(2) Brussels I Regulation, all claimants domiciled in a Member State are entitled to use the national jurisdiction rules of that State, in the same way as nationals of that State, to reach defendants domiciled in third States.
[46] Article 4(1) in conjunction with Article 23 Brussels I Regulation.
[47] See C-412/98 *Group Josi v. UGIC*, [2000] ECR I-5925, para. 36.
[48] Article 22 provides for rules of exclusive jurisdiction such as disputes involving immovable property. These rules apply without taking the parties' domicile into consideration.
[49] Article 24 covers situations in which the court seized by the plaintiff is in principle not competent under the set of jurisdiction rules of the Brussels I Regulation, but the defendant nevertheless appears at the proceedings without contesting the court's jurisdiction.
[50] Articles 25 and 26, and Articles 27 and 28, respectively.

another ‘more appropriate’ forum within or outside the EU territory is not allowed.[51] The Brussels I Regulation gives considerable weight to the principle of legal certainty by stating that ‘the rules of jurisdiction must be highly predictable’[52] and it is based on the principle of mutual trust in one another’s legal systems and judicial institutions.[53]

2.1.2 The National Jurisdiction Rules of the Dutch Code of Civil Procedure

Outside the scope of applications of these pan-European instruments, and in the absence of other international conventions regulating the jurisdiction of courts in civil and commercial matters, national jurisdiction rules apply.[54] This will primarily be the case when the defendant in the proceedings is not domiciled in a Member State of the EU or – under the Lugano Convention – in Iceland, Norway or Switzerland, or when no choice of court clause was agreed.

The international jurisdiction of Dutch courts is regulated by a set of direct rules enshrined in Articles 1-14 DCCP, which are the result of the 2002 reform of the Dutch Code of Civil Procedure. This set of rules regulates jurisdiction for Dutch courts over international disputes, outside the scope of the Brussels and Lugano instruments, but is strongly modelled on the Brussels I Regulation.[55] However, unlike these instruments, the Dutch jurisdiction rules under the DCCP distinguish between judicial proceedings to be instituted by serving a writ of summons and judicial proceedings instituted by petition. Summons cases generally involve civil and commercial matters,[56] whereas petition cases principally concern family matters.[57] Petition cases are instituted by a petition or request – *verzoekschrift* – to the court instead of by a writ of summons served on the defendant. Article 2 DCCP comprises the general rule for jurisdiction in civil and commercial matters when the defendant is domiciled in The Netherlands and Article 3 DCCP deals with the procedures commenced by petition. Articles 4 and 5 DCCP provide for some additional special jurisdiction rules in petition cases in family matters, whereas Articles 6 and 6A DCCP provide for alternative jurisdiction rules in summons cases. Most of these additional jurisdictional grounds are literally taken from

[51] C-281/02 *Owusu v. Jackson*, [2005] ECR I-1383.
[52] See Recital 11 of the Brussels I Regulation’s Preamble.
[53] See Recitals 16 and 17 Brussels I Regulation, with respect to the recognition of judgments. The Lugano Conventions are based on the same principles.
[54] This study will exclude any specialized conventions dealing with areas relating to international carriage, transport and maritime matters, such as the Rhine Navigation Convention of 17 October 1868; the Warsaw Convention 1929 for the Unification of Certain Rules Relating to International Carriage by Air and protocols; the Brussels Convention 1952 on Certain Rules Concerning Civil Jurisdiction in Matters of Collision; the Brussels Convention 1952 on Certain Rules Relating to the Arrest of Sea-going Ships; the Geneva 1956 Convention on the Contract for the International Carriage of Goods by Road (CMR Convention); the International Convention 1969 on Civil Liability for Oil Pollution Damage and protocols; the Bern Convention 1980 Concerning International Transport by Rail and protocols; the Montreal 1999 Convention for the Unification of Certain Rules for International Carriage by Air; the Geneva 1999 International Convention on Arrest of Ships; the Hamburg Rules 1978; and the Rotterdam Rules 2009. See for a world-wide convention on choice of forum, The Hague Convention on Choice of Court Agreements of 30 June 2005.
[55] Explanatory Memorandum Proposal DCCP, *Wetsvoorstel herziening van het procesrecht van burgerlijke zaken, in het bijzonder de wijze van procederen in eerste aanleg*, *Kamerstukken II* 26 855, (MvT) *Staatsblad* (2001), 580, § 23.
[56] Articles 78-260, Second Title, Book 1 DCCP
[57] Articles 261-291, Third Title, Book 1 DCCP.

Article 5 Brussels I Regulation, regulating special jurisdiction among others in contractual and tortuous matters. Following the example of Article 6 Brussels I Regulation, Article 7 DCCP confers jurisdiction based on procedural efficiency, such as jurisdiction over multiple defendants and counter-claims. Article 8 DCCP regulates the prorogation of jurisdiction on the basis of the parties' autonomy. It allows parties to agree upon a Dutch court under Article 8(1) DCCP or to derogate from the jurisdictional set of rules in favour of a foreign court by virtue of Article 8(2) DCCP. For prorogation of jurisdiction under Article 8(1) DCCP, a choice of forum in favour of a Dutch court is allowed unless 'reasonable interest' ('*redelijk belang*') to assert jurisdiction to a Dutch court is lacking. As last resort Article 9(b) and (c) DCCP provides for a *forum necessitatis* rule and gives Dutch courts jurisdiction when proceedings abroad appear impossible or if the case is 'sufficiently connected' with the forum and it would be unreasonable to expect the claimant to institute proceedings abroad. Article 12 DCCP regulates *lis pendens* in the event of parallel proceedings in another State.

In sum, the extraterritorial jurisdictional reach of the Amsterdam Court over foreign interested parties in relation to the WCAM procedure is determined by the Brussels I Regulation or the (revised) Lugano Convention, or if none of these European instruments apply, by the Dutch direct international jurisdiction rules embodied in Articles 1-14 DCCP.

2.2 The Jurisdictional Reach of the Amsterdam Court in the *Shell* Settlement

The first and so far the only time the Amsterdam Court addressed the question of international jurisdiction was in the *Shell* settlement. Despite the fact that foreign interested parties were also involved in the *Vie d'Or* and *Vedior* settlements,[58] the Amsterdam Court did not address the issue of international jurisdiction when it approved those settlements. This is probably because in those cases all applicants were established in The Netherlands, whereas in the *Shell* settlement one of the alleged responsible parties – Shell Transport and Trading Company Ltd – was considered to be domiciled in the U.K. The Amsterdam Court established jurisdiction over each joint request dealing with WCAM settlements and declared them binding, but it only explicitly dealt with the question of international jurisdiction in the *Shell* settlement. The Court's reasoning in *Shell* to assume jurisdiction is therefore all the more valuable for the present purposes.

2.2.1 The Basis for Jurisdiction in the Shell *Settlement*

In the *Shell* case, the applicants for the binding declaration were on the one hand the alleged responsible parties (Shell Petroleum N.V. established in The Netherlands and the Shell Transport and Trading Company Ltd established in the U.K.) and the representative organizations (the Dutch Investors' Association (VEB) and two Dutch pension funds, ABP and PGGM) on the other. The interested persons – or *belanghebbenden* – were shareholders located world-wide including in The Netherlands, but U.S. shareholders were excluded from the settlement agreement. Initially several interested parties – one of which was Dexia Bank

[58] In the *Dexia* case, around 4000 foreign interested parties – mainly domiciled in Belgium – were excluded from the settlement agreement. In the *Vedior* settlement, 55% of the interested parties were domiciled abroad, and in the *Vie d'Or* settlement only 500 out of 10.000 were not domiciled in The Netherlands.

Nederland BV was one of them – entered appearance during the proceedings for the binding declaration and thereby became a respondent. As will be demonstrated, the Court had to determine and identify the 'defendant' and 'claimant' in order to fit the facts into classic international litigation terminology.

The way the Court founded its jurisdiction in the *Shell* case is twofold. With respect to interested persons domiciled in the EU and the EFTA States, the Court applied the Brussels I Regulation and the Lugano Convention. With respect to interested persons not domiciled in any of those countries or in The Netherlands, the Court founded international jurisdiction on the basis of Article 3 DCCP.

With respect to the substantive scope of the Brussels I Regulation, the Court's statement was brief and merely stated that the request related to 'civil and commercial matters' as defined in Article 1(1) Brussels I Regulation.[59] Regarding its territorial scope, the Court argued that the *interested parties* are to be considered as persons domiciled in a Member State and shall be sued – as defendants – in the courts of that Member State pursuant to Article 2 Brussels I Regulation.[60] Accordingly, the Court concluded that the Brussels I Regulation applies since many of the interested parties are domiciled in one of the Member States. In that respect it should be noted that the Court did not address the requirement of internationality. The interested parties domiciled in The Netherlands were considered as defendants, and the applicants – or claimants – were also domiciled in The Netherlands.[61] It is to be expected that the international character lies in the fact that other interested parties were domiciled abroad.[62]

The jurisdictional analysis then proceeds in different steps. The first step is to identify the person to be sued. In this regard the Court ignored the applicants, but instead considered the interested persons as defendants. The Court established jurisdiction according to Articles 2 and 6(1) Brussels I Regulation by considering the place of *domicile of the interested parties*.

The second step is to accept jurisdiction over defendants domiciled in The Netherlands. The Court argued that several *interested parties* for whose benefit the settlement was concluded

---

[59] *Shell*, Court of Appeal Amsterdam of 29 May 2009, *NJ* (2009), 506, para. 5.17.
[60] Ibid.
[61] Shell Petroleum N.V. and Shell Transport and Trading Company Ltd agreed to be considered as one entity for the purpose of wrongful announcement.
[62] See C-281/02 *Owusu v. Jackson*, [2005] ECR I-1383, in which Mr Owusu, a U.K. resident, brought an action in the United Kingdom for breach of contract against Mr Jackson, who was also domiciled in that State. The fact that co-defendants were Jamaican and that the harmful event took place in Jamaica made the dispute 'international' for the scope of the Brussels I Regulation (paras. 25 and 26). See also in that sense the *Siplast* decision of the Dutch Supreme Court (HR) of 20 September 2002, *NJ* (2005), 40, with note by Prof. P. Vlas. In this case, both the defendant and claimant were domiciled in The Netherlands but the Court accepted jurisdiction over a French third party on the basis of Article 6(2) which deals with third party proceedings. Without further hesitation, the Court confirmed the international character of the dispute as the third party was a French resident (para. 4.2). The dispute therefore fell within the scope of the Brussels I Regulation despite the fact that the dispute itself was between two Dutch residents.

were domiciled in The Netherlands and that they were to be considered as persons 'to be sued' in the sense of Article 2 Brussels I Regulation. This group of *interested parties* included at least 751 legal or natural persons whose domicile was known in The Netherlands as well as one of the *respondents*, namely Dexia Bank Nederland BV that was registered in Amsterdam.[63] The Court therefore asserted jurisdiction on the basis of Article 2 with respect to the interested parties domiciled in The Netherlands.

The third step in the Court's analysis was to accept jurisdiction over non-Dutch but EU or EFTA domiciled parties under Article 6(1) Brussels I Regulation and Article 6(1) Lugano Convention. With regard to these interested parties, the Court established jurisdiction on the basis of Article 6(1) Brussels I Regulation and Article 6(1) Lugano Convention which deal with multiple defendants. Article 6(1) provides as follows:

> 'A person domiciled in a Member State may also be sued:
>
> 1. 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.'

The Court considered those *interested parties* – domiciled abroad, but within the boundaries of a Member State or EFTA State – as 'one of a number of *co-defendants*' to be 'sued' in the courts of the place where any one of them is domiciled, in this case in The Netherlands.

The Court then examined the condition laid down in Article 6(1) requiring that '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'.[64] For that purpose, the Court identified the 'claims', which under Article 6(1) are required to be closely connected, to be declaratory actions 'brought by Shell against the persons to whom [...] damage has been caused by the events' and as the Court continued 'one of those claims comprises this request for a binding declaration.'[65] In order to demonstrate that accepting jurisdiction on the basis of multiple defendants would avoid the risk of irreconcilable judgments, the Court sought the equivalent of a WCAM claim in other Member States. The Court compared the request for a binding declaration with a declaratory judgment requested by Shell against the interested parties to declare that 'those persons are only entitled to a claim under the settlement agreement and that Shell is not additionally liable for wrongful conduct'.[66] If those claims

[63] *Dexia* was a respondent in the *Shell* settlement as it did not – as an interested party – agree with the damage scheduling.
[64] *Shell*, Court of Appeal Amsterdam of 29 May 2009, *NJ* (2009), 506, para. 5.20.
[65] Ibid., para. 5.21.
[66] See also Croiset van Uchelen, A.R.J., and Van der Velden, B.W.G., 'Shell-shocked? Het internationale debuut van de wet collectieve afwikkeling massaschade', *Tijdschrift voor de ondernemingsrechtpraktijk* (2009), 7, 252-258, at 256.

were to be decided separately in different courts, the Court argued, this would inevitably lead to divergence and irreconcilable judgments.[67]

The Amsterdam Court reflected on whether jurisdiction could be barred by considerations of both applicable law as well as recognition. First, the Court stated that the close connection requirement in the sense of Article 6(1) Brussels I Regulation is satisfied despite the fact that the legal relationship between the English Shell Transport and Trading Company Ltd and the aggrieved shareholders of this English Shell company might be governed by foreign law. A foreign interested party or aggrieved shareholder would generally not anticipate that the applicable law to the legal relationship he has with the English Shell Company would change by a binding declaration in The Netherlands, especially since the settlement agreement contains a choice of law clause. Second, a binding declaration of a Dutch court could mean that aggrieved shareholders no longer have access to the initial competent (English) court, provided that the latter recognizes the binding declaration which binds the shareholder, unless he opted out, to no longer hold Shell liable.

In a fourth prong of the analysis, the Amsterdam Court also had to construct jurisdiction over the English Shell parent company (as opposed to the Dutch parent). The Court stated that the fact that there were two categories of alleged damages caused by the Dutch Shell Company on the one hand and by English Shell Company on the other hand, does not affect the close connection requirement. In the view of the Court, even though those two companies were formally independent, they followed the same course and conducted similar actions, maintained single group annual accounts and drew up annual financial statements on a consolidated basis; it does not matter whether the wrongful announcements were made by either the English or the Dutch Shell Company. This was even acknowledged by the applicants themselves during the hearing. Consequently, there is a close connection between the alleged claims against the English Shell Company and the claims against the Dutch Shell company.

The final step concerns the establishment of jurisdiction over a large group of non-European interested parties. Outside the scope of the Brussels I Regulation and the Lugano Convention, the Court established jurisdiction on the basis of Article 3 DCCP with respect to foreign interested parties domiciled outside of the Brussels and Lugano area. Article 3 DCCP establishes a general jurisdiction rule for procedures commenced by petition and confers jurisdiction to Dutch courts if the domicile or habitual residence of any *petitioner* or any of the *interested parties* is located in The Netherlands.[68] In the *Shell* settlement, the Amsterdam Court applied that rule and established jurisdiction on the fact that most of the *petitioners*, or *applicants* – Shell Petroleum N.V., the Shell Reserves Compensation Foundation, the Dutch Investors' Association (VEB), ABP, PGGM –, and the *respondents* – the Dexia Bank

[67] *Shell*, Court of Appeal Amsterdam of 29 May 2009, *NJ* (2009), 506, para. 5.21.

[68] The particularity of Article 3 lies in paragraph (c) as it contains an open-ended criterion which is generally considered by the majority of Dutch authors as a *forum conveniens* rule. The legislator introduced a certain degree of discretion for Dutch courts by asserting jurisdiction over a petition case to Dutch courts when the dispute is 'otherwise sufficiently connected with the Dutch legal order'.

Nederland B.V. and two private persons – were domiciled in The Netherlands. The English Shell parent company, the Shell Transport and Trading Company Ltd, was thus, the only petitioner not domiciled in The Netherlands.

2.2.2 No Problems with a Wide Jurisdictional Reach

It was generally expected that the Amsterdam Court would assume jurisdiction, especially since the WCAM does not explicitly exclude foreign interested parties. In the *Shell* settlement, the question of international jurisdiction was hardly addressed in the petition, but was dealt with by the applicants when raised by the Court during the oral hearings.

In none of the five WCAM cases described in Section 1, was the Court's jurisdiction challenged. This was explained in the first place by the fact that the WCAM requires the applicants to jointly request the Court to declare the settlement binding, even though theoretically respondents could also challenge the Court's jurisdiction. Secondly, the settlement element as a specific feature of the WCAM procedure was frequently pointed out in relation to the jurisdictional question: it is in all the applicants' interest that the agreement they have concluded for the benefit of all interested parties, including the foreign interested parties, is declared binding by the Court. The alleged responsible party has an interest in binding as many foreign interested parties as possible to build critical mass for adhesion of representative parties to the settlement and to minimize individual damage actions abroad. The representative foundations – especially the *ad hoc* foundations that do not have 'sister organizations' abroad – have as goal to provide damage relief for injured person on a wide scale.[69] It was emphasized that certain (categories of) interested persons can be excluded by the settlement itself. The *Shell* settlement excluded U.S. shareholders due to the class action proceedings instituted in the U.S. In the *Dexia* settlement, a group of Belgian interested parties was excluded from the settlement in order to avoid jurisdictional problems and problems related to a more favourable applicable consumer law. Other reasons why the Amsterdam Court was generally expected to accept jurisdiction was that there was generally little to no other forum available to injured parties where an effective collective redress mechanism is based on a settlement agreement and, thus, where they could be compensated for damages for their claim in such an easy manner. Additionally, it was pointed out that the tortuous conduct involved was committed in The Netherlands or that the settlement agreement was submitted to Dutch law.

Whether or not the Brussels I Regulation would apply was not an issue that was raised in the petition, the court raised it during the pre-trial review and endorsed the position taken by the applicants during the court proceedings. Nor was it considered problematic to apply Article 2 Brussels I Regulation to the specific features of proceedings commenced by petition to declare binding a settlement agreement under the WCAM. In sum, the Amsterdam Court encountered little resistance in asserting jurisdiction over *foreign interested parties* under the Brussels I Regulation.

[69] One exception is the '*Consumentenbond*' whose goal is primarily to represent Dutch consumers and who does not have the ambition to represent all consumers world-wide. It prefers to leave each sister organization to decide for itself whether or not it wants to represent its consumers in relation to a collective settlement.

2.3 The Substantive Scope of the Brussels I Regulation and the Lugano Convention

The substantive scope in the sense of Article 1 Brussels I Regulation delimits its application to 'civil and commercial matters'. The CJEU held that this provision should be interpreted autonomously.[70] Yet, little has been said with respect to *class representative settlements*[71] in relation to the substantive scope of the Brussels I Regulation.[72] In *Verein für Konsumenteninformation v. Karl Heinz Henkel*,[73] an Austrian consumer protection organization brought an action as an association on behalf of consumers against a German trader alleged to use unfair terms in consumer contracts. Any such group action was considered an action relating to a civil matter within the meaning of Article 1(1) Brussels I Regulation.[74]

Furthermore, the particular feature of Dutch procedural law that a request for binding declaration of the collective settlement is commenced by petition, does not impede the substantive application of the Brussels I Regulation. Jenard's Explanatory Report on the Brussels Convention explicitly states that the 'Convention also applies irrespective of whether the proceedings are contentious or non-contentious.'[75] Additionally, it should be noted that declaratory proceedings in which a party seeks a declaration on a particular liability question is also covered by the substantive scope of the Brussels I Regulation.[76]

The question whether the request for a binding declaration of a collective settlement falls within the scope of Article 1 can be answered either by

1. examining the nature of the underlying legal relationship leading up to the settlement agreement;[77] or
2. by considering the settlement agreement itself, as this is the matter requested to be declared binding by the Court.[78]

With respect to the first approach, it has been argued that most of the underlying litigation matter will generally be considered 'civil and commercial'. Whether potential damages are

---

[70] Case 29/76 *LTU v. Eurocontrol*, [1976] ECR 1541. See also Rogerson in Magnus, U., and Mankowski, P., eds., *Brussels I Regulation. European Commentaries on Private International Law* (2007), Article 1, at § 8.

[71] See above Section 1.

[72] Carballo Piñeiro, L., *Las ácciones colectivas y su eficacia extraterritorial. Problemas de recepción y transplante de las "class actions" en Europa* (2009), at 97.

[73] C-167/00, *Verein für Konsumenteninformation v. Karl Heinz Henkel*, [2002] ECR I-8111. See also Polak, M.V., 'Iedereen en overal?: Internationaal privaatrecht rond "massaclaims"', 81 *NJB* (2006), 41, 2346-2355, at 2349; and Briggs, A., *Civil Jurisdiction and Judgments* (2009), § 2.31, at 67 and § 2.32, at 69.

[74] C-167/00, *Verein für Konsumenteninformation v. Karl Heinz Henkel*, [2002] ECR I-8111, para. 30.

[75] Jenard Report, at 9.

[76] See Rogerson in Magnus and Mankowski, eds. (2007), Article 1, § 45, at 66, referring to C-406/92 *"Tatry" v. the owners of the ship "Maciej Rataj"*, [1994] ECR I-5439.

[77] See Polak, R., 'Approval of International Class Action Settlements in The Netherlands', *The International Comparative Legal Guide to Class & Group Actions 2009, A practical insight to cross-border Class and Group Actions work* (2009), at 11.

[78] See Poot, M., 'Internationale afwikkeling van massaschade met de Wet Collectieve Afwikkeling Massaschade', in Holtzer, M., Leijten, A.F.J.A., and Oranje, D.J., eds., *Geschriften vanwege de Vereniging Corporate Litigation 2005-2006. Serie vanwege het Van der Heijden Instituut. Deel 87* (2006), 169-202, at 173; Polak, R. (2009), at 11; and Polak, M.V. (2006), at 2349.

claimed in consumer or product liability cases, securities cases or mass tort cases, they are all covered by Article 1 and are usually not excluded by Article 1(2) which specifies its exceptions.[79]

The second approach takes into account that the Amsterdam Court is asked to examine whether the amount of compensation fixed by the settlement agreement is reasonable[80] and considers that the contractual relationship arising out of the settlement agreement should be covered by the concept of 'civil and commercial matters'.[81]

In *Shell*, the Amsterdam Court examined the 'application procedure at hand', rather than the underlying damage claim, which would indicate that the second approach was followed. The outcome would however have been the same if the Court had taken into account the underlying claim.[82]

From the fact that the Court is asked to assess the reasonableness of the settlement agreement in relation to the underlying claim and may even have to consider questions of applicable law, one should conclude that the first approach is the correct one.[83]

2.4 The Brussels I Regulation and the Meaning of 'Defendant' in Collective Settlements

The identification of the 'defendant' or 'the person being sued' according to Article 2 is crucial for the territorial scope as well as the allocation of international jurisdiction under the Brussels I Regulation. Article 2 determines the territorial scope of the Brussels I Regulation and establishes the fundamental rule for general jurisdiction at the court of the place of domicile of the 'person to be sued'.[84] Article 6 deals with multiple defendants and establishes jurisdiction over other defendants domiciled in other Member States to the courts of the place of defendant's domicile, provided one of the defendants is domiciled in that State pursuant to Article 2.

2.4.1 The Person to Be Sued under Article 2 Brussels I Regulation

The particularities of a collective settlement submitted to the court for a binding declaration differs from other cases in two respects.

First, traditional litigation primarily rests on individual claimants and defendants. Summons are brought by one or few claimants against one or few respondents. The jurisdictional rule of

---

[79] Poot (2006), at 172-173.
[80] Article 907(3) DCC.
[81] Poot (2006), at 173; and Polak, M.V. (2006), at 2349. There may be some complications in the event the settlement agreement is concluded between a State and a private entity. But the ECJ has accepted with regard to disputes involving a public authority, that any such authority is a party within its substantive scope where the public authority has acted in a private law capacity. See Rogerson in Magnus and Mankowski, eds. (2007), Article 1, § 13-20, at 52-55; see for example Case 29/76 *LTU v. Eurocontrol*, [1976] ECR 1541.
[82] *Shell*, Court of Appeal Amsterdam 29 of May 2009, *NJ* (2009), 506, para. 5.21.
[83] See Section 6.
[84] Recital 11 of the Brussels I Regulation's Preamble explicitly states that 'the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor'.

defendant's domicile can easily be applied to those defendants. Jurisdiction over one defendant on the basis of its domicile may be extended to other defendants on the basis of Article 6(1) Brussels I Regulation for reasons of procedural efficiency.[85] Irrespective of the characterization of injured parties as plaintiffs, defendants or third party interveners of mass damages in the context of the WCAM mass settlement scheme, the traditional plaintiff/defendant dichotomy is distinguishable because of the vast numbers of injured parties and the fact that the latter are not always identifiable and known.

Second, the WCAM collective or class *settlement* scheme differs from a classical 'class *action*' where one allegedly responsible party sued by (class) plaintiffs can clearly be marked as defendant or as a person 'to be sued' in the sense of Article 2 Brussels I Regulation. As a consequence of the specific character of the WCAM, a request to declare a collective settlement binding is initiated by petition and is not a pure adversarial proceeding, nor is there a 'person to be sued' in the classical sense of Article 2 Brussels I Regulation.

It has been argued that an *interested party* should be marked as defendant in the sense of Article 2 Brussels I Regulation.[86] In the *Shell* settlement, the Court identified the 'persons to be sued' for jurisdictional purposes to be the *interested persons* for whom the agreement was concluded. On the contrary, in order to assert jurisdiction over *foreign interested parties* not domiciled in the EU and Lugano area, it considered the *applicants'* domicile as well as the domicile of the *interested parties* following Article 3 DCCP. Under the Brussels I Regulation concepts of civil procedure such as the concept of 'defendant' are defined by national law. Nonetheless, it has been argued during the interviews that the 'person to be sued' or 'defendant' should be interpreted autonomously and that interested parties may be considered 'persons to be sued' partly because the Brussels I Regulation does not distinguish between proceedings commenced by petition and proceedings commenced by summons for the identification of the defendant.[87]

Conversely, Briggs defines the concept 'defendant' as one concept that 'may exclude some forms of proceedings for relief, and in this sense the respondent is not being sued.'[88] Not satisfied by this reading, he states that a person being sued is 'a person who is summoned to court and made respondent to an application and *who stands at risk of being ordered by the court to perform an act*.'[89] Under this definition, an *interested party* – especially when he is not the applicant – does not qualify as a defendant in the sense of Article 2 Brussels I Regulation, because an interested person does not stand the risk of being ordered to court to perform an act. Interested persons in the collective settlement are potential beneficiaries of a court-approved settlement and are prevented from starting individual proceedings against the

[85] See also Muir Watt, H., 'Brussels I and Aggregate Litigation or the Case for Redesigning the Common Judicial Area in Order to Respond to Changing Dynamics, Functions and Structures in Contemporary Adjudication and Litigation', *IPRax* (2010), 2, 111-116, at 112.
[86] See Polak, R. (2009), at 11; Polak, M.V. (2006), at 2349; and Poot (2006), at 175.
[87] This was stated during the interviews.
[88] Briggs (2009), § 2.134, at 201.
[89] Ibid. (emphasis added).

alleged responsible person unless they opt out of the court-approved settlement. They should not be considered as defendants.

In *Shell*, some interested persons became respondents; at least one of them, Dexia Nederland Bank N.V., was domiciled in The Netherlands.[90] Until now each request for a binding declaration of a WCAM settlement involved a respondent domiciled in The Netherlands. It is unclear whether the Amsterdam Court would still apply the Brussels I Regulation if none of the interested parties chooses to become respondents in the court proceedings or if none of the respondents is domiciled in The Netherlands.

In a classic class action situation, the alleged responsible party is the defendant. It has been argued that this is not the case in a collective settlement under the WCAM, since the alleged responsible party is one of the applicants seeking to bind interested parties to renounce their rights to initiate individual proceedings. This may be considered comparable to a declaratory judgment on liability issues initiated by the alleged responsible party against interested parties. Moreover, the alleged responsible party has agreed to compensate the damages and should therefore not be considered as a defendant who refuses to pay compensation.

As set out above, the Amsterdam Court in the *Shell* settlement relied heavily on both Articles 2 and 6(1) as a basis for jurisdiction and identified the *interested persons* as *defendants* for jurisdictional purposes. The reasoning behind this identification is that those persons need to be notified of the request for the binding declaration and that they are given the opportunity to object to the request. They have the right to file a defence and by doing so become a respondent. In addition, interested persons – like defendants – are protected by fair trial considerations.[91] For those reasons, *interested parties* have been characterized as *'potential' defendants.*[92]

This reasoning is generally accepted among the interviewees and may sound logical to Dutch lawyers familiar with proceedings commenced by petition. But it is not guaranteed that this reasoning would be followed outside The Netherlands, more specifically by the CJEU.[93] The

[90] In the sense of Article 60 Brussels I Regulation.
[91] According to Article 1013(5) DCCP, see also Polak, M.V. (2006), at 2349.
[92] Polak, R. (2009), at 11; Polak, M.V. (2006), at 2349.
[93] The Amsterdam Court may request the CJEU to give a preliminary judgment on the interpretation of the Brussels I Regulation under Article 267 of the Treaty on the functioning of the European Union (OJ C 115, 9.5.2008). The Amsterdam Court should be recognized as 'court' in the sense of the Treaty depending on a number of factors such as whether the judicial body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. See C-54/96 *Dorsch Consult Ingenieursgesellschaft v. Bundesbaugesellschaft Berlin*, [1997] ECR I-4961, para. 23. On 12 January 2010, the Third Chamber ordered the lack of jurisdiction of the ECJ for a preliminary ruling requested by the *Amtsgericht* Charlottenburg in Germany. The Court was requested to rule on the suitability (or reasonableness) of the appointment of a liquidator (para. 18). The Third Chamber examined whether the request involved a 'dispute', but ruled negatively (para. 21). The Third Chamber stated that there were no respondents against the appointment and that the assessment of an appointment of a liquidator should not be considered as a *contentious* matter. The fact that the *Amtsgericht* Charlottenburg was addressed in a *non-contentious proceeding* meant that the *Amtsgericht* was not to be recognized as a 'court' and therefore lacked jurisdiction to request a preliminary ruling. See C-497/08 *Amiraike Berlin GmbH*, OJ C 063, 13/03/2010, at 19. This differs however from the role of the Amsterdam Court in a WCAM procedure. As the subject matter of

question is whether known and unknown interested parties, for whose benefit a collective settlement has been concluded, should be identified as defendants. The answer should be given in national procedural law.[94] Under the WCAM procedure interested parties become respondents once they appear during proceedings and challenge the reasonableness of the settlement. All interested persons are therefore potential respondents, and a respondent is more likely to be considered as a defendant.

If Article 2 Brussels I Regulation is to be understood as establishing jurisdiction to the court of the place of domicile of the *interested party* in relation to collective settlements, this would lead to competent courts in *every* State where at least one interested person is domiciled.[95] This stands in contrast to one of the main objectives of the Brussels I Regulation, which is to reduce the number of competent fora and to avoid multiplication of fora.[96] Since the Dutch WCAM procedure is unique in its kind, this scenario is not to be expected for now, but may well occur in the future, as legislation in other Member States regarding collective redress for mass class settlements develops.

2.4.2 Multiple Defendants under Article 6(1)

In order to reach all interested parties, including those who are not domiciled in The Netherlands, the alternative special jurisdiction rule of Article 6(1) was used in the *Shell* case once the Amsterdam Court had accepted jurisdiction on the basis of Article 2, to assert jurisdiction over all other interested parties domiciled in another Member State or in an EFTA country. These foreign interested parties are considered as ‘co-defendants’. Setting the definition problems concerning the concept of ‘defendant’ aside, which is determined by national law on civil procedure, it is highly questionable whether Article 6(1) was meant to assert jurisdiction over foreign *interested parties* – in the *Shell* case it involved over 100.000 persons domiciled abroad – as ‘co-defendants’. This is a totally different situation than the case against ‘two or more defendants’ referred to by Briggs.[97] Moreover, as rightfully demonstrated by Rob Polak, it would suggest that the Amsterdam Court will have jurisdiction simply when just one of the injured or interested parties for whose benefit the settlement agreement has been concluded is domiciled in The Netherlands.[98]

In this context it is important to note that Article 6 applies to multiple defendants and not to multiple claimants. If the alleged responsible party should be marked as defendant, Article 6

WCAM proceedings should be understood as contentious, the Amsterdam Court meets all the criteria imposed by the CJEU to request a preliminary ruling.

[94] In a different context – of corporate law – the Supreme Court of The Netherlands even ruled that an interested party or *belanghebbende* should *not* be considered as a person to be sued in the sense of Article 2 Brussels I Regulation. See HR 25 June 2010, LJN: BM0710, at § 6.2.2.

[95] Multiple competent forums may also occur in classic multiple defendant cases where co-defendants are domiciled in several Member States, but the number of co-defendants is generally considerably less than the large numbers of interested parties.

[96] C-125/92 *Mulox v. Geels*, [1993] ECR 4075, para. 11.

[97] Briggs (2009), § 2.201, at 288.

[98] Polak, R. (2009), at 11.

in its present form would be considerably less valuable,[99] unless a new special jurisdiction rule is enacted in the Brussels model establishing jurisdiction for multiple claimants.

The purpose of Article 6 is to concentrate several claims in one forum, either because the claims are addressed to multiple defendants or co-defendants as stated in Article 6(1), or because claims are related or accumulated actions in accordance with Article 6(2). With respect to Article 6(1), this provision does not apply to co-claimants or multiple claimants. Furthermore, with respect to Article 6(2) *group actions* should not be considered as involving related and accumulated actions.[100]

2.5 The Article 6(1) Requirement

For Article 6(1) to apply, the various claims brought by the same plaintiff against different 'defendants' must be so closely connected 'that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.[101] In order to determine whether the case is one in which there is a risk of conflicting decisions, the decisions in question should be given 'in the context of the same situation of law and facts.'[102] In *Shell* there is a good arguable case to state that the factual and legal situation was similar for all 'defendants', as the event(s) allegedly giving rise to the damage was or were all concentrated in The Netherlands and was or were the same event(s) for each interested party. Since the *Roche v. Primus* case, it is however questionable whether the close connection requirement of Article 6(1) would still be easily satisfied. Primus brought a claim of European patent infringement against Roche Netherlands BV and eight Roche entities established in different States where alleged infringements also took place. Primus claimed that the infringements were coordinated by Roche Netherlands BV and initiated procedures in The Netherlands on the basis of Article 2 and against the other Roche infringers on the basis of Article 6(1), claiming that there exists such a connection that it is expedient to determine the actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. The CJEU ruled that since the case involved a number of defendants domiciled in different States in respect of acts committed in their respective territory, any given decision would not arise in the context of the same factual situation.[103] Nor would decisions be given in the same legal situation as patents and their infringements continue to be governed by national law, since patents under the European Patent Convention are bundles of national patents for enforcement and infringement purposes, although there is a centralized granting system.[104] This restrictive interpretation could mean that, in the event of a tort

[99] Stadler, A., 'Die grenzüberschreitende Durchsetzbarkeit von Sammelklagen', in Casper, M., Janssen, A., Pohlmann, P., and Schulze, R., eds., *Auf dem Weg zu einer europäischen Sammelklage?* (2009), 150-168, at 158.
[100] Carballo Piñeiro (2009), § 126, at 126-127.
[101] Case 189/87 *Kalfelis*, [1988] ECR 5565, § 12, later enshrined in the provision of Article 6(1). This has not been done in the equivalent Lugano provision, but Lugano courts usually follow the CJEU's rulings.
[102] C-539/03 *Roche Nederland BV and Others v. Frederick Primus*, [2006] ECR I-6535, § 26.
[103] Ibid., § 27.
[104] Ibid., § 29-31.

committed in different Member States and thus governed by divergent applicable laws,[105] there would be no risk of irreconcilable judgments justifying the determination of the actions together under Article 6(1). In other words, does the required connection between the individual claims underlying the WCAM settlement exist when each claim is be governed by different applicable laws and the decisions in question are therefore not given 'in the context of the same situation of law'? Applying the *Roche* ruling to WCAM procedures would sincerely question the application of Article 6(1) to *collective settlements*.[106]

Nonetheless, some have argued during the interviews that the particularity of the WCAM procedure in which the Court assesses the reasonableness of the settlement agreement should be distinguished from pure patent infringements or tort actions. In their view, Article 6(1), if applicable, should apply in a less restrictive manner in relation to the WCAM settlements since the obligations under the *group settlement* are the same for everyone. This view is based on the approach that the settlement agreement itself constitutes the close connection requirement and is therefore jurisdiction creating and not the underlying legal relationship as will be explained below in Section 2.6.

2.6 Other Possible Jurisdictional Bases

The question remains, however, whether Article 6(1) applies in the way it was constructed by the Amsterdam Court of Appeal by identifying the *interested parties* as defendants and co-defendants. When the conditions of Article 6(1) are not satisfied, could the Amsterdam Court found its competence on the basis of other jurisdiction criteria under the Brussels I Regulation? This question could be answered in the same way as the two different approaches used for identifying the reach of the substantive scope. One may consider

1. the nature of the underlying legal relationship leading up to the settlement agreement as the original legal relationship for the purpose of jurisdiction (e.g. torts, contract); or
2. the remedies for breach of the underlying obligation as reflected in the settlement agreement itself as a contractual matter requested to be declared binding by the court.

Under both approaches, additional grounds for jurisdiction (apart from Articles 2 and 6(1) Brussels I Regulation) are available, primarily under Article 5(1) and 5(3) Brussels I Regulation.

Article 5(1) reads:

[105] See Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), OJ 2007 L 199/40 [hereafter Rome II Regulation]. The Rome II Regulation harmonizes the conflict of laws rules, but different substantive laws may still apply as a result of the general rule enshrined in Article 4(2) which provides for the *lex loci damni* rule – i.e. the applicable law is determined by the law of the country where the direct damage occurred.

[106] See also Stuyck, J., 'Class Actions in Europe? To Opt-In or to Opt-Out, that is the Question', 20 *European Business Law R*eview (2009), 4, 483-506, at 502, with respect to class actions.

> ‘A person domiciled in a Member State may, in another Member State, be sued:
> (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
> (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
>
> > - in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
> > - in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,
>
> (c) if subparagraph (b) does not apply then subparagraph (a) applies’.[107]

Article 5(3) reads:

> ‘A person domiciled in a Member State may, in another Member State, be sued: in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur’.

These provisions in general entitle a claimant to choose between the court at the place of domicile of the defendant and the court having jurisdiction under the additional grounds of Article 5(1) or 5(3) and entails *forum shopping* as the plaintiff may choose among the competent forums.

On the other hand, the consequences of these two approaches are important and may lead to different additional grounds for jurisdiction. In the event of a collective settlement concerning a mass tort, the place of the harmful event would determine the competent forum according to the first approach under Article 5(3), but following the second approach under Article 5(1) the place of the obligation in question, depending on *who* claims *what*, will determine the competent court.

2.6.1 The First Approach: The Underlying Obligation

Regarding the first approach stipulated in Article 5(3), various jurisdiction rules have been suggested:[108] in matters relating to tort, delict or quasi-delict, it has been argued that the Amsterdam Court could have jurisdiction when the harmful event occurred in The Netherlands.[109] In matters relating to contracts, the Amsterdam Court has jurisdiction if the

---

[107] The 1968 Brussels Convention and the 1988 Lugano Convention merely enshrined sub (a) under Article 5(1).

[108] See also Stadler (2009), at 158.

[109] According to Article 5(3) as suggested by Stuyck in relation to class actions, see Stuyck (2009), at 502; see also Kessedjian, C., ‘Les actions collectives en dommages et intérêts pour infraction aux règles communautaires de la concurrence et le droit international privé’, in Venturini, G., and Bariatti, S., eds., *Liber Fausto Pocar – Vol. II: Nuovi strumenti del diritto internazionale privato* (2009), 532-547, at 537-538; Polak, M.V. (2006), at 2350. The harmful event should be understood to be either the place where the damage occurred or in the place of the event which gives rise to and is at the origin of that damage. See Case 21/76 *Handelskwekerij G. J. Bier BV v. Mines de potasse d’Alsace SA*, [1976] ECR 1735. For the problems arising from the multiplication of competent forums under Article 5(3) when the place where the damages occurred is located in various Member States, see Carballo Piñeiro (2009), § 118, at 121.

place of performance of the obligation in question was located in The Netherlands.[110] In the event of a consumer contract – as this is more likely the case with mass claims arising out of a contractual relationship – the question was raised whether the Amsterdam Court is competent under Articles 15-17 Brussels I Regulation if the consumer is domiciled in The Netherlands.[111]

It has been noted that both the contract and tort jurisdiction rules will in most cases not lead to a concentration of the claims in one forum. With respect to the contract rule, the *forum contractus* depends on claimant's claim and may lead to multiple jurisdictions depending on the place of performance of the contract claim which may vary from claimant to claimant. With respect to the jurisdiction rule for torts, the place where the damage occurred may also vary from one claimant to another.

With respect to consumer contracts it is doubtful whether the request for a binding declaration concerning a settlement agreement for the benefit of consumers, but concluded by consumer's associations instead of by consumers themselves, would fall under the definition of 'consumer contract' as stipulated in Article 15 Brussels I Regulation.[112] It is a logical consequence of the CJEU's settled case law that 'a legal person which acts as assignee of the rights of a private final consumer, without itself being party to a contract between a professional and a private individual, cannot be regarded as a consumer'[113] within the meaning of the Brussels I Regulation and this also applies in respect of a consumer protection organization which brings actions as an association on behalf of consumers.[114] As far as WCAM settlements are concerned, it should be noted that the representative associations are in fact party to the settlement agreement, whereas the affected consumers are not.

In sum, under this first approach it is unpredictable whether the Amsterdam Court would have competence as it depends on the underlying legal relationship that is the subject of the collective settlement. Moreover, the first approach does not guarantee concentration of mass settlements in The Netherlands.

2.6.2 The Second Approach: The Contractual Nature of a Settlement Agreement

With respect to the second approach defined in Article 5(1), it has been argued that a binding declaration of a collective settlement is a *sui generis* procedure, one which establishes a special kind of contractual relationship between the applicants. Article 5(1) could serve as a jurisdictional basis if The Netherlands is the place of performance of the obligation in question.[115] Whether it would fall under the scope of Article 5(1) depends on the autonomous

[110] According to Article 5(1) as suggested by Stuyck and Carballo Piñeiro in relation to class actions, see Stuyck (2009), at 502, and Carballo Piñeiro (2009), § 111, at 117 *et seq.* But see also the possibility of branch jurisdiction which asserts jurisdiction to Dutch courts when the activities of a branch established in The Netherlands gave rise to the mass damage claims (Article 5(5)). This is also discussed by Kessedjian, see Kessedjian in Venturini and Bariatti, eds. (2009), at 539.
[111] Pursuant to Articles 15-17 Brussels I Regulation as suggested by Poot (2006), at 177.
[112] See Poot (2006), at 178; and Stadler (2009), at 158.
[113] C-89/91 *Shearson Lehman Hutton*, [1993] ECR I-139, para. 24.
[114] C-167/00 *Verein für Konsumenteninformation v. Karl Heinz Henkel*, [2002] ECR I-1811, para. 32.
[115] See also Poot (2006), at 175.

interpretation of 'matters relating to contracts' which according to the CJEU is to be interpreted independently from national concepts.[116] In *Réunion Européenne*,[117] the court emphasized the condition that parties should have entered freely into a 'contractual' obligation. In *Handte*, the CJEU stressed that there can only be a contractual relationship when a party has undertaken a *contractual obligation* towards the other party.[118] Others have completed this definition of 'contractual matter' by stating that 'not only must the nature of the dispute be analysed, but the identity of the potential *dramatis personae* must be reasonably predictable *inter se*'.[119] The question is therefore whether an obligation under a collective settlement should be regarded as a 'contractual' obligation under Article 5(1) with respect to *interested parties*. All the more since the CJEU generally applies a restrictive interpretation to the concept 'contractual matters' on grounds of the principle of legal certainty to reduce the scope of the *forum contractus* under Article 5(1).[120]

If it does fall under the definition of 'contractual matters', one must identify the settlement agreement within the specific categories of contracts. Since a collective settlement is not a sales contract or a contract for the provision of services, the place of the obligation in question will have to be determined in accordance with Article 5(1)(a).[121] This leads to a complex identification of the place of the obligation in question in which one should first identify the obligation 'upon which claimant's action is based' and subsequently localize the place of performance by virtue of the law applicable to the contract ('*lex causae*').[122]

Firstly, should the 'claimant's action' be regarded as the applicant's request to the court to declare the settlement agreement binding?[123] Or alternatively, should this translate into an obligation under the settlement agreement? The latter would depend on *who* will seek to enforce *which obligation* under the settlement agreement. For example, the representative association or the *interested person* could request compensation if the alleged responsible party refused to pay out as agreed under the settlement agreement. The place of payment would be localized according to the *lex causae*, or the law governing the settlement agreement. If the settlement agreement does not include a choice of law clause,[124] the applicable law will be determined by Article 4 Rome I Regulation. Since a settlement agreement does not cover one of the types of contracts identified under Article 4(1), the applicable law governing the contract shall be governed by the law of the country where,

[116] Case 34/82 *Peters v. ZNAV*, [1983] ECR 987, § 9. See also Carballo Piñeiro (2009), § 108, at 113.
[117] C-51/97 *Réunion Européenne v. Spliethoff's*, [1998] ECR I-6511.
[118] C-26/91 *Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA*, [1992] ECR I-3967, paras. 15 and 20.
[119] Newton, J., *The Uniform Interpretation of the Brussels and Lugano Conventions* (2002), at 50.
[120] C-26/91 *Handte v. Traitements*, [1992] ECR I-3967, para. 14.
[121] According to Article 5(1)(c) when subparagraph (b) does not apply, then subparagraph (a) applies. As stated above, Article 5(1) Brussels and Lugano Conventions merely embodies sub (a).
[122] According to CJEU settled case law, which is mainly based on Case 14/76 *De Bloos v. Bouyer*, [1976] ECR 1497 and Case 12/76 *Tessili v. Dunlop*, [1976] ECR 1473.
[123] Poot (2006), at 176.
[124] Article 3 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), OJ 2008 L 177/6, at 6-16 [hereafter Rome I Regulation].

pursuant to Article 4(2), the party required to effect the characteristic performance of the contract has his habitual residence. The question is whether the party or parties required to effect characteristic performance under a settlement agreement are the interested parties to renounce their rights to initiate individual proceedings as argued above, or whether they are the *alleged responsible parties* who are required to pay compensation.[125]

A similar reasoning could be made in the reversed situation in which the *alleged responsible* party seeks from the interested persons (or the representative association) not to initiate proceedings against him, but this does not lead to an alternative competent forum under Article 5(1). In this situation, the obligation 'upon which the action is based' would involve an '*obligation not to do*', namely the obligation to not initiate proceedings *anywhere*, but in particular in none of the Member States. In the *Besix* case, the CJEU was asked how to locate the place of performance of an obligation *not* to do.[126] The CJEU ruled that such an obligation not to do without any geographical limits makes it impossible to determine a *forum contractus* under Article 5 and leaves the main jurisdiction rule of Article 2 as the sole jurisdiction ground.[127]

One could conclude that with respect to this second approach, it is very unlikely that the special jurisdiction rule under Article 5(1) is suitable to allocate jurisdiction in relation to contractual obligations under the settlement agreement.

2.6.3 Choice of Forum

The question is whether the jurisdictional uncertainties above could be taken away by incorporating a choice of forum for the Amsterdam Court in the settlement agreement as provided for under Article 23 Brussels I Regulation. The possibility of a choice of forum would be particularly helpful when the foundation of the court's jurisdiction is uncertain because not all applicants are domiciled in The Netherlands, or when the majority of the interested parties represented by the representative associations are not domiciled in The Netherlands.

Article 23 Brussels I Regulation institutes the requirement of internationality. It has been argued that the internationality requirement is satisfied if the dispute contains foreign elements, even if all the parties are domiciled in a Member State – or in the present case The Netherlands. A settlement agreement, concluded for the benefit of foreign interested parties or even regarding alleged damages arising out of a harmful event occurred outside The Netherlands involving foreign elements, would satisfy the internationality requirement.[128]

Furthermore, the choice of forum clause should satisfy the formal requirements of Article 23, including the requirement that the chosen court should settle any dispute in connection with a particular legal relationship.[129] With respect to the latter, in the case of the WCAM

[125] See paragraph 2.4 which deals with Article 2 Brussels I Regulation.
[126] C-256/00 *Besix v. WABAG*, [2002] ECR I-1699.
[127] Ibid., paras. 49-50.
[128] Poot (2006), at 179.
[129] Pursuant to Article 23(1) Brussels I Regulation.

procedure, the chosen court would be asked to declare the settlement agreement concluded in connection with a mass damage binding. This is a sufficiently described and particular relationship as required by Article 23.

Another question in relation to *representative settlements* is whether such a choice of forum concluded by representative applicants in the settlement agreement would also bind the interested parties, who are not parties to the agreement, and have therefore not agreed on a choice of forum. In other words, can a choice of forum clause concluded for the benefit of third parties – the affected or interested persons for whose benefit the settlement agreement was concluded – who have not signed the clause still be valid and can these third parties avail themselves of the choice of forum clause even if they have not explicitly consented to the choice of forum? It seems that this question can be answered positively by analogously applying the CJEU's ruling in *Gerling*, which dealt with an insurance contract entered into between an insurer and a policy holder.[130] The insurance contract contained a choice of forum clause not only for the benefit of the policy holder, but also in favour of beneficiaries – third parties – to the contract. The CJEU ruled that the third parties could rely on the jurisdiction clause even if they had not expressly signed and thus consented to the jurisdiction clause, provided that the formal requirements with respect to writing as enshrined in Article 23 are satisfied and that the consent of the insurer has been clearly manifested. The CJEU stated that third parties may rely on the clause even when they are not parties to the (insurance) contract and even when they are different persons whose identity may even be *unknown* when the contract was signed.[131] In this respect the position of *interested known* and *unkown parties* in WCAM cases may be comparable to the situation of the beneficiaries in the *Gerling* case.[132] A choice of forum clause embodied in a settlement agreement in writing pursuant to the formal requirements of Article 23 and provided that the *alleged responsible party* clearly manifested its consent to the choice of forum for the Amsterdam Court, could be an option to validly assert jurisdiction to the Amsterdam Court over foreign interested parties.

Moreover, Article 23 does not require that a defendant must be domiciled in a Member State or EFTA country. It is sufficient that one of the parties to the dispute is so domiciled which can, thus, also be the claimant or petitioner. In any such case, a choice of forum clause in the settlement agreement meeting the requirement of Article 23 may also bind interested parties domiciled outside EU or EFTA States. As a consequence, were there to be a choice of forum clause for the Amsterdam Court for the benefit of the interested parties for whom the settlement agreement was concluded and were it to be incorporated in the settlement agreement subject to the Court's approval, it would solve some of the jurisdiction problems raised under the application of the Brussels I Regulation.

---

[130] Case 201/82 *Gerling Konzern Speziale Kreditversicherung AG and others v. Amministrazione del Tesoro dello Stato*, [1983] ECR 2503.

[131] Ibid, at paras. 18-20. See Vlas, P., 'Commentaar EEX-Verdrag-EVEX-EEX-Verordening', in Wesseling-Van Gent, E., Ynzonides, M., and Vlas, P., eds., *Burgerlijke rechtsvordering (De Groene Serie),* (loose-leaf: Supplement 325) (2009) Article 23, aantekening 7.2; and C-112/03 *Société financière et industrielle du Peloux*, [2005] ECR I-3707. See Kramer, X.E., 'Rechtsmacht en forumkeuze in het internationaal verzekeringsrecht: Nieuwe ontwikkelingen', *Verzekerings-Archief* (2006), 4, 110-117.

[132] See also Stadler (2009), at 159, *contra* Poot (2006), at 179.

Furthermore, it should be noted that interested parties have the opportunity to *opt out* of the settlement agreement, and have therefore also the chance to *opt out* of a *choice of forum* for the Amsterdam Court if they do not want to be subjected to its jurisdiction. Similar advantages and disadvantages concerning the binding effect of known and unknown interested parties play a role.

If a choice of forum clause incorporated in the settlement agreement is an option, this would facilitate the access to the Amsterdam Court for collective settlements under the WCAM procedure. Especially since the Brussels I Regulation does not require a connection between the chosen court and the dispute.[133] A certain degree of *forum shopping* to deal with mass damages and its dispute resolution will have to be accepted.

In any event, a choice of court clause should be understood as a separate agreement within the settlement agreement in order to avoid the clause being challenged when the settlement is challenged and to ensure that the choice of court clause will survive the settlement agreement when the latter is considered invalid. Separability of the choice of court clause should be guaranteed.

2.7 The Dutch Jurisdiction Rule of Article 3 Dutch Code of Civil Procedure

Outside the scope of the Brussels I Regulation and the Brussels and Lugano Conventions, the extraterritorial reach of Dutch courts is regulated by Articles 1-14 DCCP. The particular character of a WCAM procedure which starts with a request for the binding declaration of the settlement agreement entails the application of Article 3. The first paragraph establishes the general jurisdiction rule for procedures initiated by petition to Dutch courts when the domicile of any of the *petitioner(s)* or *applicant(s)*, or any of the interested parties is located in The Netherlands. In order to assert jurisdiction over foreign *interested parties* for whose benefit the settlement was concluded – and thereby bind them unless they *opt out* – the Court did not need to consider their place of domicile. Instead it only had to determine where (one) of the applicants was domiciled.

Article 3(c) contains an open-ended criterion involving a certain degree of discretion for Dutch courts to assert jurisdiction over a petition case when the dispute is ‘otherwise sufficiently connected with the Dutch legal order’.[134] This Article would provide additional jurisdiction criteria in the event none of the applicants is domiciled in The Netherlands and would allow Dutch courts to accept jurisdiction on a case-by-case basis when there are *sufficient* connecting factors with The Netherlands. The question is whether a WCAM binding declaration requested by applicants, none of whom are domiciled in The Netherlands, will otherwise be *sufficiently connected* with the Dutch legal order to justify jurisdiction. In

[133] C-159/97 *Transporti Castelletti v. Hugo Trumpy*, [1999] ECR I-1597, para. 52.

[134] *Explanatory Report Proposal DCCP*, at 31; and see Vlas, P., ‘Commentaar Burgerlijke rechtsvordering. Boek 1. Titel 1. Eerste afdeling. De rechtsmacht van de Nederlandse rechter’, in Wesseling-Van Gent, E., Ynzonides, M., and Vlas, P., eds., *Burgerlijke rechtsvordering (De Groene Serie),* (loose-leaf: Supplement 314) (Deventer: Kluwer, 2008), Article 3, aantekening 5.

any event, the possibility of a choice of forum for the Amsterdam Court also exists under Article 8(1) DCCP.

2.8 The Search for Uniform Jurisdiction Rules for Collective Redress Mechanisms

The particular feature of the binding declaration of a WCAM settlement differentiates the WCAM procedure from other collective redress procedures. This is also reflected in the jurisdictional question. In a WCAM procedure, the negotiation of the settlement agreement is experienced as the hardest part of the collective redress, but once the settlement is concluded, the question regarding which court declares the settlement binding is straightforward, as parties will bring their request to the Amsterdam Court in accordance with the WCAM procedure.

In the long term, the interviewees acknowledge that when more (Member) States adopt collective redress mechanisms, the question will arise on how to allocate judicial jurisdiction among courts. The general view is that the allocation of jurisdiction in cross-border mass damage cases should primarily be regulated at European level and within the framework of the Brussels I Regulation by incorporating a jurisdiction rule specifically dealing with this matter. This would not be a problem when it comes to the substantive scope of the Brussels I Regulation and the rule could apply to different types of group actions as well as collective settlements.

The choice of an adequate jurisdiction ground was generally the subject of a vivid debate during the interviews. Many jurisdiction grounds were discussed:

- The place where the settlement was concluded was considered too random to provide for an adequate jurisdiction ground.

- The place where the majority or the greater part of the interested parties is located was considered inappropriate as this may be difficult to determine, especially when there are large numbers of *unknown interested* parties. Furthermore, due to the relatively small size of the Dutch economy in comparison to for instance France and Germany, the rule would generally not lead to The Netherlands as the place where the majority of the interested persons are located. This was considered detrimental to Dutch injured parties.

- The place where the event leading to the mass damage (either contractual or non-contractual) took place. The specific jurisdiction rule relating to tortuous matters under Article 5(3) could serve as a model. If the event took place in several States, there was no objection in letting the parties choose the competent forum.

- The place where the damage occurred or the place where the 'greater part' of the damage occurred. However, problems are expected as where the 'greater part' of the damage was caused may be difficult to determine in practice.[135]

- The home forum of the alleged responsible party. Several interviewees suggested the use of the centre of main interest (COMI) of the alleged responsible party which was inspired by the general rule of Regulation No 1346/2000 on Insolvency Proceedings.[136] Article 3(1) of that Regulation determines that

  > 'the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.'

- Apart from those rather closed norms, a preference is given to a more flexible formulation of the jurisdiction ground: The open character of the close connection requirement of Article 6(1) Brussels I Regulation is generally appreciated and the use of an open criterion was also discussed for the regulation of jurisdiction over mass claims, for instance at the forum with a close or the closest connection.

- Furthermore, it was also suggested that the 'close connection' criterion should be able to function as a correction when the forum specified by the jurisdiction rules has no or insufficient connection with the mass damage event.

- Whether a Dutch court should be able to accept jurisdiction in a mass damage case on the basis of a minor connection with the forum should depend on the availability of other forums closely connected to the case. In this context, the concern was expressed that in situations such as the *Converium* case, parties should be able to find a competent court to provide collective relief if parties have agreed on compensation. The Dutch forum should be able to accept jurisdiction in WCAM cases when there is no collective redress available in the Swiss forum and irrespective of the limited connection with the forum. Provided that there is no abuse of process, this concern expressed the willingness to accept a form of *forum necessitatis*.

- A correction on the basis of a *forum non conveniens* doctrine known in most common law jurisdictions was however not favoured and not considered an option within the framework of the Brussels I Regulation.

---

[135] See also Case 21/76 *Bier v. Mines de potasse d'Alsace*, [1976] ECR 1735, in which the CJEU had to distinghuish among the place where the harmful event occurred between the *handlungsort* and the *erfolgsort*.

[136] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. Preamble of the Insolvency Regulation, Recital 13, reads: 'The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.

A jurisdiction rule dealing specifically with collective claims was proposed to be incorporated in a new Article 6a or Article 6(3) within the Brussels I Regulation. The new jurisdiction rule would apply to all types of mass damage events and would not be sector specific. The enactment of such a rule under the head of Article 6 would mean that the rule confers jurisdiction by way of an alternative to the general rule of defendant's domicile under Article 2 Brussels I Regulation. The general view was that in the case of multiple claimants or multiple interested parties located in several Member States, one forum should have jurisdiction over all claims; but concentration of claims to one single forum does not mean that the jurisdiction rule has an exclusive nature. The enactment of an alternative jurisdiction rule dealing with the matter, which may lead to multiple forums being available, was considered suitable. The majority of the interviewees accepted a certain degree of *forum shopping* even if this may mean that parties searching for cross-border collective redress will temporarily chose the WCAM courts of The Netherlands for lack of similar mechanisms elsewhere.

2.9 Comparative Observations on U.S. Jurisdiction Law

In the U.S., the ordinary rules for jurisdiction also determine the jurisdictional reach of courts in class action cases involving foreign class members.[137]

The regulation of international jurisdiction in the U.S. is primarily state-based, due to the importance given to state sovereignty under the U.S. federal structure. Furthermore, the exercise of jurisdiction by U.S. courts is subjected to the U.S. Constitution; especially the due process clause incorporated by the XIVth Amendment imposes constitutional standards on the exercise of jurisdiction.[138] From the due process clause stems one of the key principles of U.S. jurisdiction law, which is the requirement that a defendant who is not present within the territory of the forum should have certain 'minimum contacts' with the territory of the forum.[139]

This principle equally applies to cross-border class action cases, and as a consequence jurisdiction over an alleged responsible party is established on the basis of its contacts with the forum regardless of the contacts of plaintiff class members, whether they are American or foreign and whether they are represented, present or absent during the proceedings.[140] This was made clear by the Supreme Court in *Phillips Petroleum v. Shutts*[141] in which the Supreme Court held that 'a forum State may exercise jurisdiction over the claim of an absent

---

[137] See *Phillips Petroleum v. Shutts*, 472 U.S. 797, 821-2 (1985); see also ILA Report on Transnational Group Actions, § 55. See for Canada: *Bisaillon v. Concordia University*, [2006] 1 SCR 666.

[138] First established by the Supreme Court in *Pennoyer v. Neff*, 95 U.S. 714 (1878). See for a general overview of U.S. law on international litigation, Chapter 5 of Van Lith, H., *International Jurisdiction in Commercial Litigation. Common Grounds for Uniform Rules in Contractual Disputes* (2009).

[139] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), at 316.

[140] See Bassett, D.L., 'U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction', 72 *Fordham Law Review* (2003), 1, 41-92, at 47 and at 51 *et seq.* See also Pinna, A., 'Les groupes internationaux de sociétés face aux class actions américaines' in Boucobza, X., and Mecarelli, G., eds., *Groupes internationaux de sociétés: nouveaux défis, nouveaux dangers*', (2007), at 13, § 18 *et seq*., available at SSRN: http://ssrn.com/abstract=1022878.

[141] 472 U.S. 797 (1985).

class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.'[142]

Apart from the jurisdiction of U.S. courts over alleged responsible parties in the capacity of defendants, U.S. courts are also concerned with the question whether they have jurisdiction to bind class plaintiffs, especially the absent class plaintiffs.[143] This is however not done on the basis of the minimum contacts test.[144] In *Phillips Petroleum v. Shutts* the Supreme Court specifically addressed the particularity of absent class plaintiffs in class actions in relation to international jurisdiction. The Supreme Court indicates that jurisdiction to bind absent class members is based on consent and consent is deemed to exist when a fully descriptive notice was given with an explanation of the right to 'opt out', which right has not been exercised.[145] It further held that the due process clause protects 'persons' and thus includes plaintiffs and that absent plaintiffs are therefore also 'entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims'.[146] The Supreme Court then identifies 'various safeguards that are necessary to bind (absent) class plaintiffs'[147] and formulates 'minimal procedural due process protections',[148] requiring that a class plaintiff should (1) receive notice, (2) have an opportunity to be heard, (3) have an opportunity to remove himself from the class by executing and returning an "opt out" form to the court, and the Court emphasizes that the due process clause requires that (4) the named plaintiff at all times adequately represent the interests of the absent class members.[149] If one of these minimal procedural due process protections has not been safeguarded, there may be jurisdictional consequences if it is related to the jurisdiction over the class plaintiff.

Finally, it should be noted that the majority of U.S. courts has discretionary power, based on an American version of the *forum non conveniens* doctrine, to eventually decline jurisdiction on the basis that another more convenient court is situated somewhere else. As a consequence, even if there is a legal basis for jurisdiction over the plaintiff's (contractual) claim in order to subject the defendant to the jurisdiction of a U.S. court and the exercise of this jurisdiction is consistent with constitutional due process standards, most U.S. courts are still allowed to decline jurisdiction on the principle that it is a *forum non conveniens*.[150] This is done on the basis of a case-by-case appreciation of *conveniens* factors.[151] In relation to

---

[142] Ibid., at 811; see also Kahan, M., and Silberman, L., 'The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc,' 73 *New York University Law Review* (1998), 3, 765-792, at 770.
[143] See also Pinna (2007), at 17, § 23.
[144] Bassett (2003), at 55 and 59. But see for a proposed different approach Cottreau, S.T.O., 'The Due Process Right to Opt Out of Class Actions', 73 *New York University Law Review* (1998), 480-528, at 503 *et seq*.
[145] Ibid., at 813 *et seq.*; and see also ILA Report on Transnational Group Actions, at § 56; Adler, D.J.D., and Lunsingh Scheurleer , D.F., 'Class Action Litigation in the U.S.', in Hart, F.M.A., ed., *Collectieve Acties in de Financiële Sector* (2009), 145-168, at 160; and Bassett (2003), at 55 and 60.
[146] 472 U.S. 797 (1985), at 811.
[147] Kahan and Silberman (1998), at 770.
[148] 472 U.S. 797 (1985), at 811-812.
[149] Ibid., at 812. See for a more in-depth overview Bassett (2003), at 64-75.
[150] The *forum non conveniens* doctrine was formally recognized as part of the U.S. jurisdictional scheme in 1947 by the U.S. Supreme Court decisions in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and *Koster v. Lumbermens' Mutual Casualty Co*, 330 U.S. 518 (1947).
[151] *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, at 263 (1981).

transnational class actions, it is important to observe that the existence of foreign class members could be part of the *conveniens* appreciation and lead to a court declining jurisdiction in favour of a another court. Such an approach is unknown in the Netherlands.[152]

Although the WCAM Act is essentially based on class settlements and is therefore not comparable to 'classic' U.S. class actions, it is important to observe the different conceptual approach taken by the Amsterdam Court with regard to the jurisdiction to bind interested parties. Unlike the Amsterdam Court, the U.S. Supreme Court emphasizes the differences between a defendant and an absent class plaintiff, who in this context may be considered as an interested party. The Supreme Court argues that

> '[u]nlike a defendant in a normal civil suit, an absent class-action plaintiff [like an interested party] is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection. In most class actions an absent plaintiff is provided at least with an opportunity to "opt out" of the class'.[153]

Conversely, it should be noted that the minimal procedural due process safeguards, as formulated by the Supreme Court and explained in the previous paragraph, are very similar to the criteria used by the Amsterdam Court to assess the WCAM settlement in order to declare it binding for (foreign) interested persons.

A final observation should be made regarding securities class actions. The jurisdiction question of class actions under the Securities Exchange Act of 1933 was developed by the Federal Court of Appeal for the Second Circuit (covering New York) and by and large followed by other federal circuits. It entailed a two-fold test: the effects test and the conduct test.[154] The effects test assesses whether conduct outside the U.S. has had a substantial adverse effect on American investors or securities markets.[155] The conduct test assesses whether the defendant's conduct in the U.S. was more than merely preparatory to the fraud, and whether particular acts or culpable failures to act within the U.S. directly caused losses to

---

[152] See Tzankova, I.N., 'Toegang tot het recht bij Europese Massaschade', 82 *NJB* 2 (2007), 41, 2634-2642, at 2637.
[153] Ibid., at 810.
[154] Recently reaffirmed by *Morrison v. National Australian Bank Ltd.* No. 08–1191, Decided 24 June 2010. See also De Wulf, H., and Van den Steen, L., 'Enkele IPR-problemen uit het economisch recht: het mogelijke conflict tussen lex concursus en lex societatis, de effecten op rekening, en Europees getinte class actions in de VS', in Erauw, J., and Taelman, P., eds., *Nieuw Internationaal Privaatrecht: Meer Europees, maar globaal* (2009), 391- 483, at 478. See in general on the international securities class actions; Silberman, L., and Choi, S., 'Transnational Litigation and Global Securities Class Actions' (January 13, 2009), NYU School of Law, Public Law Research Paper No. 09-06; NYU Law and Economics Research Paper; and Buxbaum, H., 'Multinational Class Actions under Federal Securities Law: Managing Jurisdictional Conflicts', 46 *Columbia Journal of Transnational Law* (2007), 14-71; Cox, J.D., Thomas, R.S., and Bai, L., 'Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses', *Wisconsin Law Review* (2009), 2, 421-454; Liman, L.J., and Herrington, D.H., 'Whether "Foreign-cubed" Securities Class Actions Fit in U.S. Courts', *New York Law Journal* (2009), www.nylj.com.
[155] Developed in *Schoenbaum v. Firstbrook*, U.S. Court of Appeals, 2nd Circuit, 405 F.2d 200 (1968).

foreign investors abroad.[156] These tests were not ‘easy to administer’.[157] In the *Shell* case, neither of these tests were fulfilled and the Court ruled in particular in relation to the conduct test that *Shell* did not engage in conduct in the U.S. that amounted to more than mere preparatory acts in furtherance of the alleged fraud in reporting its proved oil and gas reserves. The Court thereby refused jurisdiction over the securities class claims brought by non-U.S. purchasers of its stock.[158]

One particular kind of security class action involves the ‘foreign-cubed’ class actions. ‘F-cubed’ class actions include (1) non-U.S. investors who purchased shares (2) from a non-U.S defendant (3) on a foreign securities exchange. The question is whether such f-cubed actions belong in U.S. courts. The extraterritorial application of the U.S. securities laws, as well as the extraterritorial jurisdictional reach of U.S. courts over ‘f-cubed’ class plaintiffs was not clearly defined.[159]

Both questions regarding the extraterritorial application of U.S. securities laws and the foreign cubed securities class actions were dealt with in the recent landmark case of *Morrison v. National Australian Bank Ltd*[160]of 24 June 2010. It determines several important aspects concerning the extraterritorial reach of U.S. securities laws that mainly replace the conduct and effects tests by a transactional test limiting the application of § 10(b) of the Securities Exchange Act to securities listed on U.S. exchanges, and to transactions regarding any such securities made in the U.S.[161] As a consequence, this U.S. Supreme Court decision blocks f-cubed cases involving security class actions by non-U.S. class plaintiff investors related to securities from a company listed on a foreign securities exchange and purchased outside the U.S. This decision is likely to render collective settlements reached under the WCAM an even more valuable alternative to U.S. class action litigation, provided that a settlement can be reached.

Although the jurisdiction question was not the central issue in *Morrison v. National Australian Bank Ltd*, the new transactional test delimiting the extraterritorial reach of U.S. securities laws might affect the jurisdictional reach of U.S. courts based on the conduct and effects tests. Conversely, one should note that U.S. Congress passed a bill the day after the

---

[156] Formulated in *Bersch v. Drexel Firestone, Inc.*, U.S. Court of Appeals, 2nd Circuit, 519 F.2d 974 (1975) and *Robinson v. TCI/US West Commc'n, Inc.*, 117 F.3d 900, 905 (5th Cir.1997). See also De Wulf and Van den Steen in Erauw and Taelman, eds. (2009), at 479-480.
[157] *Morrison v. National Australian Bank Ltd.*, No. 08–1191, Decided 24 June 2010; see also Adler and Lunsingh Scheurleer in Hart, ed. (2009), at 167.
[158] *In re Royal Dutch Shell Transport Securities Litigation*, U.S. District Court, District of New Jersey, 522 F.Supp.2d 712 (2007), at 723.
[159] See Adler and Lunsingh Scheurleer in Hart, ed. (2009), at 165.
[160] No. 08–1191, Decided 24 June 2010. The decision is a majority decision but it is unanimous as to the fact that f-cubed class actions do not fall within the scope of U.S. securities laws. The concurring opinion of Justice Stevens joined by Ginsburg and the opinion of Breyer concurring in part, relate primarily to the question as to whether the new transaction test is appropriate in cases other than f-cubed class actions.
[161] No. 08–1191, Decided 24 June 2010, at 18. It is to be noted that the Court reached its decision not on the basis of jurisdiction but by the application of the Securities Act (i.e. U.S. courts have jurisdiction but the f-cubed class action fails on the merits as the transaction does not fall within the scope of U.S. securities laws).

Morrison v. National Australian Bank Ltd which re-affirms the conduct and effects tests for the jurisdictional reach of U.S. courts.[162]

2.10 Parallel Proceedings

In a classical situation of *lis pendens* where two or more courts are seized, Article 27 Brussels I Regulation establishes that in proceedings brought in courts of different Member States involving 1) *the same parties* and 2) claims with the *same cause of action*, which include the 3) same object or subject matter[163] the court last seized must – and at its own motion – stay proceedings in favour of another court firstly seized until the jurisdiction of the court first seized has been established.[164] This establishes the principle of *first come*, *first served*. This obligation to decline jurisdiction does not 'leave room for any discretion as to whether one of the courts seized is better placed than the other to deal with the substance of the case'.[165] Only if the jurisdiction of the first court seized is contested[166] and if it does not decline jurisdiction the court secondly seized *may*, at its own discretion, choose to stay proceedings until the jurisdiction of the court first seized is established.[167] This court secondly seized may merely stay proceedings, but may not examine the jurisdiction of the first court 'as the second court is not in a better position than the court first seized to determine whether the latter has jurisdiction'.[168]

In contrast to Article 27 Brussels I Regulation where a Dutch court must stay proceedings, Article 12 DCCP states that the Dutch court *may* stay proceedings. If a judgment of the foreign court firstly seized is recognizable and enforceable in The Netherlands, the secondly seized Dutch Court *must* decline jurisdiction. Article 12 DCCP is modelled on Article 27

---

[162] The Dodd-Frank Wall Street Reform and Consumer Protection Act at 1330 states that the Securities Act of 1933, Section 22 should be amended by adding at the end the following new subsection:

'(c) Extraterritorial Jurisdiction – The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 17(a) involving –
(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.'

[163] C-39/02 *Mærsk Olie & Gas*, [2004] ECR I-9657, para. 26; C-406/92 *"Tatry" v. the owners of the ship "Maciej Rataj"*, [1994] ECR I-5439, at paras. 36 and 37; Case 144/86 *Gubisch Maschinenfabrik v. Palumbo*, [1987] ECR 4861, para. 14.
[164] C-116/02 *Gasser v. MISAT*, [2003] ECR I-14693, paras. 42 and 43, referring to C-351/89 *Overseas Union v. New Hampshire Ins.*, [1991] ECR I-3317, para. 13. This applies except in the case where the court secondly seized has exclusive jurisdiction, as the ECJ stated that the *lis pendens* rule applies 'without prejudice to the case where the court second seized has exclusive jurisdiction … and in particular under Article 16 [Article 22 Brussels I Regulation] thereof'. The words 'in particular' in Article 22 of the Regulation should however not be interpreted as a possible derogation of the *lis pendens* rule in favour of a chosen court secondly seized as was decided in C-116/02 *Gasser v. MISAT*, [2003] ECR I-14693, para. 54.
[165] Opinion AG Léger in C-281/02 *Owusu v. Jackson,* [2005] ECR I-1383, para. 250.
[166] See C-351/89 *Overseas Union v. New Hampshire Ins.*, [1991] ECR I-3317, paras. 21 and 25; confirmed by C-116/02 *Gasser v. MISAT*, [2003] ECR I-14693, para. 44.
[167] C-351/89 *Overseas Union v. New Hampshire Ins.*, [1991] ECR I-3317, para. 26.
[168] Ibid., para. 23. See Jenard Report, at 41.

Brussels I Regulation and equally requires parallel proceedings to involve claims arising *out of the same cause of action* and against the *same parties*.[169]

In cases where 'related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings' in accordance with Article 28(1) Brussels I Regulation.[170] Actions are deemed to be 'related' when they 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.[171] Any court other than the court first seized may decline jurisdiction in order for the first court seized to consolidate proceedings, provided that the latter has jurisdiction over the case and that its law permits the consolidation and that one of the parties applies for consolidation.[172]

A similar rule allowing the consolidation of related proceedings does not exist under the Dutch jurisdiction rules of the DCCP.

The CJEU ruled in *Overseas Union Insurance Ltd v. New Hampshire Insurance Company*[173] that the rules established in both Articles 27 and 28 Brussels I Regulation, dealing respectively with *lis alibi pendens* and related actions, apply 'irrespective of the domicile of the parties to the two sets of proceedings', as long as the two courts involved are located in the Member States. As a consequence, when proceedings are started outside the Brussels and Lugano area, for instance in the U.S. and Dutch courts are secondly seized, the *lis pendens* or related action rules under Articles 27 and 28 of the Brussels I Regulation will not apply, even if the defendant or applicants are domiciled in a Member State. The *lis pendens* situation will then be regulated by Article 12 of the DCCP.

The question of parallel proceedings and related actions is equally relevant in multi-jurisdictional collective redress mechanisms: Parallel to a request for a binding declaration of a WCAM group settlement at the Amsterdam Court, an interested party could start individual proceedings or request a (negative) declaratory judgment abroad. Similarly, another collective action may have been instituted in another country, for instance, a U.S. class action, concerning the same mass damage that is the subject of a settlement agreement under a WCAM procedure in The Netherlands.

2.10.1 Lis Pendens

With respect to the *lis pendens* rule, the question is whether the above-mentioned situation involves the *same parties*, the *same cause of action* and the *same object*.

- The requirement of the *same cause of action* is the least problematic; the CJEU defined the cause of action as the 'facts and the rule of law relied on as the basis of

[169] Polak, M.V., 'De Trukendoos van het IPR', in Van den Berg, N., Henkemans, R., and Timmer, A., eds., *Massaclaims, Class actions op z'n Nederlands* (2007), 131-146, at 133.
[170] Article 28(1) Brussels I Regulation.
[171] Article 28(3) Brussels I Regulation.
[172] Article 28(2) Brussels I Regulation.
[173] C-351/89 *Overseas Union v. New Hampshire Ins.*, [1991] ECR I-3317.

the action'.[174] Most parallel collective proceedings will involve the *same mass damage event* giving rise to proceedings.

- As to the *same object of the action* – or subject matter – this has been defined by the CJEU as the end the action has in view.[175] The fact that the *object of the action*[176] of proceedings in a WCAM procedure is the request for a binding declaration of the settlement, whereas the *object* in a classic collective action is the awarding of compensation could have further consequences for the application of the *lis pendens* rule; both proceedings do not involve the *same object*. In that regard, a binding declaration of a WCAM settlement and a negative declaratory proceeding sought by an individual interested party to establish that he is not bound by the settlement should be understood as parallel collective procedures having the *same object*. In contrast, a (U.S.) class action or another opt-in collective redress mechanism and a request for binding declaration of a WCAM settlement do not have the same object of action.

- In relation to the *same parties*' requirement, it raises the question whether 'applicants' requesting a binding declaration of a WCAM group settlement are the '*same parties*' as an interested person instituting individual proceedings or requesting a declaratory judgment against the alleged responsible party, or even whether they are the same parties as *class members* against the alleged responsible party.[177] As M.V. Polak rightfully states, the standard *lis pendens* rule applies to situations in which parties are themselves participants to proceedings.[178]

  A distinction should be made between the different types of collective redress procedures; collective opt-in procedures, class actions and joinders are generally instituted by interested parties, whereas the WCAM procedure and negative declaratory proceedings are generally instituted by applicants such as representative parties or the alleged responsible parties and not by the interested or injured parties.[179]

  The particular nature of collective actions in general and the WCAM procedure in particular is that interested parties themselves do not institute proceedings but are bound by a court's decision.[180] Under the WCAM procedure the interested parties are not participants to the proceedings, but the representative organization and the alleged responsible parties are. The question has never been addressed by the CJEU in relation to group actions, but the CJEU stated that the concept of 'same parties' should be interpreted autonomously and widely.[181] This could be an opportunity to

[174] C-406/92 *"Tatry" v. the owners of the ship "Maciej Rataj"*, [1994] ECR I-5439, at para. 38.
[175] Ibid., para. 40.
[176] Case 144/86 *Gubisch Maschinenfabrik v. Palumbo*, [1987] ECR 4861, at para. 15.
[177] See Fawcett (1995), 744-770, at 760.
[178] See Polak, M.V. (2007), 130.
[179] See also Polak, M.V. (2006), at 2350.
[180] Ibid.
[181] See Polak, M.V. (2007), at 137; referring to C-406/92 *"Tatry" v. the owners of the ship "Maciej Rataj"*, [1994] ECR I-5439, at para. 30; and (C-351/96) *Drouot assurances v. CMI and others*, [1998] ECR I-3075, para. 16.

enlarge the application of the *lis pendens* rule in complex situations of parallel collective procedure.

In sum, it is quite difficult to satisfy the requirements to activate the *lis pendens* rule in most parallel collective redress procedures. As a consequence, in most situations of parallel collective redress procedures in different courts of Member States in which one of the procedures involves a request for a binding declaration in a WCAM procedure, the court last seized has no obligation to stay proceedings in favour of the court first seized.

In practice, parallel collective proceedings including a WCAM procedure are not considered problematic. Principally because the voluntary nature of a WCAM collective settlement diminishes the risk of parallel procedures as it is highly unlikely that parties will institute proceedings elsewhere once a settlement agreement has successfully and satisfactory been reached. Conversely, parties would not settle if part of the claimants or interested parties have started proceedings elsewhere. If parallel proceedings do exist, the general view is that the Amsterdam Court requested to declare the settlement binding and secondly seized should not stay proceedings in favour of collective action instituted elsewhere by (part of the) other claimants.

2.10.2 Related Actions

Since the conditions of the *lis pendens* rule will rarely be satisfied, the question of the application of Article 28 dealing with related actions is an important provision to coordinate parallel collective redress procedures pending in courts of different Member States. The provision allows the court last seized to stay proceedings in favour of the court first seized. The CJEU decided in *Ship "Tatry"* that the concept of 'related actions' should be given an independent and broad interpretation and should cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive.[182] This broad interpretation facilitates the application of Article 28 in relation to parallel collective redress procedures. The discretionary power given to the court is generally appreciated by the parties involved, but it was suggested that the court should only stay proceedings at the request of the parties. In the *Shell* case, there was already a consolidated U.S. class action pending in the District Court of New Jersey when the Amsterdam Court was requested to declare the WCAM settlement binding. Article 28 Brussels I Regulation did not apply, since the court first seized in this related action was the New Jersey court which is not a Brussels or Lugano court. At the joint request of the applicants, the Amsterdam Court stayed proceedings in the WCAM procedure and waited for the New Jersey court to rule on its jurisdiction over non-U.S. shareholders. Whether the Court would have stayed proceedings without such a request would have depended on the situation and the length of the U.S. court proceedings.

2.10.3 Comparative Observations

A less strict version of the *lis pendens* rule is to be found in Article 3137 of the Civil Code of Quebec. The Article reads:

[182] C-406/92 *"Tatry" v. the owners of the ship "Maciej Rataj"*, [1994] ECR I-5439, at paras. 51-52.

> 'On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.'

First this rule states that the court *may* stay proceedings, and secondly it subjects this dismissal to the condition that the action can be recognized in another State.

But this softer tone has not prevented problems as to its application in group litigation in Canada: In *Canada Post v. Lépine*, the Supreme Court of Canada stated in its conclusions dealing with a complex case involving several collective settlements and judgments from different provinces that:

> 'the provincial legislatures should pay more attention to the framework for national class actions and the problems they present. More effective methods for managing jurisdictional disputes should be established in the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space. It is not this Court's role to define the necessary solutions. However, it is important to note the problems that sometimes seem to arise in conducting such actions.'[183]

The U.S. does not apply the strict *lis pendens* rule in which a court lastly seized must stay proceedings in favour of a court firstly seized.

In the U.S. the question of parallel proceedings is not a mechanical test and is not of a mandatory nature.[184] The dismissal of claims on the basis of parallel proceedings is left to the appreciation of the court on the basis of the *forum non conveniens* or comity. The regular factors of the *forum non conveniens* doctrine are used but are mainly concerned with procedural efficiency when it comes down to parallel proceedings.[185] Under the *forum non conveniens* doctrine the court secondly seized appreciates the adequacy of the foreign available forum and the court has to establish a balance of private and public interest factors.[186]

---

[183] *Canada Post Corp. v. Lépine*, [2009] 1 S.C.R. 549, para. 57. In fact the Supreme Court raised the *lis pendens* as a basis to refuse the recognition of a judgment rendered by a sister province. See also Monestier, T., 'Lepine v. Canada Post: Ironing Out Wrinkles in the Interprovincial Enforcement of Class Judgments', 34 *Advocates' Quarterly* (2008), 499-516, at 509-510.

[184] Teitz, L., 'Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgements in Transnational Litigation', 10 *Roger Williams University Law Review* (2004), 1-72, at 13.

[185] *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422 (2007); Teitz (2004), at 12-13.

[186] See in relation to securities litigation Buxbaum, H., 'Multinational class actions under federal securities law: managing jurisdictional conflicts', 46 *Columbia Journal of Transnational Law* (2007), 14-71, at 36 *et seq.* See more specifically on the application of the *forum non conveniens* doctrine to U.S. class actions, Felder, A., *Die Lehre vom* Forum Non Conveniens*, Voraussehbarkeit des Ergebnisses ihrer Anwendung und prozessuale Aspekte für Verfahrensparteien vor den U.S. Federal Courts und den State Courts in New York bei class actions unter besondere Berücksichtigung deutscher alternative Foren oder Parteien,* (2005), at 73-78.

In *Colorado River Water Conserv. Dist. v. United States*,[187] the Supreme Court ruled that the assessment of the appropriateness of dismissal in the event of concurrent jurisdiction included factors relating to the inconvenience of the forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent fora.[188] The Supreme Court's ruling is known to have established the doctrine of *abstention*, but the term 'comity' is used in relation to foreign States.[189]

Apart from parallel litigation, there are other ways in which the U.S. system deals with jurisdictional conflicts in collective actions which are based on coordination.

Mention should be made of the multidistrict litigation procedure (MDL) which is a federal procedure that allows the transfer of all civil cases of a similar type throughout the state to one single federal court.[190] The decision to transfer is taken by a panel of judges. MDL is frequently used when several districts have initiated class action proceedings and it was also used in the *Shell* case. Such a forced joinder of complex cases with connections in several fora on the basis of intra-judicial consultation is foreign to Europe but has been suggested as an alternative to the *lis pendens* rule.

In the event of various class actions and class settlements involving the *same* mass damage event that are awaited for approval in different courts or different countries, there is a risk of jurisdictional overlapping of class members and *interested parties* potentially joining the several collective settlements in order to recover the damages multiple times. Jurisdictional conflicts in relation to class settlements in U.S. and Canadian courts have been dealt with by coordination between courts. In order for the court addressed to approve a settlement concluded for the benefit of persons who were already covered by another settlement, the court later seized seeks to incorporate approvals of other courts of the other settlements involving the same mass damage event in order to include the members or interested parties under those settlements but avoiding overlap of interested parties covered by different settlements at the same time. The coordination between courts in those situations appeared to be very effective and is explained by Buxbaum as follows:

> 'In cases in which parallel actions had already begun in Canada, for example, some U.S. courts have addressed this question directly by seeking approval of settlements from the Canadian courts. In one such case, the settlement notice listed four related actions – one in the Southern District of New York, and one each in Ontario, Quebec and British Columbia – and noted that the settlement was contingent upon approval of all the courts involved.'[191]

[187] *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976).
[188] Ibid.
[189] Buxbaum (2007), at 38; and Teitz (2004), at 12.
[190] 28 U.S. Code § 1407. When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pre-trial proceedings (paragraph a).
[191] Buxbaum (2007), at 60.

This type of coordination of collective settlements could be an instrument that can be used in Europe if the subject matter is addressed at the European Union's level.

2.11 Concluding Remarks

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. The current terminology of the Brussels I Regulation is not suitable for the concepts used in the WCAM procedure. Qualifying 'interested parties' as 'defendants' is inappropriate to determine the territorial scope of the Brussels I Regulation as well as for the application of the jurisdictional rules under Articles 2 and 6(1) Brussels I Regulation.

Applying the jurisdiction regime of the Brussels I Regulation to the WCAM procedure triggers the rules of coordination in parallel procedures such as the principle of *lis pendens* and of related actions. Especially the *lis pendens* rule seems not adapted to group litigation and requires specific attention especially as to the requirement of the *same parties* and the *same object.* The discretionary power of the related actions rule appears to provide the best solution to coordinate international jurisdiction in parallel proceedings. It takes into account the different national procedures of collective redress and allows a more flexible approach.

The international jurisdiction rule of Article 3 DCCP which applies outside the scope of the Brussels I Regulation is suitable for establishing jurisdiction to the Amsterdam Court. The place of domicile of one of the applicants or an interested party largely suffices for the purpose of a request for a binding declaration of WCAM settlements involving foreign interested parties. If necessary – although it is difficult to imagine situations which would not be covered by Article 3(a) DCCP – the open-ended criterion laid down in Article 3(c) DCCP provides sufficient flexibility to establish jurisdiction for a request of a binding declaration 'otherwise sufficiently connected with the Dutch legal order'.

Within the scope of the Brussels I Regulation the jurisdiction problem can be solved by a practical solution which is the incorporation of a choice of forum clause in favour of the Amsterdam Court of Appeal in the settlement agreement. For the application of the Brussels I Regulation, Article 23 merely requires that one of the parties, either claimant or defendant, is domiciled in The Netherlands. By applying the *Gerling* case to the WCAM procedure, a choice of forum clause incorporated in a settlement agreement would also assert jurisdiction over interested persons for whom the agreement was concluded. The practical solution of incorporating a choice of forum clause in the settlement agreement in favour of the Amsterdam Court would render the WCAM available in transnational mass damage cases affecting foreign interested parties residing outside The Netherlands as long as one of the applicants or party to the settlement agreement is domiciled in The Netherlands.

When a choice of forum clause in favour of the Amsterdam Court is lacking in the settlement agreement, a different approach than that taken by the Amsterdam Court in the *Shell* case could be taken with regard to the identification of 'person to be sued' and the foundation of international jurisdiction of the Amsterdam Court. Jurisdiction could and should be based on

the underlying legal relationship or dispute subject of the settlement agreement. Instead of qualifying the interested person as defendant, as was done by the Amsterdam Court in the *Shell* case, one could instead identify which party would have been the defendant if the underlying claim had been brought to court and not settled under the WCAM procedure. That party – in most cases the alleged responsible party – would then be the easily identifiable 'person to be sued' in the sense of the Brussels I Regulation. As a consequence, the territorial scope of the Brussels I Regulation would be delimited by the place of establishment of the alleged responsible party in a Member State.[192] The representative association(s) could be based either in The Netherlands or abroad, as long as there are foreign interested parties involved in order to satisfy the international element requirement of the Brussels I Regulation. Dutch courts will have general jurisdiction if the alleged responsible party is established in The Netherlands. If the alleged responsible party is not established in The Netherlands, Dutch courts may still be competent if one of the special rules under Article 5 specify that Dutch courts have jurisdiction.

The WCAM procedure would and should no longer be available by the simple fact that one interested party is domiciled in The Netherlands. The foundation of the Court's international jurisdiction over foreign interested parties would be based on solid and legitimate grounds and not on the problematic application of concepts. Under those circumstances, the WCAM may become an effective method for collective redress in cases connected to The Netherlands.

With this alternative approach further clarification may be obtained on the application of the Brussels I Regulation in relation to WCAM settlements and the following questions might be referred to the CJEU:

1. When a court is requested to declare binding a WCAM settlement should

    a) a 'person to be sued' in the sense of Article 2 Brussels I Regulation be interpreted autonomously or should it be determined by national laws on civil procedure?

    b) If 'a person to be sued' in the sense of Article 2 Brussels I Regulation is to be interpreted autonomously, may an interested party be identified as a 'person to be sued'?

2. In order to determine the international jurisdiction over foreign parties in a WCAM procedure, may the Amsterdam Court consider the underlying legal relationship?

The tension existing between the concepts of the Brussels I Regulation and those applied in the WCAM collective settlement procedure demonstrate that the jurisdiction rules of the

[192] Article 2 in conjunction with Article 60 Brussels I Regulation. The latter states that a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business.

Brussels I Regulation have not been written for collective redress procedures in general or for collective settlements in particular. In expectation of and depending on the clarification provided by the CJEU, further research is needed in order to explore the compatibility of the Brussels I Regulation with the collective redress mechanism in various Member States.

If a reform to modify the Brussels I Regulation is considered needed in order to deal with collective redress, it should however take into account the differences between collective settlements and their particularities of binding declaration or court approval on the one hand and collective litigation on the other. Specific heads or jurisdiction rules may be added to the current jurisdictional scheme of the Brussels I Regulation to specifically deal with collective litigation and collective settlements and adjustments could be made to deal with concepts of ‘interested parties’ and ‘class members’. Finding a consensus for adequate jurisdiction grounds dealing specifically with mass claims may however appear difficult (see paragraph 2.8) and require further study.

3 Notification of Foreign Interested Parties

Article 907(3) DCC, lists the grounds upon which the Amsterdam Court shall reject the binding declaration, but does not formally state that the binding effect will be denied if notification was not effected properly. Nonetheless, in accordance with fair trial considerations and the safeguarding of fundamental rights of persons, *proper* cross-border notification at both stages of the WCAM procedure (i.e. the initiation of the WCAM proceedings and the binding effect judgment) is of primary importance for the effect of the binding settlement outside The Netherlands on foreign interested parties. In the *Dexia* case, the Court acknowledges the importance of the proper notification by stating that the fundamental principles of fair trial in relation to the interested parties and in particular Article 6 of the European Convention of Human Rights (ECHR) require that these parties are duly and timely notified of the proceedings in order to prepare their defence.[193] Moreover, the consequences of a binding declaration are serious; once bound by the settlement agreement, the right of initiating individual procedures is waived by operation of law, whereby the access to a judge or court guaranteed by Article 17 of the Dutch Constitution and to a fair trial pursuant to Article 6 ECHR are no longer available.[194]

The procedural rules of the WCAM provide for the method of notification at two different stages of the WCAM procedure:

1. When a settlement agreement has been concluded and is submitted to the Amsterdam Court, a *pre-binding* declaration notice should be given to interested parties at the start of the proceedings.[195] The notice should be given to (foreign) interested persons known to the petitioners on whose behalf the agreement was concluded.[196] These persons are identified in the request for binding declaration by their names and places of residence, whereby it shall be sufficient to use their last known addresses.[197] The content of the notice shall include additional information, such as the name and place of residence of the petitioners, a description of the event(s) leading up to the settlement and a description of the agreement and the request.[198] This notification stage provides the interested persons with an opportunity to appear and object to the proposed settlement.[199]

[193] *Dexia*, Court of Appeal Amsterdam of 25 January 2007, *NJ* (2007), 427, para. 5.2.
[194] Falkena, F.B., and Haak, M.J.F., 'De nieuwe wettelijke regeling afwikkeling massaschade', *Aansprakelijkheid, Verzekering en Schade* (2004), 5, 198-206, at 202.
[195] Article 1013(5) DCCP.
[196] Ibid., referring to Article 1013(1)(c) DCCP.
[197] Article 1013(1)(c) DCCP in conjunction with Article 7:907(1) DCC. The settlement agreement should include a description of the group or persons on whose behalf the agreement was concluded, taking into account the nature and the seriousness of their loss and the most accurate possible number of persons belonging to the group. Article 7:907(2)(a) and (b) DCC.
[198] Article 1013(5) DCCP.
[199] Article 1013(6) DCCP.

2. Once a binding declaration has been issued and the settlement agreement has been declared binding by the Court, a *post-binding* declaration notice is given to the effect of rendering the binding declaration irrevocable.[200] This notice must include a copy of the Court's decision to declare the agreement binding, a brief description of the agreement, in particular the method by which compensation can be obtained and, if the agreement so provides, the period within which the claim for compensation must be made, as well as the legal consequences of the binding declaration. The notice must further state how and within which period of time persons entitled to compensation can free themselves from the consequences of the binding declaration and opt out.[201]

Both notices should also be given to the applicants, and the notices must further state that the petition and the binding declaration are available for inspection at the court registrar's office.

The proper notification of the interested parties is crucial with respect to:

1. The safeguarding of fundamental rights of interested parties in *opt-out* procedures: While the consequence of *not* opting out is that a person is bound by the WCAM settlement, interested persons need to be informed about the WCAM proceedings for the binding declaration to give them an opportunity to appear and object to the proposed settlement and to enable them to take an informed decision as to their opt-out rights.

2. The international recognition of the WCAM settlements that are declared binding: The proper notification of interested persons affects the question of the recognition of the binding declaration by another court and, thus, the preemption of an interested party's right to initiate individual proceedings before any such other court.

The question is whether the existing provisions at both national and international level are sufficiently effective to reach important numbers of interested parties in a mass damage case or whether the notification of large numbers of interested parties leads to many practical problems and excessive costs. Should traditional notification methods be replaced by modern methods of notification in mass damage cases and should the WCAM Act be modified for that purpose or does this necessitate regulation at European or international level? In any event, the regulation of notification of interested persons in mass damage cases should provide for a balance between the effective notification of a large number of interested parties and the procedural safeguards to which each interested person is entitled.

3.1 Notification under the WCAM Procedural Rules

The Dutch legislator enacted specific procedural rules for notification of interested parties for whose benefit a WCAM group settlement agreement was concluded, which deviate from the

[200] Article 1017(3) DCCP.
[201] Ibid.

standard notification rules in the DCCP. However, the WCAM in its current form does not make any specific mention of notification *outside* The Netherlands of *foreign* interested parties.

Article 1013(5) DCCP states that the pre-binding declaration notice to appear shall be sent to known interested persons by *ordinary post*, unless the court determines otherwise. Article 1013(5) DCCP states that notice shall also be given by an announcement in one or more newspapers to be designated by the court. It has been argued that this additional requirement to notify by public announcement compensates for the less strict rule of (personal) notification by ordinary post.[202]

The methods of notification under the WCAM should be understood as *lex specialis* to the general rules for petition cases embodied in Articles 271 and 272 DCCP. These rules distinguish between notification of petitioners and interested persons who entered in appearance who shall be notified by ordinary post (Article 271) and interested persons who have not entered in appearance who shall be notified *by registered mail* (Article 272). The WCAM does not make this distinction and merely provides for notification by ordinary post. It derogates from the regular rules, which appears to be justified by the potentially large numbers of interested persons that shall be notified in mass damage cases and the heavy burden it causes for the applicants.[203]

Article 277 DCCP provides for the notification of persons residing within EU Member States[204] by implementing the EC Regulation 1393/2007 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Regulation 2007) and specifically states that the notification of persons domiciled in EU Member States should be effected in accordance with Article 14 of that Regulation.[205] As will be explained below, Article 14 Service Regulation 2007 prescribes the notification by *post through registered mail with acknowledgement of receipt*.

Article 1013(5) allows the court to deviate from the prescribed notification methods by ordering that the notification should be done in *some other way*. In the *Dexia* case, the Court did decide otherwise in relation to the Dutch residents, and held that due to the large number of interested parties, notification should *exclusively* be done through newspapers and petitioners' websites. This was justified by the fact that the case was so surrounded by publicity that it was not expected that interested parties would be unaware of the *Dexia* settlement and the request for its binding declaration. In the *Vie d'Or* settlement the Court

[202] Frenk, N., 'Massaschade: De Nederlandse benadering', *Aansprakelijkheid, Verzekering en Schade* (2007), 33, 214-222, at 220.

[203] See the Explanatory Memorandum to the WCAM, *Kamerstukken II* 2003/04, 29 414, no. 3 (MvT), at 26; Frenk (2007), at 220.

[204] See below for the specific position of Denmark as to the application of the 2007 Service Regulation.

[205] EC Regulation No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and repealing Council Regulation (EC) No 1348/2000 OJ L 324, 10.12.2007, at 79-120. Settled case law ruled in relation to the 2000 Service Regulation is still valid case law.

decided that notification of Dutch resident interested parties could be effected by e-mail, or by ordinary post if the e-mail address was not known to the applicants.[206]

Article 1017(3) regulates the *post-binding declaration* notification and states that notice should be sent by ordinary post, as soon as possible after the court's decision has become irrevocable, to the persons known to be entitled to compensation and to the representative associations. Furthermore, a notice shall be published in one or more newspapers to be designated by the court. The court may deviate from these requirements and order some other method of notification.

In sum, the special WCAM notification rules take into account the specific features of WCAM group settlements involving potentially large numbers of interested parties in mass damage cases, but do not specifically address methods for cross-border notification in the situation of interested parties located outside The Netherlands. Nor does the WCAM distinguish between the notification of known persons with known addresses, known persons with unknown addresses and the notification of unknown persons.

3.2 International Instruments Regulating Cross-Border Notification

Notification of *known* interested persons outside The Netherlands for the purpose of the WCAM may be subjected to several existing international instruments regulating cross-border service and notification of persons. The notification of persons with *known domicile* within an EU Member State is regulated by the Service Regulation 2007 which entered into force on 13 November 2008. The Hague Service Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Service Convention) entered into force for The Netherlands on 2 January 1976, and regulates the service on persons with *known addresses* in one of the Contracting States. There is a total of 60 Contracting States to the Hague Service Convention of 1965.[207]

In accordance with Article 20(1) Service Regulation 2007, the latter prevails between EU Member States over the provisions contained in the Hague Service Convention and over other provisions contained in bilateral or multilateral agreements concluded by the Member States.[208]

---

[206] *Vie d'Or*, Court of Appeal Amsterdam of 29 April 2009, *NJ* (2009), 448, para. 4.2.

[207] See the status table of the Convention of the Hague Conference on Private International Law, at http://www.hcch.net/index_en.php?act=conventions.status&cid=17. Apart from the EU and EFTA States the other Contracting States are: Albania, Argentina, Belarus, Bosnia and Herzegovina, Canada, People's Republic of China, Croatia, Egypt, India, Israel, Japan, Republic of Korea, Mexico, Russian Federation, Sri Lanka, the Former Yugoslav Republic of Macedonia, Turkey, Ukraine, the United States of America and Venezuela. There are also some non-Member States of the HCCH organization: among others, Botswana, Kuwait, Malawi and Pakistan.

[208] See in particular the Hague Convention of 1 March 1954 on Civil Procedure, which entered into force for The Netherlands on 27 June 1959, and is relevant among others for service effected in Morocco and Suriname, available at http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=33. See also the Dutch-British Civil Procedure Convention 1933, signed in London on 31 May 1932 (Treaty Series No. 24 (1933)), which is relevant for commonwealth territories not party to the Hague Service Convention 1965. These Conventions specify a

Both international instruments are designed to serve or notify persons involved in classical one-party litigations, but not for notification of an entire group or class of interested persons for whose benefit a *group settlement* has been concluded. More importantly, none of these instruments apply to persons whose address is unknown, let alone to unknown persons.[209] As will be demonstrated below, the methods of notification of judicial documents used in both instruments focus on personal notification.

3.2.1 The Service Regulation 2007

The Service Regulation 2007 seeks to improve and expedite the transmission of judicial and extrajudicial documents in civil or commercial matters[210] for service between the Member States. [211] The Regulation of 2007 repeals its predecessor, the Council Regulation (EC) No 1348/2000, in order to modify and improve the latter. The Service Regulation 2000 was substantially based on a Service Convention from 1997 that was negotiated at intergovernmental level and which however never entered into force.[212]

The Service Regulation 2007 does not apply where the address of the person to be served with the document is not known.[213] It has been ruled that the meaning of 'extrajudicial document' under the Regulation is an autonomous Community law concept, and it is to be expected that this also applies to 'judicial documents'.[214] In any event, the notification of interested parties in proceedings instituted by summons should be considered as a judicial document which falls under the scope of Article 1 Service Regulation 2007.

The Service Regulation 2007 provides for several ways of transmitting, serving and notifying documents, of which the most important are the transmission of documents between transmitting agencies and receiving agencies (Articles 4-11), the service by postal services (Article 14) and the direct service (Article 15). There is no hierarchy between the different methods provided by the Service Regulation and it is therefore possible to serve a document by using more than one method at the same time.[215] Where service is being effected both through agencies and by post, the time of service *vis-à-vis* the person on whom service is

---

method of service of documents effected by a request of a consul of the requesting State made to the authorities of the State addressed (Article 1 the Hague Convention and Article 3 Dutch-British Convention).

[209] See Article 1 of both instruments. See also Kramer, X.E., 'Naar een effectievere grensoverschrijdende betekening van stukken: De nieuwe Betekeningsverordening', *Nederlands Tijdschrift voor Europees Recht* (2008), 6, 172-178, at 172.

[210] The concept of civil and commercial matters is not defined by the Regulation, but reference is generally made to the decisions defining the concept under the Brussels I Regulation. See above and see Case 29/76 *LTU v. Eurocontrol*, [1976] ECR 1541.

[211] As stated in the European Judicial Atlas in Civil Matters at http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_information_en.htm. It includes Denmark which declared that it will implement the content of the Service Regulation 2007 on the basis of a parallel agreement concluded with the European Community. See the declaration in OJ L 331, 10.12.2008, at 21.

[212] Convention on the Service in the Member States of the European Union of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 26 May 1997, OJ 1997 C 261, at 1. See also the Explanatory Report on the EC Service Convention (OJ 1997 C 261, at 26), which may still be valuable for the EC Regulation 2007.

[213] See above, Article 1 Service Regulation 2007.

[214] C-14/08 *Roda Golf & Beach Resort*, [2009], *NJ* 2010, 39, with note by Vlas.

[215] C-473/04 *Plumex v. Young Sports NV*, [2006] ECR I-1417, at para. 22.

effected should be determined by the date of the first service validly effected for the purposes of a procedural time-limit linked to effecting service.[216] In contrast to the Hague Service Convention, service under the Regulation is directly effected in the State of the recipient.

Article 8 addresses the language used in the document served and Article 9 determines the date of service. Article 8 states that the document may be written in a language which the addressee understands or in the official language of the Member State addressed.[217] The addressee may refuse to accept service if the document is not written in any of these languages.[218] The service of the document can however be remedied through service of a document accompanied by a translation as soon as possible.[219] Article 9 provides that the date of service will in principle be determined in accordance with the law of the Member State addressed, but where the law of the State of origin requires that a document has to be served within a particular period, the date to be taken into account with respect to the applicant shall be determined by the law of the State of origin.[220]

In relation to the direct transmission between decentralized transmitting/receiving agencies, The Netherlands has appointed bailiffs as transmitting and receiving agencies for proceedings instituted by summons and courts or the registrar's offices for the notification of documents in procedures instituted by petitions. The court registrar's office – or *griffier* – has the task of notifying petitioners – or applicants – and the *interested parties*.[221]

According to Article 14 Service Regulation 2007, each Member State can – through its transmitting agencies – effect service of judicial documents directly by postal services on persons residing in another Member State by registered letter with acknowledgement of receipt or the equivalent.[222] For the notification in the WCAM procedure, which is instituted

[216] Ibid., at para. 32.
[217] If there are several official languages in the Member State addressed, the language used should be the official language or one of the official languages of the place where service is to be effected.
[218] Annexed to the Service Regulation is a standard form to inform the addressees of their right to refuse to accept the document to be served at the time of service or by returning the document to the receiving agency within a week.
[219] Article 8(3) and see C-443/03 *Götz Leffler v. Berlin Chemie AG*, [2005] ECR I-9611; C-14/07 *Weiss und Partner*, [2008] ECR I-3367.
[220] See Kramer (2008), at 173 and 177.
[221] *Wet van 13 december 2001 tot uitvoering van de verordening (EG) Nr. 1348/2000 van de Raad van de Europese Unie van 29 mei 2000 inzake de betekening en de kennisgeving in de lidstaten van gerechtelijke en buitengerechtelijke stukken in burgerlijke of in handelszaken*: Article 2(3) Implementation Act of the Service Regulation; see also Freudenthal, M., *Schets van het Europees civiel procesrecht: Europees burgerlijk procesrecht voor de Nederlandse rechtspraktijk* (2007), at 121.
[222] See also the enactment of Article 56 DCCP regulating the service by postal services in summons cases by the bailiffs as a result of *Wet van 29 mei 2009 tot wijziging van de Uitvoeringswet EG-betekeningsverordening ter uitvoering van Verordening (EG) nr. 1393/2007 van het Europees Parlement en de Raad van 13 november 2007 inzake de betekening en de kennisgeving in de lidstaten van gerechtelijke en buitengerechtelijke stukken in burgerlijke of in handelszaken en tot intrekking van Verordening (EG) nr. 1348/2000 (PbEU L 324/79)*. See also for a general overview Freudenthal, M., 'Europese Betekeningsverordening: waarom niet per post?', *Advocatenblad* (2003), 11, 472-477.

by a joint petition, this means that the court registrar's office may notify by means of a registered letter with acknowledgement of receipt.[223]

Article 19(1) Service Regulation 2007 applies to writs of summons or equivalent, and therefore also to notification acts in petition cases. The provision states that when the defendant does not appear, a judgment may not be pronounced unless it is established that the document was served according to the Member State's domestic law or delivered in accordance with another method prescribed under the Regulation and that the defendant had sufficient time to submit a defence. A judgment may however be delivered if the document was transmitted by one of the methods laid down in the Service Regulation, and if more than six months have elapsed and no certificate of any kind has been obtained in spite of every reasonable effort by the competent authorities of the Member State addressed.[224] Furthermore, if the defendant did not know about the document to make a timely appearance, it is still possible for him to apply for relief within a reasonable time after finding out about the judgment.[225] This provision should be read in combination with Article 26(2) of the Brussels I Regulation, which states that a court shall stay its proceedings as long as it is not shown that the defendant has been able to receive the documents instituting proceedings in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.[226] It is however unknown how this should be applied in the case when thousands of notices are sent. The court will not wait six months for its binding declaration when a certificate was not provided for each person served. Furthermore, as will be explained below the court appears to be satisfied when a certain percentage of the notices sent have actually been received. It does not seem to impose the requirements of Article 19.

3.2.2 The Hague Service Convention

The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters was drafted in the midst of the Hague Conference on Private International Law (HCCH).[227] The Hague Service Convention is based on international cooperation between Contracting States and on the transmission of documents through a central authority. The service is effected in the transmitting State in accordance with its national procedure and is then notified and transferred to the State addressed through a central authority. Unlike the Service Regulation 2007, the Convention therefore does not regulate the service procedure in the transmitting State and leaves the national service procedures untouched. Article 1 Hague Convention determines its scope by stating that the Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad and that

[223] Freudenthal (2007), at 121; and Kramer (2008), at 173.

[224] Article 19(2) Service Regulation 2007, provides that the transmitting State has to make such a declaration, which is the case for The Netherlands, see Article 7 Implementation Act.

[225] Article 19(3) Service Regulation 2007.

[226] See Section 2 of this report for the Brussels I Regulation.

[227] See www.hcch.net. The purpose of this intergovernmental organization is to work for the progressive unification of the rules of private international law and it has enacted a great number of conventions to improve international legal cooperation between Contracting States.

the Convention shall not apply where the address of the person to be served with the document is not known.

The framework of the Hague Service Convention is based on two channels: the primary channel is based on the transmission of documents through central authorities designated by each Contracting State. The Central Authority of the requesting State receives the request for service and forwards a request of transmission to the State addressed (Article 3). The State addressed will serve the documents according to its national law (Article 5)[228] and will then notify the requesting State by a certificate of service (Article 6). The standard terms of the request (annexed to the Convention) must be written in either French or English. They may also be written in the language (or one of the languages) of the State in which the documents originate. The secondary channel allows the service of individuals abroad by post (Article 10(a)) provided that the State addressed has not objected to the method of service through postal service. Other methods of the secondary channel are among others the direct service through diplomatic or consular agents or channels (Articles 8-9) and through judicial officers, officials or other competent persons (Article 10(b)).

3.3 Cross-Border Notification in WCAM Settlements in Practice

For the purpose of proper notification of foreign interested parties under the WCAM procedure, a distinction should be made between known persons with known addresses, known persons with unknown addresses and unknown persons. This distinction is the result of the scope of application of the European Service Regulation 2007 and the Hague Service Convention and this distinction has also been made by the Amsterdam Court in its decisions to declare the WCAM settlements binding.

3.3.1 Notification of Known Interested Parties with Known Addresses

The WCAM Act provides that the notification at both stages should be effected to known interested persons by *ordinary post*, unless the court determines otherwise. The Service Regulation 2007 requires for postal service a *registered letter* with *acknowledgement of receipt*. In the *Dexia* case, the Court requested notification by *ordinary post* in the case of non-resident interested parties.[229] The Court hereby acknowledged that notification by ordinary post is not the prescribed way under the Service Regulation nor under the Hague Service Convention,[230] but held that this does not prevent the Court from declaring the settlement agreement binding.[231] The Court concluded that the interested parties '*as a group*' have been properly notified in the sense of Article 6 ECHR.[232] The Court took a pragmatic approach for justifying the fact that the prescribed notification methods were not in accordance with international provisions on service by stating that parties may always invoke the notification method at a later stage – at the stage of recognition and enforcement – by

[228] It can also be done by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed (Article 5(2)).
[229] *Dexia*, Court of Appeal Amsterdam of 25 January 2007, *NJ* (2007), 427, para. 2.7.
[230] Ibid., para. 5.3.
[231] Ibid., para. 5.4.
[232] Ibid., para. 5.2.

claiming that their fundamental procedural rights were violated.[233] According to Frenk, the Court most probably meant that the consequence of the violation of the fair trial principle under Article 6 ECHR would lead to the non-recognition of the binding declaration and that the interested party would therefore not be bound by the settlement agreement.[234] Conversely, the Court argues that if invoking these rights is not in the interest of the interested parties, they can invoke the binding declaration and start the procedure to obtain compensation, in which case they would be bound by the agreement.[235] However, it has been argued that the Court should not have declared the settlement binding if the notification method prescribed by the international provisions turned out to be unfeasible in practice for such large numbers of interested persons of the group.[236]

After *Dexia*, the Court took a different approach. In the *Vie d'Or* and the *Vedior* settlements the Court explicitly referred to the Service Regulation 2007 and 'other applicable international conventions' in relation to interested parties not domiciled in The Netherlands.[237] In the *Vie d'Or* settlement, the Court also requested the announcement in two local newspapers and on the website of the representative foundation.[238] One should note that the interested parties were exclusively life insurance policy holders and were therefore known persons whose addresses were by and large known.[239] The majority of the 281 foreign interested persons with known addresses in the EU were notified by registered letter with acknowledgement of receipt. During the pre-trial review, it became clear that only a few were domiciled outside the EU and that the applicants considered not to notify them at all, hereby accepting the risk that these persons could invoke the violation of their procedural rights and would not be bound by the settlement agreement.[240] The applicants considered that there was only a minor chance that these interested parties would not be satisfied with the compensation under the settlement agreement and start individual proceedings.[241] The Court indicated during the oral hearings that the non-notification of interested parties according to applicable international conventions might raise an issue of non-admissibility of the request to declare

---

[233] Ibid.
[234] Frenk (2007), at 221, referring to a similar reasoning in *Kamerstukken I* 2004/05, 29 414, C, at 11-12.
[235] *Dexia*, Court of Appeal Amsterdam of 25 January 2007, *NJ* (2007), 427, para. 5.4:

'*Mocht immers blijken dat aan hun processuele rechten afbreuk is gedaan, dan zullen zij zich daarop desgewenst, en zo nodig in rechte, nog kunnen beroepen. Van belang is echter ook dat zij, indien zij menen dat hun belang niet gediend wordt met zodanig beroep, daarvan kunnen afzien en zich ook zelf op de onderhavige beschikking kunnen beroepen, die hun in dat geval zal kunnen worden tegengeworpen.*'

See also Frenk (2007), at 220; Polak, R. (2009), at 12; Croiset van Uchelen, A.R.J., 'De verbindendverklaring van de WCAM als procesvorm', *Aansprakelijkheid, Verzekering en Schade* (2007), 5, 222-228, at 228.
[236] Frenk (2007), at 221, referring to Kroes, Chr.F., 'Note: *Dexia*. Court of Appeal Amsterdam 25 January 2007', *JBPr* (2007), 39.
[237] *Vie d'Or*, Court of Appeal Amsterdam of 29 April 2009, *NJ* (2009), 448, para. 4.2, respectively *Vedior*, Court of Appeal Amsterdam of 15 July 2009, *JOR* (2009), 325, paras. 4.2-4.3.
[238] *Vie d'Or*, Court of Appeal Amsterdam of 29 April 2009, *NJ* (2009), 448, para. 4.2.
[239] This was also the case with the *Dexia* settlement.
[240] Minutes on file with the author (case number: 200.009.408/01, Minutes of 17 October 2008, at 3).
[241] This was confirmed during the interview stage of this research project. See also Croiset van Uchelen and Van der Velden (2009), at 256, fn. 22.

the settlement binding.[242] In its binding declaration, the Court concluded that the number of interested persons domiciled abroad who had possibly not been notified according to a method prescribed by an international convention was negligible in proportion to the entire group of persons involved and that, therefore, the notification could be considered proper.[243]

In the *Shell* settlement, the Amsterdam Court gave strict instructions as to the method of notification and required the petitioners to follow the procedures of the Service Regulation 2007, the Hague Service Convention and similar instruments.[244] The Court first instructed that notification of interested parties domiciled in an EU Member State should be served by postal services, thus, by registered letter with acknowledgement of receipt following Article 14 Service Regulation 2007, and not by ordinary post as initially suggested by the applicants and primarily prescribed by the WCAM.[245] The Court also prescribed that for notification of non-EU domiciled persons located in Contracting States to other international conventions, principally the Hague Service Convention, the notification should be effected insofar as possible by registered letter – but no confirmation of receipt was required[246] – and in accordance with further requirements imposed by the receiving State. Hence, the Court fully used the possibility of ordering *some other method* of notification as provided by the WCAM Act and followed its international obligations.

In the *Dexia* and *Vie d'Or* cases, the alleged responsible parties sent the notifications themselves. Applicants intended to do the same in the *Shell* settlement, but the Court decided otherwise during the pre-trial review.[247] The Court insisted on the fact that this kind of notification, especially within the scope of international instruments, should be effected by official authorities such as bailiffs or the court registrar's office. Taking into account the large numbers of notices to be sent by registered letter with acknowledgements of receipt to known interested parties with known domicile outside The Netherlands, the Court decided that they should be served by a bailiff.[248] Apart from the fact that applicants also preferred bailiff service over registrar service, practical reasons relating to the work overload for the judiciary[249] led to entrusting bailiffs with the notification instead of the court registrar's office as prescribed by law.[250]

The bailiffs were charged to investigate which international regulation and conventions would be applicable for the notification of each foreign interested party and to comply with

[242] Minutes on file with the author (case number: 200.009.408/01, Minutes of 17 October 2008, at 3).
[243] *Vie d'Or*, Court of Appeal Amsterdam of 29 April 2009, *NJ* (2009), 448, para. 4.3.
[244] See Frenk (2007), at 221, fn. 38.
[245] *Shell*, Court of Appeal Amsterdam of 29 May 2009, *NJ* (2009), 506, para. 5.7, at 24; Article 1013(5) DCCP.
[246] *Shell*, Court of Appeal Amsterdam of 29 May 2009, *NJ* (2009), 506, para. 5.7, at 25.
[247] '*De verzoeksters lijken ervan uit te gaan dat zij zelf mogen verzenden. Verzending via de post lijkt echter, als de verordening of één van de verdragen toepasselijk is, de taak te zijn van een autoriteit – dus de griffier of een Nederlandse deurwaarder – aldus de voorzitter.*' (Minutes on file with the author – petition number 396/07, Minutes of 12 July 2007, at 3).
[248] See the Court's decision in *Shell*, Court of Appeal Amsterdam of 29 May 2009, *NJ* (2009), 506.
[249] This was confirmed during the interviews. See also Minutes of the 12 July 2007 hearing, petition number 396/07, at 3 (on file with the author).
[250] Article 2(3) Implementation Act of the Service Regulation.

the proper method prescribed by the applicable provision, including the specific requirement of each State in which persons were domiciled. Furthermore, the bailiffs supervised the print-process of the documents to be sent and had to see to it that translations were sent in the right language according to the applicable international provisions. The Court additionally instructed the bailiffs to carefully keep records for each country where notification was effected, which were to be submitted later to the Amsterdam Court. These records would specify for each country the method used for service, the day of service, and should record the number of notifications served, the number of receipts received and the number of notifications returned.[251] In practice, this required an efficient organization and a great deal of logistic management to keep the records of around 112.000 notifications effected on known foreign interested parties located world-wide with the exception of U.S. shareholders. The bailiffs did not experience this as particularly difficult, but more as time-consuming and precision work.

In order for the settlement agreement to be declared binding, it was important that a certain percentage of the foreign interested parties were properly notified and acknowledgements of receipt received. In its decision, the Court stated that if in some individual cases the notification to appear did not reach the individual, then this should be a reason for the Court to adjourn the hearing or to determine a further hearing for these individual cases. Nonetheless, the Court accepted the fact that not every known interested party will be reached by personal service. For that reason, the Court insisted on the publicity and advertisements in the media to cover these individual cases and to minimize the risk that these persons were unaware of the proceedings of the binding declaration.

For the notices to be sent by registered mail, bailiffs were allowed to complete the addresses if they were incomplete, but the Court did not allow them to check the addresses as to their correctness.[252] When documents were sent back because the person had 'moved' according to the postal services, the bailiffs were allowed to send the document a second time, but without investigating where the person had moved to. In short, problems did occur as to the accurateness of the list of names of known interested parties submitted by the alleged responsible party. During the interviews, the bailiffs indicated that the list with known interested parties and known addresses furnished by the alleged responsible party was relatively outdated. It was suggested that there should be a closer cooperation between the applicants, especially with the representative associations, to obtain more up to date information insofar as possible. One specific problem arose in relation to the notification by registered mail to England, since the Royal Mail appeared not to be familiar with returning acknowledgements of receipt.[253] Absence of an acknowledgement of receipt would potentially trigger Article 19 Service Regulation 2007 as the Court could not verify whether the interested person was properly notified. The Court requested a declaration from the Royal

---

[251] *Shell*, Court of Appeal Amsterdam of 29 May 2009, *NJ* (2009), 506, para. 5.7.

[252] It contrasts with national notification procedures, which involve checking the municipality's register for the last known address.

[253] This was confirmed during the interviews. See also *Shell*, Court of Appeal Amsterdam of 29 May 2009, *NJ* (2009), 506, para. 5.11.

Mail to prove this practical problem and required that additional announcements would be placed in English newspapers.

When notification by letter under the Hague Service Convention was not available because the receiving State declared to be opposed to this method of service, notification was effected through the Central Authorities.[254] In practice, as explained during the interviews, this meant that the bailiff had to serve the notice on the Dutch Central Authority, who in its turn sent it to the Central Authority of the receiving State.[255] Although there were hardly any problems encountered with this notification method and only very few documents were returned with a certificate of non-service, it was felt that direct contact with the Central Authority of the receiving State would have been more efficient.

3.3.2 Notification of Unknown Interested Parties and Known Parties with Unknown Addresses

The international regulations and conventions discussed above do not apply to notification of unknown parties or known parties with unknown addresses. This category includes the group of known parties whose domicile was initially known to the applicants but which afterwards appeared to be incorrect. In the absence of any international provision, cross-border notification of such persons seems to be effected in accordance with the WCAM procedural rules prescribing the announcement in one or more foreign newspapers to be designated by the court.[256] These advertisements were placed and paid by the alleged responsible parties. In the *Vedior* settlement the Court instructed to place the advertisement in certain foreign newspapers depending on the geographical distribution and diffusion of the shares issued by Vedior.[257] In the *Shell* case, this group of unknown persons or unknown addresses concerned more than 400.000 persons and advertisements were placed in more than 47 newspapers in 22 countries and in a second round an advertisement was placed in *The Times* to compensate for the fact that the Royal Mail does not send confirmations of receipt.[258] The advertisement in newspapers was not required, however, in countries with less than 50 known interested parties for whom the agreement was concluded.[259] In the *Vedior*, *Shell*, *Vie d'Or* and *Dexia* cases the Court also prescribed the announcement of the notice on special websites dealing with the settlements.

The fundamental question is whether persons can be properly served by public announcement instead of personal service. This question is even more sensitive due to the opt-out character of the WCAM procedure. Unknown interested persons or known persons with unknown addresses who have not read the announcement either in the newspapers or on the applicants'

[254] The following countries are opposed to the method of service specified in Article 10 Hague Service Convention: Argentina, People's Republic of China (regarding Hong Kong and Macao), Croatia, Egypt, India, Republic of Korea, Kuwait, Mexico (in certain situations), Norway, Russian Federation, San Marino, Sri Lanka, Switzerland, the Former Yugoslav Republic of Macedonia, Turkey, Ukraine and Venezuela.
[255] Public Prosecutor at the District Court of The Hague ('*Officier van Justitie*').
[256] Polak, R. (2009), at 12.
[257] See *Vedior*, Court of Appeal Amsterdam of 15 July 2009, *JOR* (2009), 325, para. 4.2.
[258] *Shell*, Court of Appeal Amsterdam of 29 May 2009, *NJ* (2009), 506, para. 5.13.
[259] *Shell* pre-trial review petition number 396/07, Minutes of 12 July 2007, 3 (on file with the author).

website are likely to not appear in proceedings concerning a settlement agreement concluded for their benefit, but will nevertheless be bound by it and be restrained from instituting individual proceedings by virtue of the statutory waiver and the absence of an opt-out declaration. As will be discussed in Section 5, the preclusive effect of a WCAM settlement can only be challenged under specific circumstances.

Most of the interviewees advocated this type of 'public notification' and have emphasized the importance of specific websites for efficiently spreading the notice, besides the announcement in newspapers. Some have argued that notification through the medium of newspapers is also used in other procedures – for instance in insolvency and corporate squeeze-out proceedings – and that, for exchange traded shares, notification proceedings could be modelled after notifications for shareholders' meetings.[260] Another approach would be to place such notices in the same papers where the product (or shares) alleged damage or causing harm had been advertised for sale. This is however not possible for all mass claims litigation, especially not for regular tort cases.

The factor of publicity has repeatedly been advanced as an important element, both by the Court in its decisions and by the interviewees. The more the settlement is a fact of general knowledge either through newspapers or through the internet, the more often interested persons will be considered to be 'properly notified' by the court. During the interviews it also became clear that the matter is a question of legal policy. According to some of the interviewees, fair trial considerations do not merely involve personal notification but also efficiency and pragmatism. The fact that a settlement provides for compensation, in an efficient and practical manner, for a large number of interested persons may weigh as much as one interested person who has not been reached.

3.4 Comparative Observations

The conditions for proper notification in relation to class action in the U.S. are characterized by flexible and open norms requiring the *best notice* that is *practicable under the circumstances*.[261] In any event, it should be noted that the notification of class members should be in accordance with constitutional guarantees stemming from the U.S. due process clause laid down in the XIVth Amendment to the U.S. Constitution. This has been reaffirmed by the U.S. Supreme Court in relation to the notification of absent class members in a Kansas class action suit which is based on the opt-out system. In *Phillips Petroleum Co. v. Shutts*[262] the Supreme Court ruled that

> '[i]f the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and

[260] But see also Falkena and Haak (2004), at 202, questioning whether newspapers are widely read.

[261] Rule 23(c)(2)(b) Federal Rules of Civil Procedure provides 'that the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language: [...]'.

[262] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), at 798.

> participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." […] The notice should describe the action and the plaintiffs' rights in it. […] We think that the procedure followed by Kansas, where a fully descriptive notice is sent by first-class mail to each class member, with an explanation of the right to "opt-out," satisfies due process.'

From this citation, it should be observed that firstly the courts have a considerable degree of discretion in appreciating the adequate notice of present and absent class members. Secondly, first class mail is considered sufficient to notify absent class members. By way of comparison, U.S. *first class mail* should be understood as *ordinary post with priority delivery* but not as registered mail, nor does it involve acknowledgement of receipt. However, it is important to note that the *Phillips Petroleum Co. v. Shutts* case did not involve 'alien' or 'foreign' class members but merely class members located in other American States.

In this respect, the *Currie v. McDonald's Restaurants of Canada Ltd.* case provides a good illustration of what happens when the method of notice ordered by an Illinois court over a class which included Canadian members is inadequate: The Court of Appeal for Ontario refused recognition of a U.S. class action judgment on the basis that 'the mode of notice was inadequate, as the notice was published in a publication that is not ordinarily used in English Canada for these purposes and there was evidence that the notice reached only a small proportion of the members of the plaintiff class.'[263] The Supreme Court of Canada reaffirmed the vital importance of clear notices and an adequate mode of publication.[264]

In Canada, the form and methods of the notice are to be approved by the courts on a case-by-case basis. The methods chosen depend on the size and nature of the class action and on whether the members of the class are known or unknown. The Canadian Supreme Court recently stated that

> '[i]n a class action, it is important to be able to convey the necessary information to members. Although it does not have to be shown that each member was actually informed, the way the notice procedure is designed must make it likely that the information will reach the intended recipients. The wording of the notice must take account of the context in which it will be published and, in particular, the situation of the recipients. In some situations, it may be necessary to word the notice more precisely or provide more complete information to enable the members of the class to fully understand how the action affects their rights. These requirements constitute a fundamental principle of procedure in the class action context.'[265]

[263] *Currie v. McDonald's Restaurants of Canada Ltd.*, 74 O.R. (3d) 321, paras. 38-40.
[264] *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, para. 43.
[265] Ibid.

3.5 Concluding Remarks

Apart from the fact that the notification of large groups of interested parties is a laborious task and involves considerable costs, the general consensus is that no insurmountable problems occurred. The importance of notifying as many known and unknown interested parties as possible in order to reach – and bind – them to the WCAM settlement concluded for their benefit is worth both the efforts and the costs. In practice the question of notification is to notify the foreign interested persons with known addresses according to the international provisions, to find the addresses of known interested persons and to reach unknown interested parties.

The current provisions of the WCAM do not explicitly regulate the notification of foreign interested parties, but the margin of discretion provided by Articles 1013(5) and 1017(3) DCCP allows the court to prescribe some other form of method for cross-border notification. This leads to the following conclusions:

> The notification provisions of Articles 1013(5) and 1017(3) DCCP are not incompatible with international provisions, but these provisions should however clarify that foreign interested persons should be notified in accordance with applicable international provisions. The pragmatic approach taken by the Amsterdam Court in the *Dexia* settlement is an isolated case but should be condemned and discouraged; the assessment of the adequacy of the notification methods used should not be left to the decision of interested parties to invoke the violation of their fundamental rights and of international notification provisions at the recognition stage.
>
> As to the suitability of international provisions, one may conclude that despite the fact that the international provisions used for notification under the WCAM procedure are not designed for large groups – or classes – of interested parties, little problems were encountered as to the application of the international provisions arising out of the Service Regulation 2007 and the Hague Service Convention 1965. However, in order to reach more interested parties and to reduce the certificates of non-service, it was suggested that there be closer cooperation between the applicants and a more active role of the representative associations to obtain, insofar as possible, more up to date information as to the interested parties and their addresses.
>
> With respect to the Service Regulation, the fact that the Royal Mail could not deliver acknowledgements of receipt was accommodated by the Royal Mail's declaration and the additional announcements placed in U.K. newspapers. In any event, it did not preclude the Court from declaring the settlement binding.
>
> Regarding the Hague Service Convention, the cooperation with the Central Authority was felt to be more efficient if direct contact with the Central Authority of the receiving State was allowed.
>
> The margin of discretion given to the court by Articles 1013(5) and 1017(3) DCCP allows it to deviate from the prescribed method of notification to notify foreign

interested parties outside the scope of the international provisions, especially regarding unknown parties or parties with unknown addresses. Here too, the provisions could be more explicit in their formulation in allowing the court to *order methods* more suitable for the notification of interested parties on a case-by-case basis and by taking into account the specific facts and circumstances of the mass damage event and the parties involved. This could be done by introducing more open criteria guaranteeing the best efforts under the circumstances to allow the interested parties to be heard and be aware of their rights. Elements of considerations such as the size of the class of interested parties and whether or not the interested parties had a pre-existing (contractual) relationship with the alleged responsible party may be taken into account. Explicit mention should also be made of the possibility to use a website specially opened for the winding up of the settlement agreement.

It should be emphasized that, in practice, the binding declaration of the WCAM settlement follows when the court is satisfied that a certain percentage of the foreign interested parties were properly notified. Conversely, this allows a certain number of cases in which the notice did not reach the foreign interested parties; either because they have not received the notice or were unaware of the announcements made, or because the applicants decided not to notify them at all because the costs involved were too high. In each of these cases, it is the alleged responsible party who accepts the risk that these persons may invoke the violation of their procedural rights and may not be considered bound by the settlement agreement. This risk is considered inferior since the very nature of the WCAM settlement is based on the idea that the settlement agreement is concluded by representative organizations for the benefit of the interested parties, that critical mass is thereby guaranteed and that there is only a minor chance that these parties are not satisfied with the compensation under the settlement agreement. The fact that there is a (small) percentage that has not been notified at all or that have not been properly notified, does therefore not lead to the non-admissibility of the request to declare the settlement binding nor to the rejection of the request. Nonetheless, this point may be addressed by the WCAM itself by providing further guidance as to when the prescribed notification method should be considered unsuccessful for notification of large numbers of interested persons.

The importance of the pre-trial hearing in order to determine the method of notification has been demonstrated in practice. Although the WCAM does not explicitly require the court's approval for the methods of notification,[266] the role of the court during the pre-trial hearings has proven to be crucial to facilitate cooperation between the applicants to ensure a swift notification process and to ensure as much as possible the interested parties' fundamental procedural rights. It would be recommendable to anchor this role of the Court in the WCAM Act.

[266] This is the case in several Canadian provinces.

4 Representation of Foreign Interested Persons

Article 907(3)(f) DCC requires that the *representative* foundation or association referred to is sufficiently representative of the interests of persons on whose behalf the agreement was concluded. This requirement of representation has considerable weight in the court's assessment for the binding declaration. Although the representation requirement is not subjected to or regulated by any international regulation or convention, it deserves attention in relation to this report. According to the Explanatory Memorandum to the WCAM Act, a settlement agreement concluded by a Dutch representative foundation or association should generally merely concern *Dutch* interested parties because representative foundations or associations are generally not expected to be sufficiently representative of *foreign* interested parties. The Memorandum even advises to limit the group of interested parties for whom the settlement agreement is concluded to persons established in The Netherlands.[267]

The reality seems to have caught up with this expectation. Several WCAM settlements declared binding by the Court involved representative foundations or associations which claimed to also represent *foreign* interested parties. As a consequence, they have concluded settlement agreements for the benefit of *foreign* interested parties also and intend to bind them, unless the interested parties opt out of the agreement. In *Vie d'Or*, the Court assessed the representation requirement but without distinguishing between Dutch and foreign policy holders.[268] In the *Vedior* and *Shell* settlements the Court however explicitly addressed the representation requirement.

The representation requirement is a legal requirement which needs to be fulfilled in order for the court to give the binding declaration. More importantly, the representation – or support – of *representative* associations or foundations for the interested parties is also necessary to conclude the settlement agreement. Without sufficient critical mass and strong support the 'deal' would not be sealed and no settlement agreement would be concluded. It is understandable that if a settlement agreement is limited to a certain group of persons – for instance those established in The Netherlands as advised in the Memorandum[269] – it becomes considerably less attractive for the alleged responsible party to conclude a settlement agreement, since it would still be subjected to individual proceedings abroad.[270]

The court has to either declare the settlement binding or reject the request.[271] If the representation requirement was only met in relation to a certain category of persons, the court is not allowed to partially declare the settlement agreement binding. The court could

[267] Explanatory Memorandum to the WCAM, *Kamerstukken II* 2003/04, 29 414, no. 3 (MvT), at 15-16.

[268] *Vedior*, Court of Appeal Amsterdam of 15 July 2009, *JOR* (2009), 325, para. 4.19. In *DES* and *Dexia* the settlement agreements were not concluded for the benefit of foreign interested parties. See for *Dexia*, Section 1 of this report.

[269] Explanatory Memorandum to the WCAM, *Kamerstukken II* 2003/04, 29 414, no. 3 (MvT), at 15-16.

[270] This was the case in the *Dexia* settlement, but this was possible because the group of interested persons domiciled outside The Netherlands that was excluded from the scope of the settlement agreement was identifiable and another agreement was reached with that group consisting of mostly Belgian interested parties.

[271] Until now, the Court has never refused a request for binding declaration.

nevertheless suggest to the parties to modify the petition and limit the binding effect of the settlement agreement to those interested parties who are sufficiently represented by the foundations and associations.[272] This may however be considerably less attractive for the alleged responsible party.

4.1 Criteria for Representation

The Explanatory Memorandum does not define the representation requirement, but it states that the requirement should not be defined by one conclusive criterion; instead, the association's representation stems from several criteria or a combination of criteria, such as the activities undertaken by the representative association to defend the interests of its members, the number of interested parties which are member of the association, and the general acceptance of the association's representation by the interested parties. The representation can also be deduced from the role the association has played in representing the interested parties in the media or from the fact that the association has acted on their behalf.

4.2 Establishing *Sufficient Representation* for Foreign Interested Persons

The question of representation is a procedural question and should therefore – like any other issue of procedural law[273] – be governed by the *lex fori processus*, which in this case is Dutch law.[274] The WCAM requires in Article 907(1) DCC that the foundation's or association's statutory objectives are to represent the interests of the persons for whose interests it concluded the settlement. Two types of representative organizations should be distinguished:

1. associations of general nature representing the interests of a particular group, such as the Consumers' Association ('*Consumentenbond*')[275] or the Investors' Association ('*Vereniging van Effectenbezitters – VEB*'); and

2. *ad hoc* representative foundations which according to their by-laws promote the interests of persons for the benefit of whom a specific settlement agreement has been concluded, such as the *Shell Reserves Compensation Foundation* and the *Stichting Uitvoering Schikking Vedior Foundation*.

There is no requirement under the WCAM which imposes that any such representative organization should be incorporated under Dutch law.

Despite the fact that the Memorandum may suggest to exclude representation in relation to foreign interested parties, the reality is that several methods have been used to accept that associations or foundations are sufficiently representative of foreign interested parties.

---

[272] The court may give the parties the opportunity to amend or add to the agreement, see Article 907(4) DCC.
[273] See Section 6.
[274] Polak, M.V. (2006), at 2351-2352.
[275] The *Consumentenbond* for instance has the statute of 'qualified entity' for the purpose of the Injunctions Directive 98/27/EC (Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests OJ L 166, 11.6.1998, at 51-55). The latter establishes a common procedure in consumer cases to allow a qualified entity from one country to seek an injunction in another.

1. The first method involves a written expression of support given by representative associations from other countries. In the *Shell* settlement, the English Investor's Association gave such a support letter to what had been agreed in the *Shell* settlement agreement.

2. The second method is that persons established in other countries are represented by a national representative entity which then becomes a *participant* in the representative foundation. This way, each national group of interested persons is represented by the (Dutch) foundation. In *Shell*, the Shell Foundation concluded a participation agreement with other national representative groups, which was possible according to the foundation's by-laws.[276] These groups consisting of representatives promoting the interests of the interested parties from other European countries as well as institutional investors from the United Kingdom and other European countries joined the foundation as participants. For the Court this strengthened the representation of the Shell Foundation in relation to foreign injured investors.[277] In *Vedior*, the Amsterdam Court dealt with the representative requirement by acknowledging that a considerable part – possibly even the majority – of the interested parties for whose benefit the settlement agreement was concluded was established or domiciled outside The Netherlands.[278] The Court ruled that the Vedior Foundation was sufficiently representative of the foreign injured parties since their national investor's associations – '*sister associations*' – in Germany, Belgium, France, the United Kingdom and Italy agreed to a participation agreement as provided in the foundation's by-laws and became participant to the Vedior Foundation's statutory objectives for the purpose of the *Vedior* settlement agreement. Also the Pan-European Euroshareholders Association – a confederation of European shareholders' associations gathering twenty-nine national shareholders' associations all over Europe and two corresponding members from non-EU countries – became participant to the Vedior Foundation.

3. Another option is that these national groups form an *ad hoc* foundation (under Dutch law) which then becomes a party to the settlement agreement and in its capacity of applicant requests its binding declaration.[279]

4. Finally, it remains possible that each national representative group representing interested persons established in their country, becomes a party to the settlement agreement individually and therefore an applicant to the WCAM procedure of binding declaration.

[276] This structure is known as the *deelnemerstructuur*.
[277] *Shell*, Court of Appeal Amsterdam of 29 May 2009, *NJ* (2009), 506, paras. 6.24-6.25.
[278] *Vedior*, Court of Appeal Amsterdam of 15 July 2009, *JOR* (2009), 325, para. 4.20.
[279] See Poot (2006), at 189.

The WCAM does not require that each of the applicants' representative associations has provided in its by-laws to represent the interests of all interested persons for whom the settlement agreement is concluded.[280] Nor is it required that each of the applicant associations is separately sufficiently representative in relation to the entire group of interested persons, as long as each of them is sufficiently representative for a sufficiently large portion of the represented persons. It merely comes down to the question whether the representative associations and foundations are *jointly* sufficiently representative with regard to the interests of the persons for the benefit of whom the settlement has been concluded.[281] This appeared to be of great importance for dealing with the question of representation when the agreement is concluded for the benefit of persons located in several countries:[282] It means that it is not required that each applicant is sufficiently representative of all interested parties, including all or categories of foreign parties, as long as several applicants representing several (foreign) interested persons *jointly* represent all injured persons.

4.3 Complications and Practical Solutions

In practice, the representative requirement in relation to foreign interested persons does not cause problems. It is generally assumed to be in the interest of all applicants that the foundations or associations are sufficiently representative of the group of persons for whom the agreement has been concluded.[283] This can best be illustrated by the *Converium* case where a settlement agreement may be concluded which might then be submitted to the Court for a binding declaration. The Converium Foundation[284] represents persons of which a mere 3% is established in The Netherlands; the majority of the alleged injured persons it represents are located in Switzerland. In order to fulfil the representative requirement with respect to foreign interested parties the Converium Foundation appointed two Swiss board members (out of three) and Euroshareholders joined the Converium Foundation as participant.

It is generally not considered difficult to fulfil the representative requirement. Nonetheless, interviewees do not seem to agree on the right balance of representation for associations or foundations. Some interviewees favour a representation over as many foreign interested parties as possible to obtain a support as wide as possible – without the need for foreign associations to join the settlement agreement as concluding parties and the court proceedings as applicants –, while others favour an approach in which the associations or foundations do not represent every injured party world-wide but instead leave it to the foreign national representative groups to decide whether they want to be party to the settlement agreement as co-applicants.

[280] *Dexia*, Court of Appeal Amsterdam of 25 January 2007, *NJ* (2007), 427, para. 5.23; repeated in *Vedior*, Court of Appeal Amsterdam of 15 July 2009, *JOR* (2009), 325, para. 4.20.
[281] *Dexia*, Court of Appeal Amsterdam of 25 January 2007, *NJ* (2007), 427, para. 5.26; and *Shell*, Court of Appeal Amsterdam of 29 May 2009, *NJ* (2009), 506, para. 6.22.
[282] Polak, R. (2009), at 12.
[283] See Poot (2006), at 190.
[284] Stichting SCOR Securities Compensation Fund.

The first view is based on the fact that Dutch associations or foundations have a responsibility to represent the foreign interested parties; these are not capable of representing themselves directly or the costs may be too high. It is argued that it has to be kept in mind that there hardly exists any alternative to the WCAM procedure.[285] It is therefore considered as the Dutch associations' or foundations' duty to represent *all* interested parties, including all foreign ones. The second view is more hesitant in binding all interested persons and attaches more importance to the autonomy of national associations of other (European) countries.

In any event, there seems to be a consensus on two points. First, a distinction should be made between associations and foundations of a more general nature and *ad hoc* representative foundations, as set out above. It is more acceptable and feasible for *ad hoc* representative foundations to represent foreign interested parties as they pursue a specific objective in obtaining a collective settlement for a given situation. It may be more of a problem for general associations to bind as many foreign interested parties as possible, as these associations pursue more general objectives within their own country such as the protection of local consumers or investors. Second, both views agree that similar associations in European countries ('*sister associations*') should not be by-passed but should be informed of the settlement agreement and should decide for their own members and interested parties whether or not they should be involved. Yet, more problems may arise when many national associations – instead of one 'qualified entity' per country[286] – become party to the agreement and applicant to the request for the binding decision, as a consensus with any of those would be more complicated to obtain in order to successfully conclude a settlement agreement. The *participant structure* in which national associations of other countries join the Dutch foundation as participant is favoured. The idea of the green paper of EU Commissioner Kuneva, which proposes cooperation between national associations like the Euroshareholders Association, is welcomed by some.[287] Others have warned against the monopoly position of national associations and argue that the objectives of an association as formulated in its by-laws alone should not always suffice for the representative requirement.

4.4 Comparative and Concluding Remarks

In the U.S., the question of representation of the *lead plaintiff* is addressed in the certification process. The certification of a class action should be understood as a court's approval to commence a class action and the conditions of certification are enshrined in Rule 23(a) Rules of Federal Procedure. One of the conditions for certification is the representation which is dealt with in the fourth paragraph and reads that the representative parties will fairly and adequately protect the interests of the class. Once more, the notion of what is fair and adequate in relation to representation is shaped by the due process clause: In *Phillips Petroleum Co. v. Shutts*, the U.S. Supreme Court held that the due process clause requires that the named plaintiffs at all times adequately represent the interests of the absent class

[285] Except for U.S. *class actions*, but the trend of U.S. courts is to exclude non-European class members.
[286] See Section 4.2 (fn. 217), in relation to the qualified entities in consumer matters.
[287] Green Paper on Consumer Collective Redress, COM (2008) 794 final Brussels, 27.11.2008.

members.[288] This statement was based on the Court's earlier decision in *Hansberry v. Lee*,[289] indicating that absent parties would be bound by the decree as long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest.[290] The element of 'common interest' is an important requirement for representation. One should note that the question of representation in the U.S. is however somewhat different than the representation requirement in the WCAM. In the U.S., a lead plaintiff is representative for other plaintiffs and the former is entitled to compensation if awarded in the same capacity as other class member plaintiffs. Under the WCAM, the representative organizations are not in that sense interested parties; they will not be entitled to compensation. They have therefore not the *same* interests as interested parties, but represent their interests. In sum, the common interest factor together with the due process guarantees are open norms which depend on the court's appreciation.

By way of conclusion, the requirement of representation of foreign interested parties is important for the binding declaration and for the recognition of WCAM settlements outside The Netherlands, but the question of requirement is not one which causes problems as to its regulation, or in practice. The court's wide appreciation of the representation question on a case-by-case basis has allowed representative organizations together with alleged responsible parties to find the appropriate method to deal with the representation of foreign interested persons.

Some available methods to represent foreign interested persons are: 1) the presence of a written expression of support to the representative party concluding the settlement agreement for the benefit of foreign interested persons, provided by foreign representative organizations representing interested parties outside The Netherlands; 2) including foreign representative associations as a *participant* to the representative party concluding the settlement agreement; 3) the formation of an *ad hoc* foundation of foreign representative associations which then becomes party to the settlement agreement; or 4) a foreign representative association representing foreign interested persons established in their country, directly becomes a party to the settlement agreement itself.

The court should explicitly appreciate and approve the adequacy of the method(s) chosen by the parties to guarantee the sufficient representation of foreign parties. On the basis of a case-by-case approach, this could and should be done at the pre-trail hearing in consultation with the parties to the settlement agreement. In this respect, the role of the court regarding the representation requirement deserves to be anchored in the WCAM itself.

---

[288] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). For a general overview of the adequacy of representation in U.S. law, see Adler and Lunsinh Scheurleer in Hart, ed. (2009); and Kahan and Silberman (1998).

[289] 311 U.S. 32 (1940).

[290] Ibid., at 41. For an example of adequate representation of class members in a class settlement, see the earlier Supreme Court decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). See also Bassett (2003), at 49.

5 International Recognition

In view of the possibilities to appy the WCAM settlement also in transnational mass damage cases, it is important to know whether interested parties outside The Netherlands are bound by a WCAM settlement declared binding by the Amsterdam Court. This is relevant to the question of international recognition and enforcement which will arise in a number of situations. If the binding declaration of a WCAM settlement is recognized outside The Netherlands, an interested party that has not opted out should not be able to initiate individual proceedings in relation to the same claim in another country. [291] This may be different when an interested party was not properly notified of the proceedings or of the binding declaration and was therefore unaware of the obligations under the WCAM settlement. Other countries may refuse the binding effect of the WCAM settlement even if the interested party was properly notified for other reasons such as the incompatibility with the public policy ('*ordre public*') of a particular country.

The question of international recognition and enforcement may also arise when an interested party seeks recognition and enforcement of a WCAM settlement in a country other than The Netherlands against an alleged responsible party who, although unlikely, refuses to pay compensation as agreed under the WCAM settlement declared binding by the Amsterdam Court.

When the Dutch binding declaration is not recognized in a particular country, an interested person who has not opted out of the agreement could initiate a (new) individual procedure in that country. He may also seek a declaratory judgment in courts of such country to the effect that the WCAM settlement is or is not binding.

On the other hand, the alleged responsible party may seek the enforcement of the WCAM settlement outside The Netherlands by a declaratory judgment that it is not liable for wrongful conduct and that interested parties are only entitled to compensation under the settlement. An alleged responsible party may even seek a negative declaratory judgment – in the form of an anti-suit injunction[292] – ordering an interested party not to initiate individual proceedings against him based on the WCAM settlement declared binding by the Amsterdam Court.

Whether other countries will recognize and enforce decisions of Dutch courts depends on the private international law rules of each country – in particular its rules of recognition and enforcement – unless an international instrument regulating the international recognition and enforcement of foreign judgments prevails. Except for very few bilateral conventions and specific conventions, the Brussels I Regulation and the Lugano and Brussels Conventions are the only general multilateral instruments regulating the international recognition and

[291] See also Croiset van Uchelen and Van der Velden (2009), at 256.

[292] This possibility exists outside the EU Member States since the *Turner* decision decided that anti-suit injunctions are incompatible with the Brussels I Regulation/Convention. See (C-159/02)*Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*, [2004] ECR I-3565.

enforcement of foreign judgments in civil and commercial matters.[293] As a consequence, whether WCAM settlements will be recognized in a country outside the EU and EFTA States will depend on the national law of that State. This report will therefore mainly focus on the Brussels I Regulation.

One of the most important objectives of the Brussels and Lugano instruments is to guarantee free movement of judgments by regulating that judgments – and court settlements – rendered in a Member State should be recognized and enforced in another Member State. The Brussels I Regulation establishes the principle of *automatic recognition* which entails that judgments given in one Member State are automatically recognized in another Member State, without any special procedure being required.[294]

5.1 Scope of the Recognition Regimes under the Brussels I Regulation

The scope of application of the recognition regimes for judgments and settlements of the Brussels I Regulation determines whether automatic recognition is also guaranteed for binding declarations of WCAM settlements. For the sake of clarity, this report will include judgments as well as court settlements under the concept 'decision'. Article 1 Brussels I Regulation determines – in the same way as for the jurisdiction regime – the substantive scope for the recognition regime of decisions by requiring that they should be given in respect of a 'civil or commercial matter'.[295]

However, the territorial scope of the recognition regimes of 'judgments'[296] and 'settlements'[297] differs from the Brussels I Regulation's jurisdictional regime which is enshrined in Article 2 Regulation. In brief, the Regulation's recognition and enforcement regime for judgments, established in Articles 33-56, applies to *any 'judgment' given by a court or tribunal of a Member State* as long as the 'judgment' fits the definition of Article 32 Brussels I Regulation.[298] The application of the Regulation's recognition regime for court settlements is limited by the definition of the term 'settlement' in Article 58 Brussels I Regulation. This implies that the characterization of the binding declaration of a WCAM settlement as either a 'judgment' or as a 'settlement' under the Brussels I Regulation has important consequences for the applicable recognition regime and the grounds for non-

[293] See Section 2, paragraph 2.1.2, fn. 53.
[294] Article 33(1), respectively Article 57 Brussels I Regulation. See also the British Institute of International and Comparative Law (BIICL) Final Comparative Study, 'The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process' [hereafter BIICL's Study on Effect of Judgments]; for the terminology see the Final Comparative Study, available at http://www.biicl.org/judgments/, at 47.
[295] As explained in Section 2 on International Jurisdiction. See Jenard Report, at 42 and 56. See also Gaudemet-Tallon, H., *Compétence et exécution des jugements en Europe* (2010), § 362, at 379; Briggs (2009), § 7.07, at 676; and Wautelet in Magnus and Mankowski, eds. (2007), Article 32, § 6, at 536-537. See also the CJEU's statements in Case 145/86 *Hoffmann v. Krieg*, [1988] ECR 645, para. 15; and C-172/91 *Sonntag v. Waidmann*, [1993] ECR I-1963, paras. 15 and 16.
[296] Article 32 Brussels I Regulation and Lugano 2007 Convention and Article 25 Brussels Convention and Lugano 1988 Conventions.
[297] Article 58 Brussels I Regulation and Lugano 2007 Convention and Article 51 Brussels and Lugano 1988 Conventions.
[298] Article 32 in conjuntion with Article 33(1).

recognition used. Both of these concepts and their recognition regimes will therefore be examined below.

In any event, if the binding declaration of the Amsterdam Court in a WCAM procedure is not to be considered as a 'judgment' in the sense of Article 32, nor as a settlement in the sense of Article 58, the Brussels I Regulation does not apply and the recognition and enforcement of these acts will depend on national law.

Furthermore, the automatic recognition of judgments and court settlements is guaranteed when the court issuing the decisions is a court of a Member State, even if the debtor is domiciled in a third State.[299] As a consequence, the questions of recognition and enforcement are to a great extent separated from the jurisdictional regime as they do not depend on the domicile of a respondent but on the country of origin of the judgment or settlement. The recognizing court may not examine the jurisdiction of the State of origin,[300] except when the judgment has been rendered in violation of jurisdiction rules concerning insurance and consumer contracts.[301] Moreover, the issuing court may have based its jurisdiction on national rules instead of on the jurisdictional regime of the Brussels I Regulation, but this would not preclude the recognition and enforcement regimes from applying. In other words, judgments and court settlements in the sense of the Regulation issued by the Amsterdam Court fall within the scope of the automatic recognition regimes of the Brussels I Regulation even if the Court based its jurisdiction on national jurisdiction rules of the DCCP.

5.2 Categorization of a WCAM Binding Declaration by the Amsterdam Court

Under the Brussels I Regulation and the Brussels and Lugano Conventions, the international recognition and enforcement arising in relation to a WCAM settlement comes down to the question whether a binding declaration of a settlement agreement given by the Amsterdam Court is a 'judgment' or alternatively a 'settlement' in the meaning of these instruments, in order for the settlement to have binding effect upon interested persons domiciled within EU and EFTA Member States.[302]

5.2.1 A 'Judgment' under Article 32 Brussels I Regulation

The 'judgment' concept implies an *autonomous interpretation* instead of a reference to national law,[303] and 'means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of

[299] Recital 10 of the Brussels I Regulation. See also C-129/92 *Owens Bank Ltd v. Fulvio Bracco and Bracco Industria Chimica SpA*, [1994] ECR I-117, paras. 17 and 23.

[300] Articles 35(3) and 45(1) Brussels I Regulation.

[301] Article 35(1). That provision also refers to exclusive jurisdiction as established in Article 22.

[302] The revised Lugano Convention has a recognition and enforcement regime that is similar to the Brussels I Regulation. The Brussels Convention 1968 and the Lugano Convention 1988 contain similar provisions but have a slightly stricter recognition regime with regard to the grounds of refusal. For the purpose of the present section only the Brussels I Regulation will be discussed.

[303] In the opinion of Wautelet in Magnus and Mankowski, eds. (2007), Article 32, § 4, at 536, who reads this independent interpretation in C-39/02 *Mærsk Olie & Gas*, [2004] ECR I-9657, at para. 45. See also fn. 10, at 537.

execution, as well as the determination of costs or expenses by an officer of the court.'[304] According to Briggs, the concept of judgment as defined by Article 32 Brussels I Regulation is wide but not unlimited and 'applies to many, but not all, judicial orders'.[305] Article 32 covers contentious as well as voluntary or non-contentious proceedings.[306]

In *Solo Kleinmotoren v. Boch*, the CJEU gave significant weight to the fact that a court should decide on the substance of the matter in order for its decision to qualify as a 'judgment' in the sense of Article 32 and stated that such a judgment must emanate from a judicial body of a Member State deciding *on its own authority on the issues between the parties.*[307] This statement requires further examination in relation to a binding declaration of a settlement agreement pronounced by the Amsterdam Court, especially since the Court continues in *Solo Kleinmotoren* that 'that condition is not fulfilled in the case of a settlement, even if it was reached in a court of a [Member] State and brings legal proceedings to an end'.[308] It is clear that according to that statement, the definition of 'judgments' under Article 32 does not cover court settlements.[309] For that reason the Court states that a 'decision is a judgment of a court which itself determines a matter at issue between the parties'.[310] In other words, the judgment concept requires that the issuing court has finally determined the matter as to its substance *on its own authority* and according to Wautelet this implies that the court did not merely take over what the petitioner submitted.[311] In a WCAM procedure, the Amsterdam Court does not merely take over petitioners' request since it applies a reasonableness test evaluating the substance of the settlement agreement and may suggest further provisions or amendments,[312] but the Court is not asked nor allowed to actually determine the matter as to its merits.

Consent judgments are included under the judgment concept of Article 32 Brussels I Regulation, *court settlements* are not.[313] These *judgments by consent* have similar characteristics to settlements but are in fact judicial decisions.[314] Consent judments are known in Belgium, Luxembourg, Ireland and the U.K.[315] One definition defines a *consent judgment* as 'merely a contract acknowledged in open court and ordered to be recorded but it

[304] Article 32 Brussels I Regulation.
[305] Briggs (2009), § 7.06, at 673.
[306] Gaudemet-Tallon (2010), § 369, at 388.
[307] C-414/92 *Solo Kleinmotoren v. Boch*, [1994] ECR I-2237, para. 17.
[308] Ibid., para. 18, referring to the Jenard Report, at 56, in which Jenard states that court settlements are contractual in their nature.
[309] See AG Gulmann's Opinion in C-414/92 *Solo Kleinmotoren v. Boch*, [1994] ECR I-2237, para. 17; see also BIICL's Study on Effect of Judgments, at 43.
[310] C-414/92 *Solo Kleinmotoren v. Boch*, [1994] ECR I-2237, para. 21.
[311] Wautelet in Magnus and Mankowski, eds. (2007), Article 32, § 41, at 546. See also Gaudemet-Tallon (2010), § 369, at 388.
[312] Article 907(4) DCC.
[313] Wautelet in Magnus and Mankowski, eds. (2007), Article 32, § 39, at 546 and Briggs (2009), § 7.31, at 712, both of whom refer to AG Gulmann's Opinion in C-414/92 *Solo Kleinmotoren v. Boch*, [1994] ECR I-2237, paras. 29 and 30.
[314] Vékás in Magnus and Mankowski, eds. (2007), Article 58, § 1, at 695.
[315] See AG Gulmann's Opinion in C-414/92 *Solo Kleinmotoren v. Boch*, [1994] ECR I-2237, para. 29.

binds the parties as fully as other judgments'.[316] According to Gaudemet-Tallon a consent judgment or *décision gracieuse* does not involve a court's determination of a matter at issue between the parties, but the court expresses '*sa volonté*' for example by nominating a liquidator.[317] Advocate General Gulmann states in his Opinion in *Solo Kleinmotoren* that the clear distinction between consent judgments and court settlements lies in the fact that judgments in general and consent judgments in particular have acquired the status of *res judicata*, whereas court settlements generally do not have that status.[318]

Furthermore, the Brussels I Regulation is fundamentally concerned with judicial decisions involving adversary proceedings and not with decisions given without the other party's being summoned to appear.[319] As a consequence the 'judgment' concept under Article 32 applies to decisions arising out of adversarial proceedings and does not apply to judgments rendered *ex parte* in which not all parties are present, or in cases where legal proceedings have been brought and judgments obtained without representation or notification of one of the parties.

In *Bernard Denilauler v. SNC Couchet Frères*[320] the issuing court ordered a provisional measure where the party against whom they were directed had not been summoned to appear and had therefore not been heard.[321] Without defining the concept of *adversarial proceedings*, the CJEU imposed a primordial condition for proceedings to fall within the scope of the Brussels I Regulation's regime by stating that judicial decisions delivered without the party against whom they are directed having been summoned to appear and which are intended to be enforced without prior service, are not the type of judicial decisions covered by the Regulation's system of recognition and enforcement.[322]

The importance of the opportunity to be heard was also emphasized in *Mærsk Olie & Gas.* The CJEU was asked whether a decision ordering the establishment of a liability limitation fund for the use of a ship at the *ex parte* request of the ship owner is a 'judgment' within the meaning of the Brussels I Regulation when the decision was made at the conclusion of non-contested proceedings.[323] In these proceedings the injured party was also considered an interested party and the Court's ruling was therefore awaited in The Netherlands in connection with the WCAM Act.[324] The Court ruled that as long as the order had been the 'subject of submissions by both parties before the issue of its recognition or its enforcement'

---

[316] As defined in Black's Law Dictionary, 8th Ed. (2004).

[317] Gaudemet-Tallon (2010), § 369, at 389.

[318] See AG Gulmann's Opinion in Case C-414/92 *Solo Kleinmotoren v. Boch*, [1994] ECR I-2237, para. 30, where AG Gulmann makes a distinction between court-approved settlements and consent judgments. See also Briggs (2009), § 7.31, at 712.

[319] C-39/02 *Mærsk Olie & Gas*, [2004] ECR I-9657, para. 50; Case 125/79 *Bernard Denilauler v. SNC Couchet Frères*, [1980] ECR 1553, paras. 11 and 13.

[320] Case 125/79 *Bernard Denilauler v. SNC Couchet Frères*, [1980] ECR 1553.

[321] Briggs emphazises that it is not 'the fact that the defendant did not appear which deprived the order of the character of a judgement, but the fact that, in the very nature, he *could* not have appeared', see Briggs (2009), § 7.06, at 674 (emphasis added).

[322] Case 125/79 *Bernard Denilauler v. SNC Couchet Frères*, [1980] ECR 1553, at para. 17.

[323] Article 25 Brussels and Lugano 1988 Conventions.

[324] The case of *Mærsk Olie & Gas* was mentioned and awaited by Dutch members of the parliament while evaluating the WCAM Act, see *Kamerstukken* II 2003/04, 29414, no. 7, at 4.

came to be addressed, and therefore there was an opportunity for both parties to be heard, the order should be understood as a 'judgment' under Article 32.[325]

The *Gambazzi* judgment of 9 April 2009 reaffirmed the Court's earlier judgments by stating that Article 32[326] refers, 'without distinction, to all judgments given by a court or tribunal of a Contracting State'[327] and that 'it is sufficient if they are judicial decisions which, […] have been, or have been capable of being, the subject in that State of origin and under various procedures, of an inquiry in adversarial proceedings'.[328]

These judgments could be interpreted as meaning that although to some extent the WCAM procedure is not purely adversarial or *inter partes* because interested parties are not systematically a 'party' to the proceedings, the fact that the WCAM Act attaches significant weight to the proper notification of the interested parties in order to give them the opportunity to be heard should not preclude the WCAM proceedings from being a type of proceeding covered by the Brussels I Regulation for the purpose of Article 32.[329]

5.2.2 Court Settlements under Article 58 Brussels I Regulation

In *Solo Kleinmotoren*, the CJEU explained that '*court settlements*' are governed expressly by Article 58 Brussels I Regulation[330] and that 'an enforceable settlement reached before a court of the State […] in order to settle legal proceedings which are in progress does not constitute a "judgment"'.[331] In the view of the Court 'settlements in court are essentially contractual in that their terms depend first and foremost on the parties' intention'[332] and not on a court's decision.[333] This element of a settlement based on the parties' agreement rather than on the court's authority is an important characteristic for the application of Article 58. According to Briggs, procedural measures by which a dispute may be consensually terminated are – apart from consent judgments – not included in Article 32 but may be included in Article 58.[334] The English version of Article 58 Brussels I Regulation refers to 'settlements which have been *approved* by a court in the *course of proceedings*.'[335]

The fact that the settlement had to be reached *in the course of proceedings* is an important feature for the application of Article 58 as it therefore excludes out-of-court settlements that

[325] C-39/02 *Mærsk Olie & Gas*, [2004] ECR I-9657, paras. 50 and 51.
[326] Article 25 Brussels and Lugano 1988 Conventions.
[327] C-394/07 *Gambazzi*, [2009], para. 22.
[328] Ibid., para. 23.
[329] See also Croiset van Uchelen, A.R.J., 'Van corporate litigation naar corporate settlement', in Van Solinge, G., and Holtzer, M., eds., *Geschriften vanwege de Vereniging Corporate Litigation 2003-2004. Serie vanwege het Van der Heijden Instituut te Nijmegen. Deel 75* (2004), 129-160, at 155.
[330] Article 51 Brussels Convention; C-414/92 *Solo Kleinmotoren v. Boch*, [1994] ECR I-2237, para. 22.
[331] C-414/92 *Solo Kleinmotoren v. Boch*, [1994] ECR I-2237, para. 25. See also Wasserman, R., *Transnational Class Actions and Interjurisdictional Preclusion*, University of Pittsburgh Legal Studies Research Paper No. 2010-04 (2010), available at SSRN: http://ssrn.com/abstract=1554472, at 36.
[332] C-414/92 *Solo Kleinmotoren v. Boch*, [1994] ECR I-2237, para. 21.
[333] Briggs (2009), § 7.31, at 713.
[334] Ibid., at 712.
[335] Emphasis added. Article 58 Brussels I Regulation and Lugano 2007 Convention, Article 51 Brussels and Lugano 1988 Conventions.

are later approved by a court.[336] The French and German versions of the texts even presuppose that the settlement had to be agreed *in front of* a judge – *transactions conclues devant un juge au cours d'un procès* or *vor einem Gericht im Verlauf des Verfahrens geschlossen wurden*.[337] Jenard explains in his Explanatory Report that a separate provision dealing with court settlements was needed to deal with the existence of these instruments under Dutch and German law.[338] The *court settlements* known in The Netherlands to which Jenard refers is the result of a judge's order on the parties involved to reach a settlement during the proceedings – '*ter terechtzitting*'.[339]

The requirement that the settlement should have been concluded during the course of proceedings is important and will probably mean that a WCAM settlement does not fall within Article 58 Brussels I Regulation. It could have been argued that the Amsterdam Court's binding declaration of a WCAM settlement should be understood as an approval by the Court which would create a closer link between a WCAM settlement and a court-approved settlement. In this context it should be emphasized that the formal approval of a court is *not* a requirement under Article 58 Brussels I Regulation. For that reason, the Heidelberg Report finds the English version of Article 58 misleading and states that the provision *does not require* any approval of the settlement by the court.[340] In the Dutch, French and German versions of Article 58 it is not required that the settlement had to have been approved by the court, but merely that it had to be *concluded* during the proceedings or before a judge – *transactions conclues devant le juge*. Vékás and Briggs merely repeat the English text by stating that the settlement should be approved by a court and that such an approval should be done in the course of the proceedings.[341] In light of this ambiguity, the Heidelberg Report advises to adapt the wording of Article 58 to the wording of the EC Regulation Enforcement Order for Uncontested Claims, which require that a 'settlement has been approved by a court *or* concluded before a court in the course of proceedings',[342] in order to include out-of-court settlements which are approved by a competent court at a later stage.[343] This advice has not been followed – and has not even been considered in the European Commission's Report and Green Paper on the Review of the Brussels I

[336] The Dutch version also indicates that settlements are reached in the course of proceedings: '*Gerechtelijke schikkingen die in de loop van een geding tot stand zijn gekomen*'.
[337] As rightfully pointed out by Hess, B., Pfeiffer, T. and Schlosser, P., in *The Brussels I-Regulation (EC) no. 44/2001: The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States (Study JLS/C4/2005/03)* (2008), § 551, at 161 [hereafter Heidelberg Report].
[338] See Jenard Report, at 56, under Article 51 referring to the previous Article 19 DCCP, which is currently for the greater part embodied in Article 87 DCCP.
[339] Article 87(1) reads: '*De rechter kan, op verzoek van partijen of van een van hen dan wel ambtshalve, in alle gevallen en in elke stand van het geding een verschijning van partijen ter terechtzitting bevelen teneinde een schikking te beproeven.*'
[340] Heidelberg Report, § 551, at 161.
[341] Vékás in Magnus and Mankowski, eds. (2007), Article 58, § 10, at 696; and see Briggs (2009), § 7.31, at 713.
[342] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for Uncontested Claims, OJ L 143, at 15-39 (emphasis added).
[343] Ibid. See Article 3(1)(a).

Regulation.[344] As a consequence, a settlement in terms of Article 58 is not to be understood as a *court-approved settlement*.[345]

Authentic acts and court settlements are not considered 'judicial acts', but should rather be understood as *acts of voluntary jurisdiction* or *actes de juridiction gracieuse*, and should not be confused with consent judgments.[346] Gaudemet-Tallon considers a court settlement more like a 'contract' which is not available for recognition.[347] It is for those reasons that Article 58 does not regulate the recognition of court settlements, but it merely establishes that the *enforcement* is done under the same conditions as authentic instruments pursuant to Article 57 Brussels I Regulation.[348] According to that provision, court settlements are enforceable in other Member States but their enforceability may be refused if the settlement is *manifestly contrary to the public policy* of the State in which enforcement is sought. This enforcement regime differs from the recognition regime applied for judgments in the sense of Article 32 Brussels I Regulation. The latter includes, apart from the public policy exception, a few other grounds for refusal such as when the judgment was given in default of appearance and in the case of the irreconcilability of judgments as will be demonstrated below.[349]

5.2.3 Concluding: The Binding Declaration, Judgment or Court Settlement?

A binding declaration of a WCAM settlement is to be recognized in relation to foreign interested parties outside The Netherlands and within the borders of EU and EFTA States since such declaration should be understood as a 'decision' – either a judgment or a court settlement – covered by the Brussels I Regulation.

The applicable recognition regime and the available grounds of non-recognition of the Brussels I Regulation depend on the qualification of the binding declaration within the concepts of 'judgments' in the sense of Article 32, or of 'court settlements' under Article 58 Brussels I Regulation.

The nature of a binding declaration of a WCAM settlement is difficult to qualify as a judgment or as a court settlement as the Amsterdam Court's decision lies in between both concepts. The current wording of the Brussels I Regulation is not suitable for the specific features of the binding declaration of a WCAM settlement and requires further specification or modification. Furthermore, the English version of Article 58 should be brought in line with the German and French versions of the text in order to avoid confusion as to the required approval of court settlements by the court.

---

[344] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM/2009/0174 FIN. Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, COM/2009/0175 FIN.

[345] See also Stadler (2009), at 163.

[346] Gaudemet-Tallon (2010), § 469, at 495.

[347] Ibid., § 470, at 496.

[348] According to Article 58.

[349] Article 34(2)-(4). See Heidelberg Report, § 547, at 159-160.

In default of such clarification, WCAM settlements declared binding by the Amsterdam Court should not be understood as *court settlements* in the sense of Article 58 Brussels I Regulation, because settlements are not reached *in the course of proceedings* but are first concluded between parties after which parties make a request for the binding declaration to the court.[350] This might become different if Article 58 were to be modified according to the wording of the European Enforcement Order for Uncontested Claims, by alternatively including the words 'settlement which has been approved by a court'[351] in which case the binding declaration could be considered as an 'approval'.[352] However, so far there is no indication that such an amendment to Article 58 will be made in the Commission's Proposal on the revision of the Brussels I Regulation.[353]

Although a binding declaration does not involve a court's decision ruled *on its own authority* on *the issues between the parties*, as the issue was already settled by the parties before it reached the court, a binding declaration should nevertheless be understood as a 'judgment' in the sense of Article 32 Brussels I Regulation. This conclusion is based on the fact that the court assesses the reasonability of the settlement and therefore exercises a considerable degree of control on the substance of the settlement.[354] Additionally, it should be noted that respondents in the WCAM proceedings have the right to be heard on their objections to the binding declaration. Furthermore, Article 7:907(4) DCC allows the court to give the parties the opportunity to add further provisions to the agreement or to amend it before deciding on the binding declaration. The court's role in the binding declaration of the WCAM procedure is therefore sufficiently substantial to qualify it as a 'judgment' in the sense of Article 32 Brussels I Regulation.[355]

5.3 The Automatic Recognition Regime for 'Judgments' and Its Effects

Article 32(1) establishes the principle of automatic recognition by stating that judgments given in a Member State shall be recognized in other Member States without any special

---

[350] See also Muir Watt (2010), at 114; Stadler (2009), at 163; Croiset van Uchelen (2007), at 226.

[351] Article 3(1)(a) EC Regulation Enforcement Order Uncontested Claims. The English version of the text has the same meaning as the Dutch, French and German versions respectively: '*een schikking die door een gerecht is goedgekeurd of die in de loop van de gerechtelijke procedure voor een gerecht is getroffen*'; '*une transaction qui a été approuvée par une juridiction ou conclue devant une juridiction au cours d'une procédure judiciaire*'; '*oder durch einen von einem Gericht gebilligten oder vor einem Gericht im Laufe eines Verfahrens geschlossenen Vergleich zugestimmt hat*'.

[352] See also Hess, B., 'Cross-Border Collective Litigation and the Regulation Brussels I', *IPRax* (2010), 2, 116-121, at 120, considering whether a court's approval of a collective settlement could be qualified as a judgment in the sense of Article 32. In this context, mention should also be made of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters. This Directive stipulates in Article 6(1) and (2) that Member States shall ensure that the content of written mediation agreements is made enforceable by a court either in a judgment, decision, or in an authentic instrument in accordance with the law of the Member State where the request is made. This provision could be applied by analogy to WCAM settlement agreements also reached on a voluntary basis, but generally without the assistance of a mediator. The settlement agreement could be made enforceable by the Amsterdam Court by way of a binding declaration, which should be considered as a judgment in accordance with the law of The Netherlands. See also Gaudemet-Tallon (2010), § 369, at 388-389.

[353] It is expected late 2010 or early 2011.

[354] See also Stadler (2009), at 164, fn. 35.

[355] See also Polak, R. (2009), at 13; Poot (2006), at 194.

procedure being required.[356] Recognition may only be refused if one of the grounds for non-recognition specified in Article 34 and as set out below apply or if the examination of the jurisdiction grounds preclude recognition pursuant to Article 35.

The recognition question in relation to the WCAM specifically involves the question whether the binding declaration of the Amsterdam Court binds other parties who are not party to the settlement,[357] e.g. foreign interested parties, who have not opted out and the question is whether they no longer retain their rights to institute proceedings in another State. In a WCAM procedure, the recognition question will be addressed in the courts of another Member or Contracting State when the binding declaration is presented for recognition pursuant to Article 32(2), or when the settlement declared binding by the court is relied upon to prevent re-litigation on the same dispute. The latter is referred to as *res judicata* or preclusive effect and will be dealt with before Article 32(2) in this report.[358]

5.3.1 The Preclusive Effect of WCAM Settlements Declared Binding

If a binding declaration of the Amsterdam Court is recognized as a *judgment* under the Brussels I Regulation, can a party rely upon the binding effect of the WCAM settlement outside The Netherlands and in what way is the (binding) effect of the settlement on foreign interested parties determined? This aspect of recognition concerns the principle of *res judicata*. The *res judicata* principle is a concept based on national law and there is no uniform interpretation provided by the CJEU.[359] Nonetheless, the principle has been recognized by the CJEU in the case of *Rosmarie Kapferer v. Schlank & Schick GmbH*,[360] which states that

> '[i]n order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question.'[361]

Hence, according to the CJEU the finality of judgments is an important element. The finality of judgments in the sense that judgments can no longer be called into question has also been underlined on various occasions by the ECHR.[362]

---

[356] Wautelet in Magnus and Mankowski, eds. (2007), Article 33, § 15, at 550.

[357] See BIICL's Study on Effect of Judgments, at 21-22.

[358] Wautelet in Magnus and Mankowski, eds. (2007), Article 33, § 17, at 550.

[359] BIICL's Study on Effect of Judgments, at 54.

[360] C-234/04 *Rosmarie Kapferer v. Schlank & Schlick GmbH*, [2006] ECR I-2585.

[361] Ibid., para. 20. The principle of *res judicata* was accepted earlier in relation to Community law in C-224/01 *Köbler*, [2003] ECR I-10239, para. 38. See also BIICL's Study on Effect of Judgments, at 37.

[362] See BIICL's Study on Effect of Judgments, at 39, referring to *Brumărescu v. Romania* [GC], no. 28342/95, § 6(1), ECHR 1999-VII, para. 61. See De Ly, F., and Sheppard, A., The ILA's Committee on International Commercial Arbitration; Final Report on Res Judicata and International Commercial Arbitration, at the 2006 Toronto Conference, available at http://www.ila-hq.org/en/committees/index.cfm/cid/19, at 38 [hereafter ILA's Report on Res Judicata and International Commercial Arbitration], referring to the ECHR in *Kehaya and others v.* Bulgaria, 12 January 2006.

The principle of *res judicata* entails a positive and a negative effect of judgments.[363] *Positive res judicata* or *conclusive effect* of a judgment relates to the fact that the court addressed accepts that what the court of origin decided 'constitutes a valid determination of the rights and obligations of the parties'.[364]

The *negative res judicata* or *preclusive effect* of a judgment puts a stop to the re-litigation of the claim already decided.[365] In the *De Wolf* case the CJEU ruled that recognition of a judgment precluded the initiation of proceedings concerning the *same subject matter* and brought between the *same parties*.[366]

Regarding the possibilities for the application of WCAM settlements outside The Netherlands to transnational mass damage cases, the binding effect on foreign interested parties is particularly relevant to bar further individual proceedings instituted by interested parties who have not opted out but nonetheless want to challenge the binding effect of the WCAM settlement. If WCAM settlements are found not to have binding effect outside The Netherlands, there will be no incentive left for the alleged responsible party to settle for the benefit of foreign interested parties.

The Regulation does not define the effect of recognition, but according to Jenard's Explanatory Report 'recognition must have the result of conferring on judgments the authority and *effectiveness* according to them in the State in which they were given.'[367] Jenard acknowledges that the words *res judicata* have expressly been omitted,[368] but the statement clearly refers to the effect of the judgments recognized.[369] The rule was affirmed by the CJEU in *Hoffmann v. Krieg* when it stated that 'a foreign judgment which has been recognized […] must in principle have the same effects in the state in which enforcement is sought as it does in the state in which judgment was given.'[370] As a consequence, the law of the State of origin – the *lex fori originis*[371] – determines the effect of judgments recognized under the Brussels I Regulation even if its legal consequences are unknown in the State

[363] See also Carballo Piñeiro (2009), § 237, at 228.
[364] Ibid., § 246, at 237. As formulated by Wautelet in Magnus and Mankowski, eds. (2007), Article 33, § 4, at 548; Polak, M.V. (2006), at 2354.
[365] Wautelet in Magnus and Mankowski, eds. (2007), Article 33, § 6, at 548; Polak, M.V. (2006), at 2354; see BIICL's Study on Effect of Judgments, at 14 and 60; and also ILA's Report on Res Judicata and International Commercial Arbitration, at 29 and 31, although international arbitral awards are to be treated differently from court judgments.
[366] Case 42/76 *Jozef de Wolf v. Harry Cox BV*, [1976] ECR 1759, at paras. 10-11. See also ILA's Report on Res Judicata and International Commercial Arbitration, at 34, maintaining the *triple identity test* (identity of claims, of the causes of actions and of the parties).
[367] Jenard Report, at 43; see for a more detailed review of Jenard's comments in BIICL's Study on Effect of Judgments, at 54-55.
[368] This is because judgments given in interlocutory proceedings and *ex parte* may be recognized, and these do not always have the force of *res judicata* according to Jenard, see Jenard Report, at 43.
[369] Wautelet in Magnus and Mankowski, eds. (2007), § 7, at 548; Polak, M.V. (2006), at 2354.
[370] Case 145/86 *Hoffmann v. Krieg*, [1988] ECR 645, para. 11. See also the decision of the Dutch Supreme Court affirming the rule established by the CJEU in the latter decision, HR 12 March (2004), *NJ* 2004, 284, with note by Vlas.
[371] See Polak, M.V. (2006), at 2355; and see also Carballo Piñeiro (2009), § 236, at 227.

addressed.[372] This means that Dutch law determines the effect of the Amsterdam Court's binding declaration and since a binding declaration of a WCAM settlement establishes *res judicata*, other Member and Contracting States will have to accept that effect. The main effect provided for in the WCAM is that any further individual or collective litigation in relation to that mass event will be precluded.[373] Only the grounds for non-recognition may impose a limitation to these consequences.[374]

The statement of the CJEU related to the ***res judicata*** seems to emphasize that the effect of recognition of a judgment bars proceedings concerning the *same parties*, the *same claims* and the *same subject matter*.[375] Although the exact application of this *triple identity test*[376] has not been explained by the Court, recourse may be found in the similar (autonomous) test applied in the light of the *lis pendens* rule under Article 27 Brussels I Regulation.[377] In relation to the WCAM, problems may occur with the notion of *same parties*, as it is unlikely that the same group of interested persons will tend to start another procedure somewhere else. The problems identified in Section 2 – dealing with international jurisdiction – regarding the meaning of 'interested parties' in relation to 'defendants' and whether interested parties are 'party' to the settlement agreement, also arise with respect to the *res judicata* and its notion of *same parties.* As far as the *same cause of action* or *subject matter* is concerned, an action instituted by the alleged responsible party for a declaration of recognition of the binding declaration – positive declaratory relief under Article 32(2) as set out below – should be considered to arise out of the same cause of action for damages instituted by an interested party against the alleged responsible party when the damage involves the same event as the subject matter settled under the WCAM.

In the U.S., the *Full Faith and Credit Clause* enshrined in Article IV of the U.S. Constitution regulates the interstate recognition of judgments and applies the same reasoning as the Brussels I Regulation in recognizing that courts must give the same effect to the judgment as it would receive in the State of origin.[378]

The *lex fori originis* also determines whether a judgment's preclusive effects will extend to parties other than claimants/defendants or applicants who may have become parties in the course of proceedings or may benefit from the proceedings in some other way.[379] The preclusive effect of judgments may even extend to third parties who did not appear in proceedings but were represented by representative associations, including those who were not known at the moment of the request for the binding declaration of the settlement

[372] Wautelet in Magnus and Mankowski, eds. (2007), Article 33, § 7, at 549.
[373] Briggs (2009), § 7.26, at 705.
[374] As discussed in Section 5.4.
[375] Case 42/76 *Jozef de Wolf v. Harry Cox BV*, [1976] ECR 1759, at paras. 10-11. See also BIICL's Study on Effect of Judgments, at 39.
[376] See the ILA's Report on Res Judicata and International Commercial Arbitration, at 34, maintaining the *triple identity test* (identity of claims, of the causes of actions and of the parties).
[377] BIICL's Study on Effect of Judgments, at 63.
[378] Ibid., at 41 and 62.
[379] Ibid., at 21.

agreement.[380] Again, the effects given to judgments are not uniform between legal systems.[381] Some legal systems limit the preclusive effect of judgments involving representative actions to the actual parties to the proceedings, but the majority of legal systems within the EU do not extend the judgments' effects to third parties.[382] With regard to the WCAM, this issue relates to the question whether the preclusive effect accorded to the binding declaration of the Amsterdam Court extends to interested persons. Interested persons – known and unknown – may be considered bound as parties to the settlement by the binding declaration and this may entail a preclusive effect if *the law of the State of origin* states so.[383] The fact that the WCAM extends the effects of the Amsterdam Court's binding declaration to interested parties means that, pursuant to the *lex fori originis*, the effect of the recognition of the binding declaration will also bind interested parties in Member States.

In relation to settlements which have *not* been approved or have not been declared binding by a court, and are therefore a matter of international contractual obligations, it should be noted that since there is *no court decision, there is no res judicata*.[384]

In practice, interested parties who have not expressed the wish to opt out will carefully weigh the procedural costs of instituting (individual) proceedings against the possibility of obtaining a higher amount of compensation than the compensation awarded by the WCAM and the chances of success of obtaining a determination of the liability of the alleged responsible party. The general view is that such assessment will discourage interested parties from re-litigating the issue. Whether interested parties are *legally bound* by the WCAM settlement once it is declared binding by the Amsterdam Court is, in practice, only relevant to a limited degree. Foreign interested parties are often bound *de facto* as they are compensated and, thus, discouraged to re-litigate the matter.

5.3.2 Declaratory Proceedings

Article 33(2) Brussels I Regulation stipulates that *any interested party* may raise the recognition of a judgment of another Member or Contracting State as a principal claim to obtain a declaration that the judgment is recognized. Although this possibility appears to be rarely used, it is particularly interesting for binding WCAM settlements, especially for the alleged responsible party who can, through such a declaration, obtain finality in every State where interested parties – known and unknown – are thought to be located.[385]

---

[380] Ibid.
[381] Ibid., at 55.
[382] See Carballo Piñeiro (2009), § 236, at 227; and BIICL's Study on Effect of Judgments, at 24, 55 and 61. In this context it may be relevant to note that France does not apply the *lex fori originis* but takes an intermediate position by applying domestic law in conjunction with the rules of the State of origin to determine the preclusive effect of foreign judgments recognized. As will be explained below, France is in particular critical of the opt-out character of collective redress mechanisms and is likely to invoke the public policy ground for non-recognition.
[383] BIICL's Study on Effect of Judgments, at 22.
[384] These traditional types of settlements do not fall under Article 58 or under Article 32. See Carballo Piñeiro (2009), § 222, at 214. The WCAM settlement is no such traditional settlement as it has been declared binding by the Court and is therefore an '*autentica class settlement*' based on judicial order, ibid., § 227, at 219.
[385] Wautelet in Magnus and Mankowski, eds. (2007), Article 33, § 20, at 551; BIICL's Study on Effect of Judgments, 49.

Jenard defines an *interested party* for the purpose of this provision as 'any person who is entitled to the benefit of the judgment in the State in which it was given.'[386] Consequently, apart from the alleged responsible party which was the initial applicant requesting the binding declaration of a WCAM settlement from the Amsterdam Court, any interested party for whose benefit the agreement was concluded may also institute such principal action for recognition.

The provision seems to merely allow positive declarations of recognition in order to confirm judgments issued by the court of origin. It does not seem to have been enacted to allow for a negative declaration of recognition sought by a person who wishes to raise the non-recognition of a judgment as a principal issue.[387] However as correctly advanced by Wautelet, when a court dismisses an application for a (positive) declaration of recognition, the effect will be similar to a negative declaration.[388]

5.4 Grounds for Non-Recognition

For foreign interested parties to be bound by a WCAM settlement depends on whether the binding declaration is entitled to recognition under the Brussels I Regulation, which would prevent foreign interested parties from ignoring the settlement and start new proceedings. The recognition regime of the Brussels I Regulation includes grounds for non-recognition of judgments. In other words, the application of grounds for non-recognition of a judgment may result in not giving the legal effect to a WCAM settlement which it has under Dutch law as *the law of the State of origin* within the EU and EFTA States, and foreign interested parties would thereby not be bound by it.

Besides the limited examination of the grounds of jurisdiction,[389] there are four grounds for refusal of recognition of 'judgments' specified in Article 34. They are exhaustive and should be interpreted strictly and can only be invoked at the enforcement stage.[390]

Article 34 reads:

> 'A judgment shall not be recognised:
>
> 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

---

[386] Jenard Report, at 49.

[387] See Wautelet in Magnus and Mankowski, eds. (2007), Article 33, § 28, at 553-554. Wautelet also refers to Kropholler, J., *Europäisches Zivilprozeßrecht: Kommentar zu EuGVO, Lugano-Übereinkommen und Europäischem Vollstreckungstitel* (2005), Article 33, note 7, who argues that such a negative declaration of recognition should depend on the national law of the court addressed. See BIICL's Study on Effect of Judgments, 48.

[388] Wautelet in Magnus and Mankowski, eds. (2007), Article 33, § 29, at 554.

[389] See under Article 35.

[390] According to Articles 43(1) and 45(1), an appeal on one of the grounds specified in Articles 34 and 35 may be lodged against the declaration of enforceability. Under the Brussels and Lugano 1988 Conventions Article 26 established a presumption in favour of recognition which could however at the recognition stage be rebutted on the grounds stipulated in Article 27.

2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.'

The four grounds for non-recognition are not overlapping[391] and deserve further examination in light of the specific features of the *opt-out* WCAM procedure. With respect to the non-recognition of WCAM settlements, possible problems relate to the *opt-out* character of the WCAM procedure. The possibility that an (unknown) interested party may become bound by a settlement agreement of which he was unaware, despite proper notification through newspapers and websites, and for that reason had not opted out of the agreement could be particularly problematic at the recognition stage of a WCAM settlement. Briggs states that

> 'Article 34(1) and 34(2) may be particularly material to a contention that a person, who was notified of his entitlement to membership of a class, and of his liability to suffer estoppels by *res judicata* unless he takes steps to avoid this outcome is bound and adversely affected by a judgment in proceedings to which he is not party. It may be hard to understand why someone invited to be a claimant, and who ignores the invitation, should suffer any adverse consequences as a result. But much the same may be said of defendants who are served and who ignore the invitation to defend.'[392]

5.4.1 Default of Appearance and the Protection of the Interested Party

Article 34(2) constitutes the most probable ground for refusal of recognition in the situation described above as it principally deals with a person's right to be heard. This ground prohibits recognition of a judgment under three conditions:

1. default of appearance of the 'defendant';
2. the defendant was not served with the document which instituted proceedings in sufficient time in order for him to arrange his defence; and

[391] See Francq in Magnus and Mankowski, eds. (2007), § 19, at 567; and Briggs (2009), § 7.12, at 687; C-78/95 *Hendrikman and Feyen v. Magenta Druck & Verlag*, [1996] ECR I-4943, at para. 23.
[392] Briggs (2009), § 7.26, at 706.

3. the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.[393]

It is feasible to apply this ground for refusal of a WCAM binding declaration rendered in *default of appearance* of interested parties who can demonstrate that the notice to inform them of the procedure did not reach them.[394] Interested parties in WCAM procedures need to be notified in order to enable them to be heard if they do not agree with the settlement concluded for their benefit. In WCAM proceedings, especially unknown interested parties are likely not to appear in the proceedings if they were unaware of the proceedings because the notification by newspaper and website did not reach them. In this respect, it could very well be argued that an interested party – for whom the settlement was concluded in order for him to be awarded compensation but also so that he would no longer retain his right to initiate individual proceedings – could be considered 'defendant' for the purpose of recognition under Articles 32 and 34 and the term should therefore be understood in a broader sense than for the purposes of applying the jurisdiction grounds.[395]

According to the CJEU, the concept *document which instituted proceedings* means 'the document which must be duly and timeously served on the defendant in order to enable him to assert his rights before an enforceable judgment is given in the State of origin'.[396] The notification at the first stage of the WCAM procedure, which is meant to inform the defendant about the proceedings being initiated, falls within this meaning.[397] The notice gives him the opportunity to appear in court and prepare his defence and should therefore be understood as the 'document instituting proceedings'.[398]

The notice to appear must have been served in sufficient time and in such a way that the 'defendant' was able to prepare his defence. Whether the service was regular depends on the law of the adjudicating court.[399] It is important to stress that this ground does not imply that if the notification was irregular – in the sense that it was not in accordance with the provisions for proper service – it would systematically lead to non-recognition; it is sufficient that the notification occurs in a way that the defendant was able to prepare his defence 'even though it is unlikely that the notification would effectively reach him'.[400]

---

[393] According to Briggs and Francq each of these conditions must be met in order to have recourse to the ground for non-recognition under Article 34(2). Briggs (2009), § 7.17, at 693; and Francq in Magnus and Mankowski, eds. (2007), § 36, at 579.
[394] It should be noted that this 'default of appearance' notion should be interpreted autonomously and will therefore not depend on the qualification of Dutch law on civil procedure. See Francq in Magnus and Mankowski, eds. (2007), § 44, at 583.
[395] See Francq in Magnus and Mankowski, eds. (2007), § 42, at 583, arguing that the term is broader than Article 26; see also Section 2 of this report on international jurisdiction.
[396] C-474/93 *Hengst Import BV v. Anna Maria Campese*, [1995] ECR I-2113, para. 19.
[397] Under Article 1013(5).
[398] See Francq in Magnus and Mankowski, eds. (2007), § 40, at 581.
[399] See Section 3 of this report, which examines Dutch law for proper service, which includes the Service Regulation and the Hague Service Convention. See also Briggs (2009), § 7.20, at 696.
[400] See Francq in Magnus and Mankowski, eds. (2007), § 54-55, at 590; Briggs (2009), § 7.20, at 697; and see C-283/05 *ASML Netherlands BV v. Semiconductor Industry Services GmbH*, [2006] ECR I 1201, paras. 47 and 49.

5.4.2 Public Policy

The recognition and enforcement of a WCAM binding declaration – if it was to be understood as a judgment pursuant to Article 32 – might also be refused if recognition would be *manifestly contrary to public policy* of the Member State addressed.[401] Whether or not recognition contravenes the public policy of the Member State addressed varies from State to State, as public policy is primarily national law.[402] Nonetheless, the CJEU is 'required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State.'[403] The public policy ground must be interpreted strictly, considering that it constitutes an exception to the free movement of judgments which is one of the fundamental objectives of the Brussels I Regulation.[404] The Court repeated that the public policy clause 'ought to operate only in exceptional cases'[405] and that *the recourse to it is in any event precluded when the issue must be resolved on the basis of a specific provision* such as the ground embodied in Article 34(2).[406] As indicated earlier, Article 34(2) concerning the right to be heard should first be considered before invoking *the procedural public policy principles* under Article 34(1). The public policy ground for refusal only applies when the ground enshrined in Article 34(2) does not apply.[407]

Article 34(1) Brussels I Regulation establishes public policy as a ground for non-recognition, preventing recognition if the *effect*[408] of recognition would constitute a manifest breach of the fundamental principles of the State addressed. Recourse to the public policy ground for non-recognition is not available on the mere ground that there is a 'discrepancy between the legal rules' applied in the judgment by the court of origin and the State in which enforcement is sought.[409] As a consequence, it is not sufficient that the State addressed is opposed to or unfamiliar with opt-out procedures; a State addressed may only refuse recognition on the basis of the public policy ground if the opt-out mechanism constitutes a manifest breach of the fundamental principles of its legal order. This has been made clear by the CJEU in the

---

[401] In the IBA Guidelines, Article 3.02 formulates the *public policy clause* in terms of sovereignty, stating that a judgment may be recognized 'provided it does not adversely interfere with the sovereignty of the jurisdiction in which it is to be enforced'. But see Article 4.01 which is referred to below.

[402] Gaudemet-Tallon (2010), § 407, at 423; Francq in Magnus and Mankoswki, eds. (2007), Article 34, § 15, at 565; Briggs (2009), § 7.14, at 688; Poot (2006), at 195.

[403] C-394/07 *Gambazzi*, [2009], para. 26; C-7/98 *Krombach v. Bamberski*, [2000] ECR I-1935, para. 23; C-38/98 *Régie Nationale des Usines Renault SA v. Maxicar SpA*, [2000] ECR I-2973, para. 28.

[404] See C-38/98 *Régie Nationale des Usines Renault SA v. Maxicar SpA*, [2000] ECR I-2973, para. 26.

[405] As explained by Jenard in his report, see the Jenard Report, at 44; see C-38/98 *Régie Nationale des Usines Renault SA v. Maxicar SpA*, [2000] ECR I-2973, para. 26, referring to Case 145/86 *Hoffmann v. Krieg*, [1988] ECR 645, para. 21 and Case C-78/95 *Hendrikman and Feyen v. Magenta Druck & Verlag*, [1996] ECR I-4943, para. 23.

[406] As stated by the Court in C-78/95 *Hendrikman and Feyen v. Magenta Druck & Verlag*, [1996] ECR I-4943, para. 23, referring to Case 145/86 *Hoffmann v. Krieg*, [1988] ECR 645, para. 21.

[407] See for a good example C-394/07 *Gambazzi*, [2009].

[408] Rather than the judgment itself as explained by Gaudemet-Tallon, see Gaudemet-Tallon (2010), § 398, at 413; Francq in Magnus and Mankowski, eds. (2007), § 19, at 566; and Briggs (2009), § 7.13, at 687.

[409] C-7/98 *Krombach v. Bamberski*, [2000] ECR I-1935, para. 36; C-38/98 *Régie Nationale des Usines Renault SA v. Maxicar SpA*, [2000] ECR I-2973, para. 34.

Krombach v. Bamberski case in which the Court states that recognition or enforcement of the judgment would be

> 'at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. [Such] infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order.'[410]

In fact, the public policy ground for non-recognition of a judgment might include a violation of fundamental rights under the ECHR.[411]

With respect to WCAM procedures, the particularity of the opt-out system may cause resistance in other Member States. Apart from situations covered by Article 34(2) in which a defendant – or interested party – was not properly notified of the proceedings and failed to appear, the question is whether specific characteristics of the WCAM could result in a binding WCAM settlement being considered manifestly contrary to the public policy of the Member State addressed in cases where an interested party did appear or, if he was properly notified of the proceedings, did not appear.[412] The opt-out system of the WCAM procedure is considered by Hess to be 'not in accordance with European procedural law'[413] and may constitute a manifest breach of the fundamental principles of the legal order of the State addressed.[414] As a consequence, a WCAM settlement declared binding by the Amsterdam Court on an interested party who was properly served and who did not opt out, could very well be refused recognition in a Member State because the *effect* of the binding declaration is considered contrary to the fundamental rights of the State in which recognition is sought.

Public policy as ground for non-recognition includes a violation of the fundamental principles of the ECHR and involves the right to a fair trial under Article 6 ECHR and the right of protection of property under Article 1 of the First Protocol to the ECHR. The first fundamental principle of the right to a fair trial as embodied in Article 6 ECHR only falls

---

[410] C-7/98 *Krombach v. Bamberski*, [2000] ECR I-1935, para. 37, repeated in C-394/07 *Gambazzi*, [2009], para. 27. See also Gaudemet-Tallon (2010), § 404, at 420.
[411] C-394/07 *Gambazzi*, para. 28. See also Briggs (2009), § 7.14, at 688.
[412] Croiset van Uchelen does not expect that recognition of the binding declaration would be refused on those grounds if service was proper, see Croiset van Uchelen (2007), at 227.
[413] See Hess (2010), at 120.
[414] France in particular seems to be hostile to the opt-out procedures according to Muir Watt and Pinna, see Muir Watt (2010), at 115, and A. Pinna, 'Recognition and Res Judicata of U.S. Class Action Judgments in European Legal Systems', 1 *Erasmus Law Review* (2008), 2, 31-61, at 45. But see *contra* Matousekova, M., 'Would French Courts Enforce U.S. Class Action Judgments?', *Contratto e Impresa* (2006), 261-676, at 668. Whether a U.S. class action with opt-out procedure was compatible with French *ordre public* was the key issue in relation to the 'superiority' test in the certification process of Rule 23(a) Federal Rules of Civil Procedure; *In re Vivendi Universal, S.A. Securities Litigation*, U.S. District Court, Southern District of New York, 241 F.R.D. 213 (2007). Germany also seems hostile, see ILA Report on Transnational Group Actions, at 23, for the decision of the Regional Court Stuttgart, 24 November 1999, *IPRax* (2001), 24.

under public policy when the situation is not covered by Article 34(2), which mainly deals with the right to be heard.[415]

Article 6 ECHR guarantees access to justice and fair trial, which may be restricted only under specific circumstances and conditions. A person may of his own free will waive his right to have his case heard in public, 'but any such waiver must be made in an unequivocal manner'.[416] The idea that a person can only become party to a settlement and waive his rights to individual proceedings by affirmative or presumptive consent, established by an opt-in process and not 'by an omission (opting out)',[417] is particularly criticized in view of the fundamental principles of fair trail.[418]

The fundamental guarantees of Article 6 ECHR have also been subject of debate. The Dutch Council of State – *Raad van State* – was critical about the opt-out mechanism in its advice to the Government and Parliament concerning the constitutional guarantees and Article 6 ECHR.[419] The Council argued that not using the opt-out possibility is not to be considered on the same level as a waiver of a person's right to individual proceedings.[420] The Council stated that this may only be the case when the person involved was adequately notified of the proceedings, of the binding declaration and of the possibility to opt out and when the person had sufficient time to evaluate the *pros and cons* of the consequences of opting out.[421] This line of reasoning was followed by the Amsterdam Court in its binding declaration of the *Dexia* settlement.[422] In this respect, it is to be mentioned that the WCAM takes into consideration the possibility that a person entitled to compensation did not know and *could not* have known of his loss and provides that person with a period of six months to opt out after he became aware of his loss.[423] But the question is – and remains – whether the State in which recognition of the binding declaration is sought agrees with this reasoning in light of its public policy. Especially when a *foreign interested party* – known or unknown – was simply never informed despite proper notification of his right to opt out, it is highly conceivable that the State in which recognition is sought for that purpose will invoke the public policy ground for refusal.[424]

The ILA Report on Transnational Group Actions, referring to the Regional Court of Stuttgart, illustrates the reluctance of Germany to recognize opt-out U.S. class action decisions which are considered incompatible with German fundamental procedural principles:

[415] See also Poot (2006), at 195.
[416] Case of *A.T. v. Austria* of 21 March 2002 (Application no. 32636/96), at para. 35, also referred to in the Council of State's advice in *Kamerstukken II*, 2003/04, 29 414, no. 4 (*Advies Raad van State*), at 1.
[417] See ILA Report on Transnational Group Actions, § 116, at 23.
[418] See Muir Watt (2010), at 115.
[419] *Kamerstukken II*, 2003/04, 29 414, no. 4 (*Advies Raad van State*), at 2.
[420] Ibid., at 3.
[421] Ibid., at 2-3.
[422] *Dexia*, Court of Appeal Amsterdam of 25 January 2007, *NJ* (2007), 427, at paras. 5.7-5.8.
[423] Article 908(3) DCC. See Poot (2006), at 196.
[424] See ILA Report on Transnational Group Actions, at 23; Poot (2006), at 196; and Falkena and Haak (2004), at 202.

> '[A] judgment rendered in a class action … without the active participation of the plaintiff and which may not even have required proper service of process to the defendant, would not be recognizable. … [S]uch class action is clearly not compatible with fundamental procedural principles … of German law – and incidentally also of other Continental European laws …. Pursuant to the Continental European view, judicial relief has to be granted individually and nobody must accept that a binding decision is imposed on him by third parties simply because he is part of a group ("class") – possibly even without being granted the right to be heard. Even if the law in question allows a plaintiff to opt-out of the class, this does not solve the problem. Either the law fully ensures that all members of the "class" are notified about the proceedings. … . Or the law does not ensure such notification, whereas in this case there is no possibility to opt-out from the class, which would constitute a violation of the public policy as described above.'[425]

The Stuttgart Court seems to accept an opt-out procedure if it is ensured that *all interested parties – class members – are notified* of the proceedings and of the opt-out procedure. This raises an interesting aspect of notification, especially since the Amsterdam Court had not required that *all interested parties* had to be notified, but was satisfied with a certain percentage having been notified.[426] In that regard Gaudemet-Tallon mentions the situation in which an interested party was properly notified in the sense that notification was in accordance with the EC Service Regulation and the Hague Service Convention, but nevertheless the interested party was not reached.[427]

That this approach was taken by the Stuttgart Court in respect of U.S. class actions does however not necessarily mean that the same approach would and should be taken with respect to Dutch WCAM settlements declared binding. First, it should be kept in mind that U.S. class actions differ considerably from WCAM collective settlements. Second, the recognition of a Member State's judgment is subordinated to benchmarks prescribed by the CJEU which are meant as a reference by which public policy should be measured.[428]

These benchmarks operate in light of the Regulation's objective of free movements of judgments and the public policy ground for refusal should be understood as having a 'narrow field of operation'.[429] *In abstracto*, the public policy defence should not interfere with the principle of mutual respect for each other's legal systems, and should only be applied if the judgment of the court of origin constitutes a manifest or disproportionate breach of

[425] See ILA Report on Transnational Group Actions, at 23, referring to the decision of the Regional Court Stuttgart, 24 November 1999, *IPRax* 2001, 240.
[426] See Section 3 of this report. In fact, the decision of the U.S. Supreme Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) shows that the due process rights of absent class members within the meaning of the Bill of Rights are implicated and that taking due process seriously means providing for adequate notification to *all* class members.
[427] Gaudemet-Tallon (2010), § 416, at 432, including fn. 129, referring to Article 26(2) Brussels I Regulation which is replaced by Article 19 Service Regulation. But see also C-283/05 *ASML Netherlands BV v. Semiconductor Industry Services GmbH*, [2006] ECR I 1201, para. 30.
[428] Briggs (2009), § 7.14, at 688.
[429] Ibid., § 7.13, at 687.

fundamental rights.[430] Several Member States currently have some form of collective redress mechanism and national legislators have made specific choices in relation to the opt-in or opt-out procedures. The public policy defence leaves national rules on civil procedure untouched and allows different national approaches and legislative choices to co-exist in the European judicial area as long as these are not manifestly disproportionate. In *Régie Nationale des Usines Renault SA v. Maxicar SpA* the CJEU prohibits

> 'the courts of the State in which enforcement is sought from refusing to recognise or enforce that judgment solely on the ground that there is *a discrepancy between the legal rule applied* by the court of the State of origin and that which would have been applied by the court of the State in which enforcement is sought had it been seised of the dispute'.[431]

The public policy defence should therefore apply in such a way as to 'ensure the efficient conduct of proceedings in the interests of the sound administration of justice'.[432] The fact that an opt-out procedure is unknown in the State of recognition does not constitute a manifest disproportionate breach to accept the public policy defence and preclude its residents of having access to a foreign or Dutch collective redress mechanism based on an opt-out procedure.

The public policy exception however allows a national court to assess whether the application of the public policy clause is justified in the light of the specific circumstances of a *concrete* case of a(n) (interested) party.[433] Application of a public policy ground may be justified in the concrete circumstance that a foreign unknown interested party was not given the opportunity to be heard, for instance because the notification of the proceedings and of the opt-out procedure did not effectively reach him.[434]

In the *Dexia* settlement, the incompatibility of the opt-out procedure with the fundamental principle of the protection of property was also advanced and could also be considered as a possible ground for refusal based on public policy. This principle guarantees for every natural or legal person the peaceful enjoyment of his possessions and states that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.[435] It was argued by respondents in the *Dexia* settlement that the compensation awarded under the settlement is inferior to the value of the rights an investor in *lease products* loses and therefore investors

[430] *Gambazzi*, [2009], para. 29.
[431] C-38/98 *Régie Nationale des Usines Renault SA v. Maxicar SpA*, [2000] ECR I-2973, para. 29 (emphasis added). Confirmed by C-7/98 *Krombach v. Bamberski*, [2000] ECR I-1935, para. 36
[432] C-394/07 *Gambazzi*, [2009], para. 32.
[433] Ibid., paras. 34-35.
[434] The Amsterdam District Court, which was requested to recognize a U.S. settlement, mentioned a similar minor exception where under rare circumstances a U.S. settlement should not be recognized: when in an individual case (i) the procedural safeguards were not upheld, or (ii) recognition of the settlement agreement were to be unacceptable in view of the standards of reasonableness and fairness. District Court (*Rechtbank)* Amsterdam of 23 June 2010, LJN: BM9324, § 6.5.4.
[435] Article 1 First Protocol to ECHR, Paris, 20.III.1952, as amended by Protocol No. 11.

were being deprived of their possessions.[436] The Amsterdam Court, however, ruled that the collective settlement of the *Dexia* mass damage was in the public interest because it avoids endless and multiple procedures being paid from public funds.[437]

5.4.3 Irreconcilable Judgments

Article 34(3) and (4) precludes recognition and enforcement when a judgment – such as a binding declaration – is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought or with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties.[438] Again, the fact that the WCAM concerns a settlement between representative foundations and alleged responsible parties requesting the binding declaration makes it difficult to imagine situations in which irreconcilable judgments may occur, since the 'same parties' conditions may be difficult to fulfil.[439] It is difficult to identify unknown interested parties in an opt-out procedure, as they will only become known at the very last stage of the procedure, namely once they claim the compensation to which they are entitled in the settlement agreement. This problem of identification makes an examination as to whether these unknown interested parties are the same in other collective redress mechanisms particularly complex. Furthermore, Briggs argues that there is no irreconcilability when a contractual settlement of claims is involved, even one which *has been judicially approved*, which in the case of the WCAM settlement involves a binding declaration.[440] Article 34(3) and (4) should therefore be considered as difficult grounds for non-recognition to apply to the WCAM settlements.

5.4.4 Grounds for Non-Recognition: Conclusion

By way of conclusion, the recognition of a binding declaration in other Member and EFTA States may be refused mostly on grounds of public policy. Whether or not this will be the case will depend on the State addressed and the boundaries set by the CJEU. But it should be kept in mind that the free movement of judgments under the Brussels I Regulation is meant to *ensure the efficient conduct of proceedings in the interests of the sound administration of justice*[441] and that the Dutch WCAM procedure provides for an efficient, simple and cheap collective redress mechanism. Nonetheless, the opt-out procedure may under some circumstances lead to incompatibility with Article 6 ECHR, which may have important consequences as to the binding effect of the WCAM settlement in a concrete case.

These concrete cases are unlikely to involve known foreign interested parties, since they will generally be effectively reached through regular notification at their last known place of residence and in accordance with international provisions.

---

[436] *Dexia*, Court of Appeal Amsterdam of 25 January 2007, *NJ* (2007), 427, at para. 5.11.
[437] Ibid., at paras. 5.12-5.13.
[438] Provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.
[439] See Poot (2006), at 198; and see also Hess (2010), at 198.
[440] Briggs (2009), § 7.22, at 700.
[441] C-394/07 *Gambazzi*, [2009], para. 32.

Unknown foreign interested parties could however have been notified in accordance with the Dutch WCAM provisions of notification but still not have been reached and not have had the opportunity to either be heard or opt out. In a concrete case, where an interested party was not and could not have been notified of the WCAM settlement and the opt-out procedure, a public policy defence could be justified. It involves the rare situations in which for some legitimate reason the unknown person was not and could not be aware of the WCAM settlement and was not reached by the notifications despite all world-wide and public announcements and advertisements.

In most situations, it will be unlikely that the public policy refusal leads to non-recognition of the binding effect of the WCAM settlement.

It is however important to observe that one of the main objectives of the revision of the Brussels I Regulation is the abolition of the *exequatur* procedure in all matters covered by the Regulation.[442] It is still uncertain whether this will happen, but this may also mean that the grounds for refusal, including the public policy ground, will no longer be available at the enforcement stage and binding declarations could be recognized throughout the EU.[443] The Dutch Response to the Green Paper insists on maintaining certain safeguards, especially concerning public policy aspects.[444]

Finally, it is worth mentioning that the Report on the revision of the Brussels I Regulation states that:

> 'in cases where the declaration of enforceability is challenged, the ground of refusal of recognition and enforcement most frequently invoked is the lack of appropriate service pursuant to Article 34(2). However, the general study shows that such challenges are rarely successful today. As to public policy, the study shows that this ground is frequently invoked but rarely accepted. If it is accepted, this mostly occurs in exceptional cases with the aim of safeguarding the procedural rights of the defendant. It seems extremely rare, in civil and commercial matters, that courts would apply the public policy exception with respect to the substantive ruling by the foreign court. The other grounds for refusal are rarely invoked.'[445]

Conversely, it should be noted that the Dutch WCAM is fairly unique and new and that, as is the case with Denmark and Portugal, the opt-out system has not been challenged until now in relation to public policy.

---

[442] See the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(2009) 174 final, at 4, available at http://ec.europa.eu/justice_home/news/consulting_public/0002/report_en.pdf; and see the Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(2009) 175 final, at 2.

[443] See Gaudement-Tallon (2010), § 398, at 412, fn. 56.

[444] Dutch Response to the Green Paper on the Review of the Brussels I Regulation, § 3, at 2, available at http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0002_en.htm.

[445] See the Report of the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(2009) 174 final, at 4.

5.5 Outside the Scope of the Brussels I Regulation and the Brussels and Lugano Conventions

As indicated above in the introduction, the lack of unification in the field of international recognition outside the scope of the Brussels I Regulation and the Brussels and Lugano Conventions entails the application of national rules which may vary considerably from state to state. An analysis of the law of various jurisdictions regarding recognition and enforcement falls, however, outside the scope of this report as The Netherlands has no impact on the attitude of foreign States in relation to recognition of WCAM collective settlements.

Two developments may, however, be noted. Both the ILA and the IBA have attempted to provide some guidance as to the complexity of the international recognition of judgments dealing with collective redress. It should be noted that although these associations have addressed the question of collective redress in a broad sense, they mainly focused on group or class actions and have not specifically dealt with class or collective settlements.

The ILA's tenth recommendation deals with recognition and enforcement and reads:

> '10.1. The requested court should not refuse to grant *res judicata* effect or enforce a foreign decision merely because the decision was rendered under an opt-out group action model.
>
> 10.2. The requested court may review the foreign proceedings having in mind the best practices outlined in this Resolution and, where it is satisfied that the due process rights of the absent claimants have been preserved and that their interests have not been prejudiced by reason of the fact that the matter was decided in the forum where the judgment was rendered, recognize or enforce the foreign decision or give preclusive effect to the foreign settlement, provided that all other requirements for the recognition and enforcement of foreign judgments in the requested country have been fulfilled.
>
> 10.3. In particular, the requested court should verify how the absent claimants were notified and satisfy itself that the method chosen in the initial action was proper to reach them.'

In sum, the ILA encourages the recognition of collective redress judgments based on an opt-out system, provided that it satisfies certain fundamental procedural rights and guarantees the protection of the parties. In particular, the court addressed needs to verify that the absent claimants – or in the case of the WCAM the unknown interested parties – have been properly notified or at least that the method chosen was proper enough to enable notification to reach them. This does not however mean that the interested party has, in fact, been reached.

On 16 October 2008 the IBA adopted the Guidelines for Recognising and Enforcing Foreign Judgments for Collective Redress. These Guidelines are meant as an aid for decision-makers in countries where there is existing jurisdiction to recognize and enforce foreign judgments

for 'collective redress' and to assist in the assessment of whether a collective redress judgment from another country should be enforced.[446]

The IBA Guidelines for Recognising and Enforcing Foreign Judgments for Collective Redress also attach significant weight to procedural rights and protection of defendants. Article 4.01 states that a 'court should be satisfied before enforcing a judgment for collective redress from another jurisdiction that the principles of natural justice and due process were adequately addressed by the court issuing the judgment.' The IBA Guidelines are more critical and less lenient than the ILA recommendations towards the acceptance of collective redress judgments in opt-out procedures. They state that the requirement of natural justice and due process may give rise to problems in opt-out regimes which requires a party to receive notice of the proceedings and be given an opportunity to be heard.[447] According to those Guidelines the problem is that

> '[a]n absent claimant [or interested party] may not have received actual notice of the action; he or she may not have a right to be heard; and although the absent claimant [or interested party] may be "represented" by the representative claimant, he or she will not be represented by either a representative claimant or counsel of his or her choosing.'

For those cases, the IBA Guidelines provides for minimal procedural rights that should be reflected in the judgments. One such 'minimal procedural right' is the adequate representation of the interested party.[448]

5.6 The Question of International Recognition in Practice

The general view of the interviewees is that the automatic recognition and enforcement under the Brussels I Regulation and the Brussels and Lugano Conventions is a crucial and valuable mechanism for the collective redress under the WCAM in relation to foreign interested parties. The grounds for non-recognition and the public policy refusal is not considered as a threat to the WCAM settlements reached so far and has not affected the willingness to settle. Major or frequent problems with respect to the recognition and enforcement of settlement agreements are generally not expected. The general assumption is that the settlement character of the WCAM and the strict representation requirement ensure that all parties are satisfied with the agreement reached under the supervision of the Amsterdam Court and its review as to the reasonableness of the settlement. The WCAM procedure is thought to contain sufficient guarantees for safeguarding the interested parties' rights and vouches for the quality of the settlements. As long as the interested parties have properly been notified and adequately represented by the association or foundation – especially with respect to the unknown interested parties – there seems to be no reason why the binding declaration should not be recognized outside The Netherlands and why the settlement should not be given preclusive effect and not bind interested parties, who have not opted out.

[446] See § 5, at 1, available at www.ibanet.org.
[447] IBA Guidelines, at 22.
[448] Ibid., at 23-27.

Furthermore, the interviewees emphasized that the question of recognition and enforcement is a matter of risk calculation for the applicants, and is not an element to be taken into account by the Amsterdam Court in its assessment of the binding declaration.

Although the opt-out mechanism of the WCAM is more likely to be sanctioned in the recognition and enforcement stage by the public policy clause than an opt-in procedure, most of the interviewees favour the opt-out procedure. They argue that an opt-in procedure would not reach as many interested parties and that, therefore, critical mass is much more difficult to achieve and less conducive to mass settlements. Moreover, individual proceedings will be a threat to the alleged responsible party and also discourage mass settlements based on agreement. The advantage of the opt-out system is that the alleged responsible party can identify the potential individual proceedings once the opt-out period has expired. Furthermore, it has been argued that the WCAM and the requirement of a binding declaration of the Amsterdam Court are redundant if it were to be an opt-in procedure, since this can also be regulated by contract and be left to contract law.

5.7 Concluding Remarks

The recognition regime of the Brussels I Regulation applies to WCAM collective settlements, but the current terminology of the Brussels I Regulation in relation to 'judgments' and 'court settlements' is not suitable. Further clarification is required as to whether a settlement agreement reached before court proceedings have started, but approved by a court in a subsequent stage, should be understood as a judgment or court settlement.

Due to the supervising role and requested approval of the Amsterdam Court of a WCAM settlement, a binding declaration of such a collective settlement should be understood as a 'judgment' in the sense of Article 32 and the recognition regime of Article 33 *et seq.* is applicable. This also means that the legal effect given under Dutch law to the binding declaration of the Amsterdam Court should be recognized with respect to foreign interested parties.

The importance of the protection of procedural rights of interested parties in a WCAM procedure entails that especially the non-recognition grounds of Article 34(1) and 34(2) are relevant for the recognition of binding declarations outside The Netherlands. Applicants should particularly take into account that the binding declaration may not be recognized abroad on the grounds of public policy, but that this public policy defence will not succeed if it is based on a general rejection of the opt-out procedure. Only under very specific circumstances, mainly involving unknown foreign interested parties, a public policy defence could lead to the non-recognition of the binding effect of the WCAM settlement. As long as the interested parties have been properly notified, the public policy refusal is not considered problematic in practice and it is a risk that applicants are willing to take.

6 Applicable Law

The question of applicable law touches upon some aspects in WCAM settlements but plays a considerably less important role due to the very nature of the WCAM which is based on a settlement.[449] Also during the interviews, the topic of the applicable law was not considered a matter which deserved particular attention and appeared to be subordinate to the other issues dealt with previously in this report. In practice, very few problems have so far been encountered in relation to the applicable law in WCAM procedures involving foreign interested parties or other international elements. Paragraph 6.1 deals with the law applicable to the WCAM settlement, which is followed by the law governing the question of reasonableness in paragraph 6.2. The latter may also depend on the law applicable to the claim underlying the settlement agreement as will be explained in paragraph 6.2. For the sake of clarity and completeness, paragraph 6.3 provides a short overview of possible laws applicable to the underlying claim. Paragraph 6.4 briefly explains the importance of overriding and mandatory provisions, and in paragraph 6.5 attention is paid to some procedural issues.

6.1 The Law Applicable to the WCAM Settlement

The question as to the law governing the WCAM settlement agreement is relevant for a number of issues such as the termination of the settlement agreement or the requirements for an opt-out declaration.[450] A settlement agreement concluded between the alleged responsible parties and the representative organizations is to be considered as a contract and should therefore be treated as such in order to determine the applicable law governing the agreement (the *lex causae*).

Dutch courts will determine the law governing the settlement agreement according to the Rome I Regulation, as will other courts from all the Member States of the European Union except for Denmark.[451] According to the Regulation's Preamble, 'the proper functioning of the internal market creates a need […] for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought'.[452] The Rome I Regulation entered into force on 17 December 2009 for contracts concluded as from this date and replaces the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations.[453] The substantive scope of the Rome I Regulation is consistent with the Brussels I Regulation and the Rome II Regulation[454] and applies to

[449] See also ILA Report on Transnational Group Actions, at 17: 'the question of applicable law arises but normally plays no role at the settlement level'.
[450] Kroes (2007), at 101-103.
[451] Denmark did not adopt the Rome I Regulation and is not bound by it. See also Recital 46. The U.K. (in spite of Recital 45) and Ireland (Recital 44) have notified their wish to take part in the adoption and application of the Rome I Regulation.
[452] Recital 6 Rome I Regulation.
[453] Pursuant to Articles 24 and 29 Rome I Regulation.
[454] See also Recital 7 Rome I Regulation.

international contractual obligations in civil and commercial matters.[455] Article 2 establishes the Rome I Regulation's universal application, meaning that the Regulation may specify any law applicable to a contractual obligation whether or not it is the law of a Member State. Article 1 requires the presence of an 'international element' in the contractual relationship. Apart from the *Shell* settlement in which one of the alleged responsible parties was established in London (U.K.), all WCAM settlements concluded until now were concluded by parties established in The Netherlands.[456] The question is whether a WCAM settlement agreement concluded between alleged responsible parties and representative organizations, all of whom are established in The Netherlands, should be understood as an 'international contractual relationship' in the sense of the Rome I Regulation when the agreement is concluded for the benefit of *foreign* interested parties. The initial Explanatory Report to the Rome Convention provides that Article 1 is meant to apply in situations which involve one or more foreign elements and in all cases where the dispute would give rise to a conflict between two or more legal systems.[457] Besides the fact that one or all of the parties to the contract are foreign nationals or persons habitually resident abroad, the report further identifies as *foreign elements* the fact that the contract was made abroad and the fact that one or more of the obligations of the parties are to be performed in a foreign country.[458] In theory, this means that when there are *foreign* interested parties for whose benefit the settlement agreement was concluded, the agreement will at least in part have to be performed in their country of residence which gives the settlement an international element. In practice, the question is whether the latter also applies when there are only a few foreign interested parties in proportion to the majority of the interested parties residing in The Netherlands.[459] The general view is that even a relatively small number of foreign interested parties will give the settlement an *international character* for the applicable law to be determined by the Rome I Regulation.[460]

In practice, concluding parties will draft a settlement agreement in view of an eventual binding declaration in line with the provisions of the WCAM Act and with the requirements of Article 7:907(2) DCCP in particular. Consequently, they will include an explicit choice for Dutch law governing the settlement agreement which enables them to choose the Dutch legal system in an attempt to obtain the effects provided by the WCAM.

---

[455] Article 1 Rome I Regulation. Article 1(2) excludes among others obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments (d), obligations arising out of dealings prior to the conclusion of a contract (i) and questions governed by the law of companies, such as the creation, legal capacity, internal organization or winding-up of companies and the personal liability of officers and corporate members (f).

[456] The Shell Transport and Trading Company Ltd was the only foreign party to the *Shell* settlement agreement.

[457] Report on the Convention on the Law Applicable to Contractual Obligations by Giuliano/Lagarde, OJ C 282/1, Article 1(1).

[458] Ibid.

[459] See Poot (2006), at 182-183.

[460] Ibid., at 183.

Apart from the *DES* settlement, all other WCAM settlement agreements concluded until now contain a choice of law clause for Dutch law.[461] The *Shell* settlement provides that 'this settlement agreement and any ancillary agreements shall be governed by and interpreted according to the laws of The Netherlands, excluding its conflict of laws provisions'.[462]

The freedom of the parties to choose the law governing the contractual relationship is allowed under Article 3 Rome I Regulation.[463] Article 3(1) Rome I Regulation reads:

> '[a] contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.'

The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. It is not required that the law chosen have a natural connection with the contract. This is an important aspect for parties who wish to obtain the effects of the WCAM even if the damage, the interested parties and the alleged responsible party have no connection with The Netherlands. An explicit choice of law in favour of Dutch law governing the settlement agreement enables foreign parties to express the wish to follow the WCAM procedure, regardless of the lack of a connection with the Dutch forum.

In the absence of a choice of law clause in the settlement agreement, the *lex causae* is determined by Article 4 Rome I Regulation which regulates the general conflict rule for contracts.[464] Since a settlement does not fall within the category of contracts covered by the types of contracts listed in Article 4(1), the (*alternative*) rule of Article 4(2) provides that a contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. There is uncertainty as to whether such a party exists in settlement agreements. Some have argued that the obligations under the settlement agreement are equally balanced and that there is no characteristic performance, while others have identified the obligation to pay compensation as the characteristic performance of a WCAM settlement.[465] In the former case, Article 4(4) indicates that in the absence of a characteristic performance, the contract shall be governed by the law of the country with which it is most closely connected. This open criterion will

---

[461] See for an explicit choice of law in favour of the law of The Netherlands, Article 28.1 of the *Dexia* settlement, available at http://www.dexialease.nl/tds_images/hoofdovereenkomst.pdf; Article 12 of the *Vedior* settlement, available at http://www.vediorsettlement.com; Article 11.12 *Vie d'Or* settlement, available at http://www.stichtingviedor.nl.

[462] Article XII-H of the *Shell* settlement, available at http://www.shellsettlement.com/docs/Exhibit%201%20Settlement%20Agreement.pdf.

[463] This freedom may be limited to protect 'weaker parties' such as employees and (individual) consumers, see Article 6(2).

[464] Article 4 establishes the general rule for contracts that are not specific or protecting weaker parties, e.g. contracts of carriage (Article 5), consumer contracts (Article 6), insurance contracts (Article 7) or individual employment contracts (Article 8).

[465] See Poot (2006), at 187; and Polak, M.V. (2006), at 2352; Kroes (2007) at 100, who favour the obligation to pay compensation as the characteristic performance of the settlement; *contra* Bertrams, R.I.V.F., and Kruisinga, S.A., *Overeenkomsten in het internationaal privaatrecht en het Weens Koopverdrag* (2007), § 29, at 187.

weigh a number of factors relating to the settlement agreement and the underlying mass damage event such as the place of establishment of the alleged responsible party, the place of domicile of the (majority of) interested parties, and the place of establishment of the representative organization.

In the latter case, the party required to effect the payment of compensation is the alleged responsible party. As a consequence, the law of the habitual residence of the alleged responsible party will be the law governing the settlement.[466] Dutch law will govern the settlement agreement if the alleged responsible party is established in The Netherlands, in other cases, foreign law will apply. Nonetheless, Article 4(3) indicates that where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that of the characteristic performance, the law of that other country shall apply. This situation may arise when the conclusion of the settlement, the harmful event and the mass damage leading up to the settlement, the representative organizations and the (majority of the) interested parties are all concentrated in one forum which would make the settlement *manifestly* more closely connected to that forum than to the place of establishment of the alleged responsible party.

The application of Article 4(3) Rome I Regulation could also result in an 'accessory connection' of the law governing the settlement agreement to the underlying claim arising out of the mass damage to which the settlement agreement is accessory; the settlement is intended to provide collective redress in relation to the relationships underlying the mass claims. Accessory connection, thus, looks at the relationships underlying the mass claims and not at its result, the settlement agreement. It presupposes a pre-existing relationship between the parties and is based on the idea that one legal relationship is manifestly more closely related – or accessory – to another legal relationship, which therefore justifies the same law governing both relationships.[467] The law applicable to the settlement agreement then follows the law applicable to the pre-existing relationship between the parties as a result of the mass damage event, whether contractual or tortuous.

6.2 The Law Applicable as to the Reasonableness Test

Pursuant to Article 7:907(3) DCC, the Amsterdam Court shall reject the request for a binding declaration of the settlement agreement if the compensation awarded is not reasonable. The reasonableness test principally scrutinizes the amount of compensation awarded in the settlement agreement. The ease and speed with which the compensation can be obtained and the possible causes of the damage are taken into account as well as the nature and the seriousness of the parties' loss and the strength of the parties' claims in court. In the absence of a group settlement, separate claims against the alleged responsible party, including the amount of compensation, are governed by the law governing the underlying legal relationship

[466] The habitual residence of companies and other bodies, corporate or unincorporated is the place of central administration pursuant to Article 19(1). The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

[467] See among others Bertrams and Kruisinga (2007), § 29, at 187 and Polak, M.V. (2006), at 2352-2353.

as explained above. Where interested or injured parties are located in different States, conflict of laws rules may determine different laws applying to each of the interested parties' claims.

The reasonableness test also includes the assessment of criteria used to determine which persons qualify for compensation and the description or categorization of groups of persons on whose behalf the agreement was concluded.[468] The Explanatory Memorandum refers to *damage scheduling* which enables a settlement agreement to differentiate between different groups of parties entitled to different amounts of compensation depending on the nature of their (alleged) claim.[469]

When the settlement agreement is concluded for the benefit of foreign interested parties residing in different countries, the question is whether the reasonableness test should take into account differences regarding the amount of compensation awarded under the various substantive laws governing the underlying claims of foreign interested parties. It should be noted that a choice of law clause as to the applicable law to the settlement agreement does not affect the underlying claim (or rights) that interested parties may have according to the applicable law concerned.[470] None of the WCAM provisions or the Explanatory Memorandum indicate how the reasonableness criterion should apply in relation to foreign interested parties. It is, however, generally accepted that the evaluation of the *reasonableness* of the amount of compensation awarded in the settlement agreement should take into account different applicable laws governing the separate underlying claims of individuals against the alleged responsible party, depending on the parties concerned, even if this makes the assessment considerably more complex.[471]

In practice – as became clear from the interviews conducted – a damage scheduling clause in the settlement agreement could differentiate between interested parties residing in different countries on the basis of the different applicable laws governing the position and strength of each of their claims. This practice of damage scheduling in order to take into account the differences of compensation according to the applicable law concerned is generally welcomed by practitioners and judges, because leaving the evaluation to the applicable law is considered too much of a risk for the alleged responsible party and does not offer certainty. In more detail, rather than treating all interested parties the same, it involves a categorization of interested parties in *subclasses* according to the applicable law concerned, regardless of the amount of the compensation reasonably awarded under the applicable law. In practice, the categorization of interested persons into subclasses involves a short inquiry into the facts and the applicable law, but is also done on the basis of close cooperation with the representative organizations.

[468] These aspects are specified in Article 7:907(2)(a), (c), and (d) DCC, and they should be included in the settlement agreement and should be examined by the Amsterdam Court pursuant to Article 7:907(3) DCC.
[469] See the Explanatory Memorandum to the WCAM, *Kamerstukken II* 2003/04, 29 414, no. 3 (MvT) at 11; and see Polak, R. (2009), at 13.
[470] See Polak, M.V. (2006), at 2353.
[471] See among others Polak, R. (2009), at 13.

6.3 Possible Laws Applicable to the Underlying Claims in Mass Damage Cases

As explained above, the reasonableness of the settlement may be assessed on the basis of the law applicable to the underlying claim. The latter depends on the nature of the claim and may vary from one interested person to another. Due to the importance of the applicable law for the reasonableness test, a short overview of the complex determination of the law governing the underlying claim is provided for the non-specialist reader.

Many claims in international mass damage cases will involve cross-border torts. The law applicable to cross-border torts is primarily regulated by the Rome II Regulation, and second by special international conventions, in particular the Hague Convention on Product Liability in relation to mass damage caused by a product.[472] The Rome II Regulation entered into force on 11 January 2009 and applies to tortuous events giving rise to damage occurring after that date. Article 1 determines the substantive scope of the Rome II Regulation applying to international non-contractual obligations in civil and commercial matters, not involving in particular the liability of the State for acts and omissions in the exercise of State authority and excluding several non-contractual obligations such as those arising out of the law of companies and nuclear damage.[473] Article 3 enshrines the universal application of the Rome II Regulation, which means that any law may apply whether or not it is the law of a Member State. Article 4 deals with cross-border torts in general, where specific provisions for specific torts do apply such as for torts relating to product liability (Article 5), unfair competition (Article 6), environmental damage (Article 7) and industrial action (Article 9). A choice of law agreement after the damaging event has occurred is allowed under Article 14 and would help the situation in which different applicable laws apply according to some of the conflict rules explained below.[474] A choice of law clause agreed after the event shall be expressed or demonstrated with reasonable certainty by the circumstances of the case. In the context of the WCAM such a choice of law would be helpful if concluded between the parties concluding the settlement agreement, but shall not prejudice the rights of third parties, hence the interested parties.

The general conflict rule for non-contractual obligations embodied in Article 4 Rome II Regulation is the *lex loci damni* rule which determines the law of the country in which the damage occurs or the law of the place of injury.[475] In an international mass damage case, there may be many places of injury located in several States where injured parties are residing. The *lex loci damni* rule results in at least as many applicable laws as there are States

[472] The Convention of 2 October 1973 on the Law Applicable to Product Liability, available at www.hcch.net, is relevant for The Netherlands which is one of the few Contracting States to this Convention. The Convention entered into force for The Netherlands on 1 September 1979. Less relevant in mass damage cases is the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents.
[473] Article 1(2)(d) and (f) Rome II Regulation.
[474] Article 14(1)(b) also allows a choice of law before the event occurred where all the parties are pursuing a commercial activity. A choice of law cannot be made in torts arising out of unfair competition (Article 6(4)) and intellectual property rights (Article 8(3)). See also the Green Paper on Consumer Collective Redress, COM(2008) 794 final Brussels, 27.11.2008, § 60, at 14.
[475] Article 4(2) mandatorily deviates from the *lex loci damni* when the alleged liable party and the party sustaining damage both have their habitual residence in the same country at the time when the damage occurs, since the law of that country will then apply.

in which injured parties reside. The traditional *lex loci delicti* rule – abandoned by the Rome II Regulation – may have been more suitable for mass damage cases as it determines the law of the country in which the event giving rise to the damage occurs and would have led to the application of one substantive law. The general escape clause of Article 4(3) provides for an exception to the *lex loci damni* rule in favour of a law 'manifestly more closely connected'. In international mass damage cases one could think of several circumstances – as was frequently advanced during the interviews – where the law of the country of the harmful event or even the law of the place of establishment of the alleged responsible party are manifestly more closely connected than the *lex loci damni*.

In unfair competition cases, Article 6(3)(b) is an example of legislation to reduce the applicable laws when the damage occurred in more than one country and it was inspired by the White Paper on Damages Actions for Breach of the EC antitrust rules.[476] In certain circumstances provision was made to allow a person seeking compensation to found his claim on the law of the court seized, provided this market is substantially affected, instead of on the law where the market is likely to be affected under the main rule of Article 6(1) Rome II Regulation.

In the event of a mass environmental damage, Article 7 also applies the *lex loci damni*, unless the claimant chooses to base the claim on the law of the country in which the event giving rise to the damage occurred. This construction could give the opportunity to group claimants or a representative organization to construct the *class action* on the basis of the *lex loci delicti.*

In The Netherlands, the conflict of law rule involving product liability will primarily be established by the Hague Convention on Law Applicable to Product Liability. The Rome II Regulation does not prejudice the application of the Hague Convention on Product Liability to which one or more Member States are parties pursuant to Article 28 Rome II Regulation. Its substantive scope embodied in Articles 1 to 3 indicates that the Convention determines the applicable law to the liability of manufacturers of a product which caused damage if the product was not directly transferred by the latter to the person suffering damage.[477] The hierarchy of the conflict rules states that the law of the State of the habitual residence of the person directly suffering damage (Article 5) first applies, if not available, the law of the State of the place of injury (Article 4) shall apply, or lastly when none of the above apply, the law of the State of the principal place of business of the person claimed to be liable (Article 6) shall apply.[478] The application of the latter would equally result in multiple applicable laws in mass damage cases where injured parties reside in different countries. When the Hague Convention does not apply, the applicable law may still be determined by the Rome II

[476] COM(2008) 165, 2.4.2008; see also Carballo Piñeiro (2009), § 208, at 202.
[477] Article 1(2). Article 11 establishes the universal application of the Convention and the independence of any requirement of reciprocity.
[478] But see also Articles 6 and 7, where neither of the laws previously designated apply.

Regulation and in particular by Article 5(1),[479] which alternatively indicates that – depending on the facts of the case – the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, the law of the country in which the product was acquired, or the law of the country in which the damage occurred shall apply. Article 5(2) includes a *manifestly more closely connected* escape clause, allowing the derogation from the law identified in Article 5(1).

If the underlying claim concerns a contractual relationship between the interested party and the alleged responsible party, the Dutch courts will – within the limits of their scope as explained above – apply the Rome I Regulation. Absent a choice of law pursuant to Article 3, Article 4 determines the applicable law for contracts in general and specifies certain categories of contracts; sales, service and distribution contracts are respectively governed by the law of the country where the seller, the service provider or the distributor has his habitual residence.[480]

Mass claims arising out of contractual relationships in security matters are dealt with by Article 4(1)(h). It was specifically enacted for contracts concluded at a financial market – or as defined by the Rome I Regulation, a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – and should be governed by the law of that financial market.[481]

Special attention should also be given to Article 6(1) which determines the applicable law to consumer contracts and stipulates that the general conflict of laws rule is governed by the law of the country where the consumer has his habitual residence, provided that the conditions imposed by Article 6 are met. This rule does not apply to rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service (Article 6(4)(d), and contracts concluded at a financial market (Article 6(4)(e)) referring to Article 4(1)(h)). Parties to consumer contracts may choose a law in accordance with Article 3, but the result of such choice may not deprive the consumer of the protection afforded to him by the provisions of the law of his habitual residence.[482] According to the Green Paper this rule will cause practical problems when the consumers are located in many different Member States. The Green Paper suggests amending the rules in collective redress cases in

[479] Without prejudice to the main rule hidden under Article 4(2), Article 5 only applies when Article 4(2) does not. See also Schwartze, A., 'A European Regime on International Product Liability: Article 5 Rome II Regulation', *NIPR* (2008), 430-434.
[480] Respectively, Article 4(1)(a), (b) and (f).
[481] See in particular Struycken, T., and Bierman, B., 'Rome I on Contracts Concluded in Multilateral Systems', *NIPR* (2009), 4, 416-425, at 416-417.
[482] Article 6(2) Rome I Regulation.

favour of the law of the trader, or the law of the market most affected or of the Member State where the representative entity is established.[483]

As a consequence, several conflict of laws rules determining the applicable law to the claim underlying a WCAM settlement result in the application of different laws depending on the relationships with the interested parties concerned.

6.4 Overriding and Mandatory Provisions

When determining the applicable law in non-contractual and contractual relationships, one should take into account the application of overriding mandatory provisions, irrespective of the law otherwise applicable. Both the Rome I and Rome II Regulations allow the courts the possibility to apply provisions of the law of the forum in a situation where these provisions are mandatory (Article 9(2) Rome I Regulation and Article 16 Rome II Regulation). Such overriding mandatory rules of the *lex fori* may correct the effects of the applicable law and may affect the freedom of choice of law enjoyed by the parties.[484] They are particularly relevant in consumer protection and in securities litigation. Overriding mandatory rules of countries other than the forum may also be applied under the restrictions of Article 9(3) Rome I Regulation.

When a settlement agreement incorporates a *damage scheduling clause* which takes into account the different laws governing the underlying claims of different groups of interested parties, such damage scheduling clause might need to have regard to overriding mandatory rules. The Amsterdam Court will therefore apply mandatory rules protecting certain parties, consumers in particular, depending on the scope of the rule. In the *Dexia* case, parties were very well aware of the fact that Belgian *mandatory* consumer protection rules would more severely condemn the security lease products than Dutch law and that a choice of law clause in the settlement agreement would not ‘repair’ the protection given under Belgium law. It would not preclude the fact that the underlying claims of Belgian consumers against Dexia were governed by Belgian law and that even if another law would have been chosen in the (consumer) contract, the Belgian mandatory rules would have still applied. Instead of leaving this question to the appreciation of the Amsterdam Court when assessing the reasonableness of the settlement, parties preferred to exclude Belgian interested parties from the settlement all together.[485]

6.5 The Law Governing the Prescription Period and Its Interruption

The law applicable to issues of a procedural nature in the WCAM settlement includes questions as to the law governing the question of representation and the law determining the prescription period. The general rule for procedural issues is that the procedural law of the

[483] Green Paper on Consumer Collective Redress, COM (2008) 794 final Brussels, 27.11.2008, § 59, at 14. See also Carballo Piñeiro (2009), § 211, at 204 *et seq.*
[484] Article 17 Rome II Regulation states that in assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and insofar as is appropriate, of the rules of safety and conduct that were in force at the place and time of the event giving rise to the damage.
[485] As explained in Section 2 of this report.

forum applies – *lex fori processus* – and it thus applies to the question of representation as explained in Section 4 of this report.

Article 7:907(5) DCC states that during the proceedings on the binding declaration the prescription period to institute individual proceedings for compensation of damage against the alleged liable party is interrupted (*stuiting verjaringstermijn*). A proposal to modify the WCAM – as explained earlier[486] – suggests to interrupt the prescription period till the end of the opt-out period, to prevent (other) interested parties from being influenced by the outcome of interested parties who have opted out and have initiated individual proceedings and that thereby becomes a *test case* proceeding.[487] After the interruption, a new prescription period applies. The idea is to ensure that the WCAM procedure does not prevent the parties from going to court once the request for binding declaration has been rejected.[488] The WCAM does not regulate the prescription period in the event of a WCAM procedure and refers back to the regular provisions of the Civil Code.[489] Under Dutch law, the prescription period is five years.[490] One of the amendments proposed to the WCAM is to incorporate a special WCAM prescription period of two years after the opt-out period has elapsed. This modification is proposed to meet the interests of the alleged responsible party who wishes to put an end to the collective redress procedure at some point after the WCAM procedure has been completed.

Questions of prescription periods are governed by the *lex causae*, hence the law applicable to the contract.[491] When Dutch law applies to the settlement agreement, the interruption of the prescription period and the start of a new prescription period of five years to initiate judicial proceedings after the opt-out period also applies to *foreign* interested parties, even when their claim is governed by foreign law according to which there is no interruption of the prescription periods at all, or conversely, which allows the renewal of a longer or shorter prescription period.[492] In practice, this question could arise when the interested party who has opted out wishes to initiate proceedings outside The Netherlands after the five years of the new prescription period has elapsed, on the basis that it is not bound by the settlement agreement since it opted out and that according to the law of the court seized there is a longer prescription period. Since it is unknown how this foreign court will act, this problem could only be solved at European (or international) level. One may suggest the formulation of a

---

[486] As explained in Section 1 of this report.
[487] This happened in the *Dexia* settlement.
[488] See Article 8(1) of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters which states that Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.
[489] During the interviews it became clear that proposed modifications of the WCAM as explained in Section 1 of this report also include the incorporation of a specific WCAM prescription period of two years.
[490] Article 7:907 in conjunction with Article 3:319(2) DCC.
[491] See also Article 12(1)(d) Rome I Regulation.
[492] The rule is not unfamiliar to international conventions: see for instance the Brussels Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910. According to Article 7(3), the grounds upon which the said periods of limitation may be suspended or interrupted are determined by the law of the court where the case is tried.

more flexible prescription period provision in relation to foreign interested parties based on reasonableness and on a balance between the alleged responsible party's interests to find closure and the interested parties' opportunity to initiate judicial proceedings within the limits of the expiry of the prescription period.

6.6 Concluding Remarks

The diversity of conflict of laws rules makes the assessment of reasonableness complex if the question is left to the applicable law to the underlying relationship and the applicable law differs from one interested party to another and from one claim to another. The complexity and uncertainty as to the applicable law to the underlying relationship could only be taken away by the enactment of a conflict of laws rule specifically dealing with mass damage cases that are governed by one law. Since the Dutch courts are bound by the conflict of laws rules embodied in the Rome I Regulation or Rome II Regulation, or subsequently by the specified Hague Convention, this modification can only be done at European or at international level.

The incorporation of a *damage scheduling* clause provides a practical solution and it should be recommended to systematically categorize the interested parties according to their applicable laws, including the mandatory provisions of the *lex fori*. Although this solution involves an inventory of applicable laws during the negotiations of the settlement agreement, this should be done on the basis of close cooperation with the representative organizations.

In relation to the law applicable to the prescription periods, the current provisions deserve some modification where the prescription period in relation to foreign interested parties could be based on a more flexible approach in order to find a balance between the alleged responsible party's interests to find closure and the interested parties' opportunity to initiate judicial proceedings within the limits of the expiry of the prescription period.

7 Conclusions and Recommendations

This report analysed the various aspects of private international law which come into play when a WCAM collective settlement is concluded for the benefit of foreign interested parties and it focused on the transnational aspects of WCAM settlements outside The Netherlands. The report examined aspects of international jurisdiction, cross-border notification, recognition, applicable law and representation of foreign interested parties. The main research question addressed the suitability of existing instruments regulating each of these aspects at national, European and international level for the application of the WCAM in transnational mass damage cases.

The research was conducted on the basis of a literature analysis and on the findings of a *series of interviews* with professionals directly involved with the WCAM collective settlements. Finally the research includes – where necessary – *comparative observations* in relation to jurisdictions such as those of the U.S. and Canada that are familiar with collective or group actions based on an *opt-out* mechanism like the WCAM procedure.

7.1 International Jurisdiction

Paragraph 2.2.2 illustrated that initially it did not seem problematic for the Amsterdam Court to accept jurisdiction to declare binding a settlement agreement concluded also for the benefit of foreign interested parties. In practice, parties requested and expected the Court to give the settlement agreement legal effect in order to bind all interested parties for whose benefit the settlement was concluded, including foreign interested parties. The wide jurisdictional reach of the Court over foreign interested parties was accepted.

The applicable Dutch jurisdiction rule embodied in Article 3 DCCP is largely suitable for the regulation of international jurisdiction outside the scope of the Brussels I Regulation (see paragraph 2.7).

However, a closer look at the grounds used to found jurisdiction on the basis of the jurisdiction rules of the Brussels I Regulation revealed that there is friction between the concepts used in the WCAM and the concepts of the Brussels I Regulation (see paragraph 2.4). The current approach taken by the Amsterdam Court which qualifies 'interested persons' as 'persons to be sued' and 'co-defendants' in the sense of respectively Articles 2 and 6 Brussels I Regulation is problematic for the application of the rules defining the scope and the jurisdiction rules of the Brussels I Regulation.

When at least one of the applicants or party concluding the settlement agreement is domiciled in the Brussels I Regulation area, the jurisdiction problem within the scope of the Brussels I Regulation can be solved by a practical solution: The systematic incorporation of a choice of forum clause in favour of the Amsterdam Court in the settlement agreement. The *Gerling* case permits that a choice of forum clause is concluded for the benefit of third parties, who are not party to the agreement. In relation to the WCAM procedure, this means that interested persons may benefit from a choice of forum clause incorporated in a settlement agreement.

The Amsterdam Court will then have no problem in accepting jurisdiction (see paragraph 2.6.3).

For situations in which a choice of forum clause was not incorporated in the settlement agreement, further clarification is needed as to the meaning of certain concepts and jurisdiction. Although procedural concepts embodied in the Brussels I Regulation are left to national procedural law, the current problems warrant a preliminary ruling from the CJEU. A different approach which founds jurisdiction on the basis of the legal relationship underlying the settlement would solve the conceptual problems arising when an 'interested person' is identified as a 'person to be sued' (see paragraph 2.6.1). The question is whether jurisdiction can be asserted by looking at the underlying legal relationship instead of looking at the settlement agreement itself. This question too merits clarification from the CJEU. The Amsterdam Court meets the criteria to be recognized as a 'court' competent to request the CJEU to give a preliminary judgment on the interpretation of the Brussels I Regulation, including the requirement that the subject matter involves contentious proceedings. The Amsterdam Court is therefore competent to request the preliminary rulings from the CJEU to obtain clarification as to the concept used in the Brussels I Regulation in relation to a WCAM procedure.

The tension existing between the concepts of the Brussels I Regulation and those applied in the WCAM collective settlement demonstrate that the jurisdiction rules of the Brussels I Regulation have not been written for collective redress procedures in general or for collective settlements in particular. In expectation of and depending on the clarification provided by the CJEU, further research is needed in order to explore the compatibility of the Brussels I Regulation with the collective redress mechanism in various Member States.

If a reform to modify the Brussels I Regulation is considered needed in order to deal with collective redress, it should however take into account the differences between collective settlements and their particularities of binding declaration or court approval on the one hand and collective litigation on the other. Specific heads or jurisdiction rules may be added to the current jurisdictional scheme of the Brussels I Regulation to specifically deal with collective litigation and collective settlements and adjustments could be made to deal with the concepts of 'interested parties' and 'class members'. Finding a consensus for adequate jurisdiction grounds dealing specifically with mass claims may however appear difficult (see paragraph 2.8) and require further study.

The *lis pendens* requirements of the 'same parties' and the 'same object of action' will rarely lead to the application of the rule. The 'related actions' rule provides for more flexibility, but only partly solves the problems of parallel litigation in collective actions since it leaves the coordination to the court last seized. A mechanism of cooperation and coordination along the lines of the U.S. *multidistrict litigation* is advisable at European level and requires further study.

Recommendations in relation to the Brussels I Regulation with regard to international jurisdiction and the WCAM

- *Settlement agreements should systematically include a choice of forum clause in favour of the Amsterdam Court of Appeal.*
- *To obtain further clarification on the application of the Brussels I Regulation in relation to WCAM settlements, the following questions might be referred to the CJEU:*

  1. When a Court is requested to declare binding a WCAM settlement:

  c) Should a 'person to be sued' in the sense of Article 2 Brussels I Regulation be interpreted autonomously or should it be determined by national laws on civil procedure?

  d) If 'a person to be sued' in the sense of Article 2 Brussels I Regulation is to be interpreted autonomously, may an interested party be identified as a 'person to be sued'?

  2. In order to determine the international jurisdiction over foreign parties in a WCAM procedure, may the Amsterdam Court consider the underlying legal relationship?

– Further study is needed to explore the compatibility of the Brussels I Regulation with the collective redress mechanisms in various Member States.

7.2 International Recognition

A binding declaration of a WCAM settlement should enjoy the free movement of judgments guaranteed under the scope of the recognition regime of the Brussels I Regulation. The current terminology of the Brussels I Regulation is however not suited to the concept of a binding declaration of WCAM collective settlements. Moreover, the English language version is not consistent with the other versions of the Brussels I Regulation. This leads to uncertainty as to whether the binding declaration should be considered either a 'judgment' in the sense of Article 32 or as a 'court settlement' as stipulated under Article 58 Brussels I Regulation. This qualification is important for the grounds for non-recognition that are available for each of the decisions. Clarifications are needed to align the Brussels I Regulation with the Amsterdam Court's decisions under the WCAM. Especially because such clarifications do not require laborious legislative reform and may be modelled on existing terminology of other European instruments.

The nature of a binding declaration of a WCAM settlement should be understood as a court's approval of a settlement concluded before court proceedings were initiated. The settlement agreement is therefore not reached in *the course of proceedings* as required for court settlements in accordance with Article 58 Brussels I Regulation (see paragraph 5.2.2).

A binding declaration does not involve a court's decision ruled on its own authority on the issues between the parties, because the issue was already settled by the parties before it reached the court. A binding declaration should therefore be understood as a 'judgment' in the sense of Article 32 Brussels I Regulation, due to the substantial evaluation effected by the Court on the substance of a WCAM settlement to assess its reasonableness. Furthermore, the Court is allowed to give the parties the opportunity to add further provisions to the agreement or to amend it, before deciding on the binding declaration and respondents in the WCAM proceedings have the right to be heard on their objections to the binding declaration (see paragraph 5.2.1).

The fact that a binding declaration should be understood as a 'judgment' has two important consequences for foreign interested parties residing outside The Netherlands but within the borders of the EU and EFTA:

1) The binding effect of the WCAM on foreign interested parties: A WCAM settlement declared binding by the Amsterdam Court has binding effect on foreign parties residing outside The Netherlands but within the borders of the EU and EFTA for whose benefit the agreement was concluded, unless they opted out. The consequence of the recognition of a foreign judgment is that it has in principle the same effects in the State in which enforcement is sought as it does in the State in which judgment was given. This means that the effect of a binding declaration under Dutch law should be the same in other Member States where the judgment is recognized. As a consequence, other Member States have to recognize the preclusive effect of the WCAM settlement declared binding by the Amsterdam Court and this prevents re-litigation of the claim settled under the agreement (see paragraph 5.3.1).

2) The grounds for non-recognition of a judgment: The recognition of a binding declaration may only be refused on the basis of one of the four grounds of refusal of recognition embodied in Article 34 (see paragraph 5.4). The importance of proper notification of interested parties under the WCAM procedure is also reflected in the grounds for non-recognition listed in Article 34. The fact that the recognition of judgments may be refused if the decision was taken in the situation of a 'default of appearance' of the 'defendant' who had not been served with the notice in sufficient time in order for him to arrange his defence and the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so, is particularly relevant in the WCAM procedure (see Article 34(1) and paragraph 5.4.1).

The opt-out character of the WCAM procedure calls for a double check of the proper notification in the recognition stage. In theory, the opt-out procedure of the WCAM is said to be a sensitive issue and a potential ground for refusal of recognition of the binding declaration on the basis of public policy (see Article 34(1) and paragraph 5.4.2). If recognition of the binding declaration were to be refused, it is most likely that this would be done on the basis of incompatibility of the opt-out procedure with the public policy defence, which is applied differently in each Member State. Such violation of public policy should however entail a manifest and disproportionate breach of fundamental rights in a concrete

case. In practice, such concrete cases will merely involve unknown foreign interested parties who have been properly notified in accordance with the Dutch WCAM provisions of notification, but have nonetheless not been reached and have therefore not had the opportunity to either be heard or opt out. These concrete situations which are considered rare, involve the situation where for some legitimate reason the unknown person was not and could not be aware of the WCAM settlement and was not reached by the notifications despite all world-wide and public announcements and advertisements. In practice, it is even less likely that such person would actually invoke the public policy as the WCAM settlement provides for an efficient and relatively inexpensive way of redress and the compensation awarded to interested parties who were not aware of the settlement is usually welcomed as 'found money'. In sum, when interested parties have been properly notified, the public policy refusal is not considered problematic in practice and is a risk that applicants are willing to take.

Recommendations for the Brussels I Regulation in relation to the recognition

- A binding declaration of WCAM settlements should be understood as a 'judgment' in accordance with Article 32. This should be clarified in the text of Article 32.

- The English version of Article 58 should be brought in line with the German and French versions of the text in order to avoid confusion as to the required approval of court-settlements by the court.

7.3 Cross-Border Notification

The importance of notifying as many known and unknown interested parties as possible in order to reach – and bind – them to the WCAM settlement concluded for their benefit is worth both the efforts and the costs.

The Service Regulation and the Hague Service Convention are not inadequate to deal with large numbers of known interested parties in collective settlements. Few practical problems were encountered with regard to the application of its provisions, despite the fact that large groups of known interested parties needed to be notified and that this is a laborious task which involves considerable costs. In order to reach more interested parties and to reduce the certificates of non-service, it was however suggested that a closer cooperation between the applicants and a more active role of the representative associations would obtain, insofar as possible, more up to date information as to the known interested parties and their addresses (see paragraph 3.2).

The notification of unknown interested parties is unfortunately not regulated by international instruments and is therefore left to national law. The current provisions of the WCAM do not explicitly regulate the notification of foreign interested parties, but the margin of discretion provided by Articles 1013(5) and 1017(3) DCCP allows the court to prescribe some other form of method for cross-border notification. Especially regarding unknown parties or parties with unknown addresses, the Court should be given the explicit possibility to *order or approve methods* of notification. The importance of the pre-trial hearing in order to determine the method of notification has been demonstrated in practice. Although the WCAM does not

explicitly require the Court's approval for the methods of notification, the role of the court during the pre-trial hearings has proven crucial to facilitate cooperation between the applicants to ensure a swift notification process and to ensure as much as possible the interested parties' fundamental procedural rights. It is recommended to anchor this role of the Court in the WCAM Act.

The binding declaration of the WCAM settlement follows when the Court is satisfied that at least a certain percentage of the foreign interested parties was properly notified. Conversely, this allows a certain number of cases where the notice did not reach the foreign interested parties; either because they have not received the notice or were unaware of the announcements made, or because the applicants decided not to notify them at all because the costs involved were too high. In each of these cases, it is the alleged responsible party who accepts the risk that these persons may invoke the violation of their procedural rights and may not be considered bound by the settlement agreement. This risk is considered inferior since the very nature of the WCAM settlement is based on the idea that the settlement agreement is concluded by representative organizations for the benefit of the interested parties, that critical mass is thereby guaranteed and that there is only a minor chance that these parties are not satisfied with the compensation under the settlement agreement. The fact that there is a (small) percentage that has not been notified at all or has not been properly notified, does therefore not lead to the non-admissibility of the request to declare the settlement binding, nor to the rejection of the request. Nonetheless, this point may be addressed by the WCAM itself by providing further guidance with respect to when the prescribed notification method should be considered unsuccessful for notification of large numbers of interested persons (see paragraph 3.3).

Recommendation for Articles 1013(5) and 1017(3) DCCP

- Outside the scope of international instruments, Articles 1013(5) and 1017(3) DCCP should require the Court's approval or at least the Court's involvement as to the choice of notification methods, especially in relation to unknown interested parties. The use of a pre-trial hearing for the court should be institutionalized in the WCAM Act.

- Articles 1013(5) and 1017(3) DCCP should emphasize that the Court is flexible in determining the appropriate notification methods on a case-by-case basis outside the scope of international instruments. This involves the introduction of open norms emphasizing the best efforts to guarantee proper notification and of elements of appreciation such as the number of interested parties and the presence of a pre-existing (contractual) relationship with the alleged responsible party.

- Within the notification methods listed in Articles 1013(5) and 1017(3) DCCP; explicit mention should also be made of the possibility of the use of any electronic means (e.g. website) specially opened for the winding up of the settlement agreement.

- The percentage of foreign interested parties which have not received proper notice should be limited and regulated by Articles 1013(5) and 1017(3) DCCP or any other provision in the WCAM.

7.4 Representation

The requirement of representation of foreign interested parties is important for the binding declaration and for the recognition of WCAM settlements outside The Netherlands, but the question of requirement is not one which causes problems as to its regulation, nor does it cause problems in practice. The Court's wide appreciation of the representation question on a case-by-case basis has allowed representative organizations together with alleged responsible parties to find the appropriate method to deal with the representation of foreign interested persons.

Among the available methods to represent foreign interested persons are: 1) the presence of a written expression of support to the representative party concluding the settlement agreement for the benefit of foreign interested persons provided by foreign representative organizations representing interested parties outside The Netherlands; 2) by including foreign representative associations as a *participant* to the representative party concluding the settlement agreement; 3) by the formation of an *ad hoc* foundation of foreign representative associations which then becomes party to the settlement agreement; or 4) a foreign representative association representing foreign interested persons established in their country, directly becomes a party to the settlement agreement itself (see paragraph 4.2).

The Court should explicitly appreciate and approve the adequacy of the method(s) chosen by the parties to guarantee the sufficient representation of foreign parties. On the basis of a case-by-case approach, this could and should be done at the pre-trial hearing in consultation with the parties to the settlement agreement. In this respect, the role of the Court regarding the representation requirement deserves to be anchored in the WCAM itself.

Recommendation for the WCAM for the representation of foreign interested parties

- The WCAM should anchor in its provisions a pre-trial hearing to determine the appropriate method(s) of representation when the settlement agreement is concluded for the benefit of foreign interested parties represented by one of the applicants. The Amsterdam Court should explicitly appreciate and approve the method chosen by the parties to guarantee the sufficient representation of foreign parties on a case-by-case basis.

7.5 Applicable Law

The assessment of the reasonableness of the settlement agreement should be done on the basis of a damage scheduling clause. An inventory of applicable laws will take place during the negotiations of the settlement agreement and not primarily by the Court during proceedings for the binding declaration. The Court is left to appreciate the eventually applicable mandatory provisions of the *lex fori* (see paragraph 6.6).

Recommendation for the WCAM for issues of applicable law

- Article 7:907(2) shall also require the inclusion of a damage scheduling clause in the settlement agreement – if appropriate considering the different foreign interested persons involved – which takes into account the differences in applicable law as to the reasonableness of the awarded compensation.

Bibliography

Adler, D.J.D., and Lunsingh Scheurleer, D.F., 'Class Action Litigation in the U.S.', in Hart, F.M.A., ed., *Collectieve Acties in de Financiële Sector* (2009), 145-168

Bassett, D.L., 'U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction', 72 *Fordham Law Review* (2003), 1, 41-92

Bertrams, R.I.V.F., and Kruisinga, S.A., *Overeenkomsten in het internationaal privaatrecht en het Weens Koopverdrag* (Deventer: Kluwer, 2007)

Boom van, W., and Arons, T., 'Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands' 21 *European Business Law Review*, (2010) 5, *forthcoming.*

Briggs, A., *Civil Jurisdiction and Judgments* (London: LLP, 2009)

Buxbaum, H., 'Multinational Class Actions under Federal Securities Law: Managing Jurisdictional Conflicts', 46 *Columbia Journal of Transnational Law* (2007), 14-71

Carballo Piñeiro, L., *Las ácciones colectivas y su eficacia extraterritorial. Problemas de recepción y transplante de las "class actions" en Europa* (Santiago de Compostela: Servizo de Publicacións e Intercambio Científico, 2009)

Cottreau, S.T.O., 'The Due Process Right to Opt Out of Class Actions', 73 *New York University Law Review* (1998), 480-528

Cox, J.D., Thomas, R.S., and Bai, L., 'Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses', *Wisconsin Law Review* (2009), 2, 421-454

Croiset van Uchelen, A.R.J., ‘Van corporate litigation naar corporate settlement’, in G. van Solinge, and M. Holtzer, eds., *Geschriften vanwege de Vereniging Corporate Litigation 2003-2004. Serie vanwege het Van der Heijden Instituut te Nijmegen. Deel 75* (Deventer: Kluwer, 2004), 129-160

Croiset van Uchelen, A.R.J., ‘De verbindendverklaring van de WCAM als procesvorm’, *Aansprakelijkheid, Verzekering en Schade* (2007), 5, 222-228

Croiset van Uchelen, A.R.J., and Van der Velden, B.W.G., ‘Shell-shocked? Het internationale debuut van de wet collectieve afwikkeling massaschade’, *Tijdschrift voor de ondernemingsrechtpraktijk* (2009), 7, 252-258

Falkena, F.B., and Haak, M.J.F., ‘De nieuwe wettelijke regeling afwikkeling massaschade’, *Aansprakelijkheid, Verzekering en Schade* (2004), 5, 198-206

Fawcett, J.J., ‘Multi-party Litigation in Private International Law’, 44 *International and Comparative Law Quarterly* (1995), 4, 744-770

Felder, A., *Die Lehre vom* Forum Non Conveniens*, Voraussehbarkeit des Ergebnisses ihrer Anwendung und prozessuale Aspekte für Verfahrensparteien vor den U.S. Federal Courts und den State Courts in New York bei class actions unter besondere Berücksichtigung deutscher alternative Foren oder Parteien*, (Konstanz: Hartung-Gorre, 2005)

Frenk, N., ‘Massaschade: De Nederlandse benadering’, *Aansprakelijkheid, Verzekering en Schade* (2007), 33, 214-222

Freudenthal, M., ‘Europese Betekeningsverordening: waarom niet per post?’, *Advocatenblad* (2003), 11, 472-477

Freudenthal, M., *Schets van het Europees civiel procesrecht: Europees burgerlijk procesrecht voor de Nederlandse rechtspraktijk* (Deventer: Kluwer, 2007)

Gaudemet-Tallon, H., *Compétence et exécution des jugements en Europe* (Paris: L.G.D.J., 2010)

Hess, B., Pfeiffer, T. and Schlosser, P., *The Brussels I-Regulation (EC) no. 44/2001: The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States (Study JLS/C4/2005/03)* (München: Beck, 2008)

Hess, B., 'Cross-border Collective Litigation and the Regulation Brussels I', *IPRax* (2010), 2, 116-121

Kahan, M., and Silberman, L., 'The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc,' 73 *New York University Law Review* (1998), 3, 765-792

Kessedjian, C., 'Les actions collectives en dommages et intérêts pour infraction aux règles communautaires de la concurrence et le droit international privé', in Venturini, G., and Bariatti, S., eds., *Liber Fausto Pocar – Vol. II: Nuovi strumenti del diritto internazionale privato* (2009), 532-547

Kramer, X.E., 'Rechtsmacht en forumkeuze in het internationaal verzekeringsrecht: Nieuwe ontwikkelingen', *Verzekerings-Archief* (2006), 4, 110-117

Kramer, X.E., 'Naar een effectievere grensoverschrijdende betekening van stukken: De nieuwe Betekeningsverordening', *Nederlands Tijdschrift voor Europees Recht* (2008), 6, 172-178

Kroes, Chr.F., 'Note: *Dexia*. Court of Appeal Amsterdam 25 January 2007', *JBPr* (2007), 39

Kropholler, J., *Europäisches Zivilprozeßrecht: Kommentar zu EuGVO, Lugano-Übereinkommen und Europäischem Vollstreckungstitel* (Frankfurt am Main: Recht und Wirtschaft, 2005)

Liman, L.J., and Herrington, D.H., 'Whether "Foreign-cubed" Securities Class Actions Fit in U.S. Courts', *New York Law Journal* (2009), www.nylj.com

Lith, H. van, *International Jurisdiction in Commercial Litigation. Common Grounds for Uniform Rules in Contractual Disputes* (The Hague: T.M.C. Asser Press, 2009)

Magnus, U., and Mankowski, P., eds., *Brussels I Regulation. European Commentaries on Private International Law* (München: Sellier, 2007)

Matousekova, M., 'Would French Courts Enforce U.S. Class Action Judgments?', *Contratto e Impresa* (2006), 261-676

Monestier, T., 'Lepine v. Canada Post: Ironing Out Wrinkles in the Interprovincial Enforcement of Class Judgments', 34 *Advocates' Quarterly* (2008), 499-516

Muir Watt, H., 'Brussels I and Aggregate Lititgation or the Case for Redesigning the Common Judicial Area in Order to Respond to Changing Dynamics, Functions and Structures in Contemporary Adjudication and Litigation', *IPRax* (2010), 2, 111-116

Newton, J., *The Uniform Interpretation of the Brussels and Lugano Conventions* (Oxford: Hart, 2002)

Pinna, A., 'Les groupes internationaux de sociétés face aux class actions américaines' in Boucobza, X., and Mecarelli, G., eds., *Groupes internationaux de sociétés: nouveaux défis, nouveaux dangers* (Paris: Economica, 2007), at 13, § 18 *et seq.*, available at SSRN: http://ssrn.com/abstract=1022878

Pinna, A., 'Recognition and Res Judicata of U.S. Class Action Judgments in European Legal Systems', 1 *Erasmus Law Review* (2008), 2, 31-61

Polak, R., 'Approval of International Class Action Settlements in the Netherlands', in *The International Comparative Legal Guide to Class & Group Actions 2009. A practical insight to cross-border Class and Group Actions work* (London: Global Legal Group, 2009), available at www.iclg.co.uk

Polak, M.V., 'Iedereen en overal? : Internationaal privaatrecht rond "massaclaims"', 81 *NJB* (2006), 41, 2346-2355

Polak, M.V., 'De Trukendoos van het IPR', in Van den Berg, N., Henkemans, R., and Timmer, A., eds., *Massaclaims, Class actions op z'n Nederlands* (Nijmegen: Ars Aequi Libri, 2007), 131-146

Poot, M., 'Internationale afwikkeling van massaschade met de Wet Collectieve Afwikkeling Massaschade', in Holtzer, M., Leijten, A.F.J.A., and Oranje, D.J., eds., *Geschriften vanwege de Vereniging Corporate Litigation 2005-2006. Serie vanwege het Van der Heijden Instituut. Deel 87* (Deventer: Kluwer, 2006), 169-202

Schwartze, A., 'A European Regime on International Product Liability: Article 5 Rome II Regulation', *NIPR* (2008), 430-434

Silberman, L., and Choi, S., 'Transnational Litigation and Global Securities Class Actions' (January 13, 2009), NYU School of Law, Public Law Research Paper No. 09-06; NYU Law and Economics Research Paper

Stadler, A., 'Die grenzüberschreitende Durchsetzbarkeit von Sammelklagen', in Casper, M., Janssen, A., Pohlmann, P., and Schulze, R., eds., *Auf dem Weg zu einer europäischen Sammelklage?* (München: Sellier, 2009), 150-168

Struycken, T., and Bierman, B., 'Rome I on Contracts Concluded in Multilateral Systems', *NIPR* (2009), 4, 416-425

Stuyck, J., 'Class Actions in Europe? To Opt-In or to Opt-Out, that is the Question', 20 *European Business Law R*eview (2009), 4, 483-506

Teitz, L., 'Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgements in Transnational Litigation', 10 *Roger Williams University Law Review* (2004), 1-72

Tzankova, I.N., 'Toegang tot het recht bij Europese Massaschade', 82 *NJB* 2 (2007), 41, 2634-2642

Vlas, P., 'Commentaar EEX-Verdrag-EVEX-EEX-Verordening', in Wesseling-Van Gent, E., Ynzonides, M., and Vlas, P., eds., *Burgerlijke rechtsvordering (De Groene Serie),* (loose-leaf: Supplement 325) (Deventer: Kluwer, 2009)

Vlas, P., 'Commentaar Burgerlijke rechtsvordering. Boek 1. Titel 1. Eerste afdeling. De rechtsmacht van de Nederlandse rechter', in Wesseling-Van Gent, E., Ynzonides, M., and Vlas, P., eds., *Burgerlijke rechtsvordering (De Groene Serie),* (loose-leaf: Supplement 314) (Deventer: Kluwer, 2008)

Wasserman, R., *Transnational Class Actions and Interjurisdictional Preclusion*, University of Pittsburgh Legal Studies Research Paper No. 2010-04 (Pittsburgh, Pennsylvania: University of Pittsburgh School of Law, 2010), available at SSRN: http://ssrn.com/abstract=1554472

Wulf, H. de, and Van den Steen, L., 'Enkele IPR-problemen uit het economisch recht: Het mogelijke conflict tussen lex concursus en lex societatis, de effecten op rekening, en Europees getinte class actions in de VS', in Erauw, J., and Taelman, P., eds., *Nieuw Internationaal Privaatrecht: Meer Europees, maar globaal* (Mechelen: Kluwer, 2009), 391-483

Table of Cases

European Court of Human Rights

- *A. T. v. Austria*, 21 March 2002
- *Brumărescu v. Romania*, 28 October 1999, *Reports of Judgments and Decisions* 1999-VII
- *Kehaya and others v. Bulgaria*, 12 January 2006

European Court of Justice (cases listed by case number)

- *Industrie Tessili Italiana Como v. Dunlop AG* (Case 12/76), [1976] ECR 1473 [Tessili *v. Dunlop*]
- *A. De Bloos, SPRL v. Société en commandite par actions Bouyer* (Case 14/76), [1976] ECR 1497 [*De Bloos v. Bouyer*]
- *Handelskwekerij G.J. Bier BV v. Mines de potasse d'Alsace SA* (Case 21/76), [1976] ECR 1735 [*Bier v. Mines de potasse d'Alsace*]
- *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol* (Case 29/76), [1976] ECR 1541 [*LTU v. Eurocontrol*]
- *Jozef de Wolf v. Harry Cox BV* (Case 42/76), [1976] ECR 1759 [*Jozef de Wolf v. Harry Cox BV*]
- *Bernard Denilauler v. SNC Couchet Frères* (Case 125/79), [1980] ECR 1553 [*Denilauler v. SNC Couchet Frères*]
- *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging* (Case 34/82), [1983] ECR 987 [*Peters v. ZNAV*]
- *Gerling Konzern Speziale Kreditversicherung-AG and Others v. Amministrazione del Tesoro dello Stato* (Case 201/82), [1983] ECR 2503 [*Gerling v. Amministrazione del Tesoro dello Stato*]
- *Gubisch Maschinenfabrik KG v. Giulio Palumbo* (Case 144/86), [1987] ECR 4861 [*Gubisch Maschinenfabrik v. Palumbo*]
- *Horst Ludwig Martin Hoffmann v. Adelheid Krieg* (Case 145/86), [1988] ECR 645 [*Hoffmann v. Krieg*]
- *Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst and Co. and Others* (Case 189/87), [1988] ECR 5565 [*Kalfelis*]
- *Kongress Agentur Hagen GmbH v. Zeehaghe BV* (C-365/88), [1990] ECR I-1845 [*Hagen v. Zeehaghe*]
- *Overseas Union Insurance Ltd and Deutsche Ruck UK Reinsurance Ltd and Pine Top Insurance Company Ltd v. New Hampshire Insurance Company* (C-351/89), [1991] ECR I-3317 [*Overseas Union v. New Hampshire Ins.*]
- *Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA* (C-26/91), [1992] ECR I 3967 [*Handte v. Traitements*]
- *Shearson Lehmann Hutton Inc. v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* (C-89/91), [1993] ECR I-139 [*Shearson Lehmann Hutton Inc. v. TVB*]
- *Volker Sonntag v. Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann* (C-172/91), [1993] ECR I-1963 [*Sonntag v. Waidmann*]
- *Mulox IBC Ltd v. Hendrick Geels* (C-125/92), [1993] ECR 4075 [*Mulox v. Geels*]

- *Owens Bank Ltd v. Fulvio Bracco and Bracco Industria Chimica SpA* (C-129/92), [1994] ECR I-117 [*Owens v. Bracco*]
- *The owners of the cargo lately laden on board the ship "Tatry" v. the owners of the ship "Maciej Rataj"* (C-406/92), [1994] ECR I-5439 [*"Tatry" v. the owners of the ship "Maciej Rataj"*]
- *Solo Kleinmotoren GmbH v. Emilio Boch* (C-414/92), [1994] ECR I-2237 [*Solo Kleinmotoren v. Boch*]
- *Hengst Import BV v. Anna Maria Campese* (C-474/95), [1995] ECR I-2113 [*Hengst Import v. Campese*]
- *Bernardus Hendrikman and Maria Feyen v. Magenta Druck & Verlag GmbH* (C-78/95), [1996] ECR I-4943 [*Hendrikman and Feyen v. Magenta Druck & Verlag*]
- *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH* (C-54/96), [1997] ECR I-4961 [*Dorsch v. Bundesbaugesellschaft Berlin*]
- *Drouot assurances SA v. Consolidated metallurgical industries (CMI industrial sites), Protea assurance and Groupement d'intérêt économique (GIE)* (C-351/96), [1998] ECR I-3075 [*Drouot assurances v. CMI and others*]
- *Réunion européenne SA and Others v. Spliethoff's Bevrachtingskantoor BV and the Master of the vessel "Alblasgracht V002"* (C-51/97), [1998] ECR I-6511 [*Réunion européenne v. Spliethoff's*]
- *Transporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA* (C-159/97), [1999] ECR I-1597 [*Castelletti*]
- *Dieter Krombach v. André Bamberski* (C-7/98), [2000] ECR I-1935 [*Krombach v. Bamberski*]
- *Régie nationale des Usines Renault SA v. Maxicar SpA and Orazio Formento* (C-38/98), [2000] ECR I-2973 [*Régie Nationale des Usines Renault SA v. Maxicar SpA*]
- *Group Josi Reinsurance Company SA v. Universal General Insurance Company (UGIC)* (C-412/98), [2000] ECR I-5925 [*Group Josi v. UGIC*]
- *Verein für Konsumenteninformation v. Karl Heinz Henkel* (C-167/00), [2002] ECR I-8111 [*Verein für Konsumenteninformation v. Henkel*]
- *Besix SA v. Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. AG (WABAG) and Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzschmar GmbH & KG (Plafog)* (C-256/00), [2002] ECR I-1699 [*Besix v. WABAG*]
- *Gerhard Köbler v. Republik Österreich* (C-224/01), [2003] ECR I-10239 [*Köbler*]
- *Mærsk Olie & Gas A/S v. Firma M. de Haan en W. de Boer* (C-39/02), [2004] ECR I-9657 [*Mærsk Olie & Gas*]
- *Erich Gasser GmbH v. MISAT Srl* (C-116/02), [2003] ECR I-14693 [*Gasser v. MISAT*]
- *Andrew Owusu v. N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others* (C-281/02), [2005] ECR I-1383 [*Owusu v. Jackson*]
- *Société financière et industrielle du Peloux v. Axa Belgium and Others* (C-112/03), [2005] ECR I-3707 [*Peloux v. Axa Belgium*]
- *Götz Leffler v. Berlin Chemie AG* (C-443/03), [2005] ECR I-9611 [*Leffler v. Berlin Chemie*]
- *Roche Nederland BV and Others v. Frederick Primus and Milton Goldenberg* (C-539/03), [2006] ECR I-6535 [*Roche v. Primus*]
- *Rosmarie Kapferer v. Schlank & Schick GmbH* (C-234/04), [2006] ECR I-2585 [*Kapferer v. Schlank & Schick*]
- *Plumex v. Young Sports NV* (C-473/04), [2006] ECR I-1417 [*Plumex v. Young Sports*]

- *ASML Netherlands BV v. Semiconductor Industry Services GmbH* (C-283/05), [2006] ECR I 1201
- *Ingenieurbüro Michael Weiss und Partner GbR v. Industrie- und Handelskammer Berlin* (C-14/07), [2008] ECR I-3367 [*Weiss und Partner*]
- *Marco Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company* (C-394/07), [2009] [*Marco Gambazzi v. DaimlerChrysler Canada Inc.*]
- *Roda Golf & Beach Resort SL* (C-14/08), [2009] [*Roda Golf*]
- *Amiraike Berlin GmbH* (C-497/08), [2010]

Canada

- *Canada Post Corp. v. Lépine*, [2009] 1 S.C.R. 549, 2009 SCC 16
- *Currie v. McDonald's Restaurants of Canada Ltd.*, 74 O.R. (3d) 321

Germany

- Regional Court Stuttgart 24 November 1999, *IPRax* (2001), 24

Netherlands

- HR 20 September 2002, *NJ* (2005), 40 (*Siplast SA*)
- HR 12 March 2004, *NJ* (2004), 284
- HR 25 June 2010, LJN: BM0710
- Court of Appeal Amsterdam of 1 June 2006, *NJ* (2006), 461, LJN: AX6440 (*DES*)
- Court of Appeal Amsterdam of 25 January 2007, *NJ* (2007), 427, LJN: AZ7033 (*Dexia*)
- Court of Appeal Amsterdam of 29 April 2009, *NJ* (2009), 448, LJN: BI2717 (*Vie d'Or*)
- Court of Appeal Amsterdam of 29 May 2009, *NJ* (2009), 506, LJN: BI5744 (*Shell*)
- Court of Appeal Amsterdam of 15 July 2009, *JOR* (2009), 325, LJN: BJ2691 (*Vedior*)
- District Court (*Rechtbank)* Amsterdam of 23 June 2010, LJN: BM9324

United States

U.S. Supreme Court

- *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)
- *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976)
- *Hansberry v. Lee*, 311 U.S. 32 (1940)
- *Morrison v. National Australian Bank Ltd.* No. 08–1191, Decided 24 June 2010
- *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)
- *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422 (2007)

Others

- *Bersch v. Drexel Firestone, Inc.*, U.S. Court of Appeals, 2nd Circuit, 519 F.2d 974 (1975)
- *In re Vivendi Universal, S.A. Securities Litigation*, U.S. District Court, Southern District of New York, 241 F.R.D. 213 (2007)
- *Robinson v. TCI/US West Commc'n, Inc*., 117 F.3d 900, 905 (5th Cir.1997)
- *Schoenbaum v. Firstbrook*, U.S. Court of Appeals, 2nd Circuit, 405 F.2d 200 (1968)

Annex I – Members of the Supervising Committee

- Prof. Dr. P. Vlas (Chairman), Professor of Private International Law and Comparative Law, VU University Amsterdam; Advocate General of the Supreme Court of The Netherlands (Hoge Raad der Nederlanden)
- Prof. Dr. N. Frenk, Professor of Dutch Private Law, Faculty of Law, VU University Amsterdam; Legislation Department, Ministry of Justice
- E.C. van Ginkel, LLM, Commissioning Research Division (EWB), Research and Documentation Centre, Ministry of Justice
- P.M.M. van der Grinten, LLM, Legislation Department, Ministry of Justice
- Dr. F. Ibili, *Gerechtsauditeur*, Supreme Court of The Netherlands (Hoge Raad der Nederlanden)

Annex II – List of Interviewees

Judge J.M.J. Chorus, Vice-President, Amsterdam Court of Appeal

Dr. P.W.J. Coenen, Vereniging van Effectenbezitters, The Hague

Judge W.H.F.M. Cortenraad, Vice-President, Amsterdam Court of Appeal

Drs. A.R.J. Croiset van Uchelen, Attorney, Amsterdam

B.F.M. Knüppe, Dexia Bank Nederland N.V.

Prof. Dr. M.J. Kroeze, Stichting Shell Reserves Compensation Foundation

M.A. Leijten, Attorney, Amsterdam

J.H. Lemstra, Attorney, The Hague

Drs. D.F. Lunsingh Scheurleer, Attorney, Amsterdam

K. Peters, Consumentenbond, The Hague

Prof. Dr. M.V. Polak, Attorney, Amsterdam

R.W. Polak, Attorney, Amsterdam

G. van Puivelde, Bailiff (kandidaat-gerechtsdeurwaarder), The Hague

Prof. Dr. I.N. Tzankova, Attorney, Amsterdam

G.J.M. Wouters, Bailiff (kandidaat-gerechtsdeurwaarder), The Hague

Annex III – Questionnaire (NL)

Inleiding

De bedoeling van de vragenlijst is een indicatie te geven van de vragen die tijdens het interview aan bod kunnen komen alsmede een structuur voor het interview te bieden.

Het onderzoeksverslag zal in bijlage enkel de gegevens van de geïnterviewden bevatten, tenzij hier tegen bezwaar bestaat. De aantekeningen van de interviewverslagen zijn interne documenten van het onderzoeksteam en zullen vertrouwelijk behandeld worden en niet aan derden meegedeeld worden zodat de geïnterviewden vrijuit kunnen praten.

Het primaire doel van het interview is te inventariseren welke problemen van internationaal privaatrecht Wcam procedures opleveren. In dat opzicht beoogt het interview ervaringen vanuit de praktijk in kaart te brengen als input voor het onderzoek omtrent de aspecten van internationaal privaatrecht van de Wcam. In het onderzoeksverslag zullen ervaringen niet aan specifieke personen of organisaties gekoppeld worden.

Naar aanleiding van de voornoemde inventarisatie, beogen het interview en de vragen tevens te peilen of de geïnterviewden meningen hebben omtrent mogelijke verbeteringen van de huidige Wcam. Ook hier geldt dat meningen niet aan specifieke personen of organisaties gekoppeld zullen worden om een open gedachtenwisseling tijdens het interview te bevorderen. Dit is slechts anders voor geïnterviewden van belangenverenigingen voor zover (1) deze geïnterviewden gemachtigd zijn namens hun vereniging een standpunt te vertolken; én (2) de desbetreffende passage van het onderzoeksverslag die een mening van een belangenvereniging verwoordt, door de geïnterviewde is geaccordeerd.

Vragenlijst

1. In welke hoedanigheid bent u betrokken geweest bij een Wcam-procedure en op welke wijze heeft u in deze procedure te maken gehad met aspecten van internationaal privaatrecht?

2. Welke problemen heeft u ondervonden ten aanzien van de vraag of de Nederlandse Wcam rechter internationaal bevoegd was? Wat was de impact van voornoemde vraag op de Wcam-procedure?

3. - Indien de Nederlandse rechter zich heeft gebogen over de bereikte vaststellingsovereenkomst ten aanzien van de afwikkeling van de schade in de zaak waarbij u betrokken was, vindt u het gerechtvaardigd dat de Nederlandse rechter bevoegdheid aannam? Met andere woorden vond u dat de Nederlandse rechter voldoende aanknopingspunten met de zaak heeft/had of is/was een andere (buitenlandse) rechter meer verbonden met de zaak?

- Kunt u aangeven welke aanknopingspunten u van belang vindt voor de bevoegdheid van de Nederlandse rechter in een internationale massaschadeclaim? Bijvoorbeeld de woonplaats van de aansprakelijke, de plaats van de geleden schade of de woonplaats van de belanghebbende of opteert u voor een open norm zoals het voldoende band criterium?

- Dient een dergelijke bevoegdheidsregel op nationaal, Europees of internationaal niveau tot stand gebracht te worden?

4. Indien belanghebbende in eenzelfde massaschade zaak in verschillende staten gevestigd of woonachtig zijn, bent u van mening dat een aansprakelijkheidsprocedure zich moet concentreren bij één rechter van een bepaald land, zoja welke? Of vindt u dat er de mogelijkheid moet bestaan tot forum shopping?

5. Hebt u problemen ondervonden ten aanzien van parallelle buitenlandse procedures en, zo ja, welke? Wat was de impact van buitenlandse procedures op de Nederlandse Wcam-procedure?

6. Stel dat er in het buitenland nog een soortgelijke massaschade-procedure gestart was, verlangt u dan van de Nederlandse rechter dat hij zich onbevoegd verklaart althans zijn beslissing aanhoudt of partijen opdraagt de bereikte schikking te beperken tot benadeelden die niet in de buitenlandse parallelle procedure zijn betrokken? Maakt voor uw antwoord nog uit of de parallelle procedure een opt-in procedure is of een opt-out?

   - Indien uw antwoord nee is, neemt u problemen van eventuele tegenstrijdige beslissingen voor lief? Of zou u voorstander zijn van een coördinatiemechanisme in de Wcam dat aan de Nederlandse rechter vraagt zijn goedkeuring van een regeling te onthouden indien deze strijdig is met een buitenlandse regeling?

7. Hebt u problemen ondervonden ten aanzien van het opt-out karakter van de Wcam-procedure ten aanzien van buitenlandse benadeelden en, zo ja, welke? Wat was de impact van deze problemen op de Wcam-procedure?

8. Bent u van mening dat een door de Nederlandse rechter verbindend verklaarde overeenkomst ook buitenlandse benadeelden moet binden? Zo ja, bent u van mening dat de huidige regels voor erkenning en tenuitvoerlegging van beslissingen in de verordening Brussel I dit voldoende en voldoende duidelijk regelen of acht u aanvullende regels wenselijk/noodzakelijk? Dient een dergelijke verklaring ook onbekende belanghebbenden te binden?

9. Hebt u problemen ondervonden met het oproepen van buitenlandse benadeelden? Zo ja, hoe hebt u die opgelost? Wat was de impact van deze problemen op de Wcam-procedure?

10. Hebt u problemen ondervonden ten aanzien van de erkenning van een buitenlandse massaschade-procedure in een hangende of toekomstige Wcam-procedure en, zo ja, welke? Wat was de impact van een dergelijke erkenning op de Wcam-procedure?

11. Verwacht u van de Nederlandse rechter dat hij buitenlandse massaschade-procedures over hetzelfde onderwerp in Nederland erkend, mits de partijen behoorlijk zijn opgeroepen? Hoe groot acht u de kans in alsnog geconfronteerd te worden met acties in het buitenland ten aanzien van benadeelden die al onder de Wcam-schikking vallen?

12. Hebt u problemen ondervonden ten aanzien van de representativiteitseis in de Wcam en, zo ja, welke? Wat was de impact van dergelijke problemen op de Wcam-procedure?

13. Bent u van mening dat de vraag naar representativiteit van bekende en onbekende buitenlandse belanghebbenden door de Nederlandse rechter aan de hand van het Nederlandse recht beantwoord dient te worden of door het recht van het land waar de belanghebbenden woonplaats heeft, of wellicht door enig ander recht?

14. Hebt u problemen ondervonden ten aanzien van het toepasselijke recht in de Wcam-procedure? Bijvoorbeeld met betrekking tot het toepasselijke recht van de vaststellingsovereenkomst of het toekennen van de damages?

Annex IV – The Dutch Act on the Collective Settlement of Mass Damage Claims – The WCAM

Article 907 of Book 7 of the Civil Code

1. An agreement concerning the payment of compensation for damage caused by a single event or similar events concluded between a foundation or association with full legal competence and one or more other parties who have committed themselves by this agreement to pay compensation for this damage may, at the joint request of the parties who concluded the agreement, be declared binding by the court on persons to whom the damage was caused so long as the foundation or association represents the interests of these persons pursuant to its articles of association. Persons to whom the damage was caused shall be deemed to include persons who have acquired a claim with respect to that damage under universal or singular title.

2. The agreement shall in any case include:

a. a description of the group or groups of persons on whose behalf the agreement was concluded, according to the nature and the seriousness of their loss;

b. the most accurate possible indication of the number of persons belonging to the group or groups;

c. the compensation that will be awarded to these persons;

d. the conditions these persons must meet to qualify for the compensation;

e. the procedure by which the compensation will be established and can be obtained;

f. the name and place of residence of the person to whom the written notifications referred to in Article 908(2) and (3) can be sent.

3. The court shall reject the request if:

a. the agreement does not comply with the provisions of paragraph 2;

b. the amount of the compensation awarded is not reasonable having regard, inter alia, to the extent of the damage, the ease and speed with which the compensation can be obtained and the possible causes of the damage;

c. insufficient security is provided for the payment of the claims of persons on whose behalf the agreement was concluded;

d. the agreement does not provide for the independent determination of the compensation to be paid pursuant to the agreement;

e. the interests of the persons on whose behalf the agreement was concluded are otherwise not adequately safeguarded;

f. the foundation or association referred to in paragraph 1 is not sufficiently representative of the interests of persons on whose behalf the agreement was concluded;

g. the group of persons on whose behalf the agreement was concluded is not large enough to justify a declaration that the agreement is binding;

h. there is a legal entity which will provide the compensation pursuant to the agreement and it is not a party to the agreement,

4. Before making a decision the court may give the parties the opportunity to add further provisions to the agreement or to amend it.

5. The request referred to in paragraph l shall interrupt the limitation period for any legal action for compensation of damage against the persons that are party to the agreement to the extent that the agreement provides for compensation for this damage. If the request has been granted irrevocably, a new limitation period shall commence at the start of the day following the day on which the definitive decision is made on the compensation to be awarded. A new limitation period shall also commence at the start of the day following the day on which the notification referred to in Article 908(2) has been given. If the request is not granted, a new limitation period shall commence at the start of the day following the day on which the irrevocability of this decision has been established. If the agreement is cancelled pursuant to Article 908(4), a new limitation period shall commence at the start of the day following the day on which such cancellation takes place pursuant to that paragraph. Article 319(2) of Chapter 3 shall be applicable.

6. The agreement may provide that a right to compensation pursuant to the agreement shall lapse if a person entitled to compensation has not claimed the compensation within a period of at least one year from the start of the day following the day on which he became aware of his right to demand immediate payment of the compensation.

Article 908 of Book 7 of the Civil Code

1. As soon as the request for a declaration that the agreement is binding has been granted irrevocably, the agreement referred to in Article 907 shall, as between the parties and the persons entitled to compensation, have the consequences of a settlement agreement with each of the persons entitled to compensation being regarded as a party to it.

2. The declaration that the agreement is binding shall have no consequences for a person entitled to compensation who has notified the person referred to in Article 907(2)(f) in

writing, within a period to be determined by the court of at least three months following the announcement of the decision referred to in Article 1017(3) of the Code of Civil Procedure, that he does not wish to be bound.

3. A declaration that the agreement is binding shall have no consequences for a person entitled to compensation who could not have known of his loss at the time of the announcement referred to in paragraph 2 if, after becoming aware of his loss, he has notified the person referred to in Article 907(2)(f) in writing of his wish not to be bound. A party that has committed itself, by the agreement, to pay compensation for damage may give a person entitled to compensation as referred to in the first sentence notice in writing of a period of at least six months within which that person can state that he does not wish to be bound. This notice shall also state the name and the place of residence of the person referred into in Article 907(2)(f).

4. A stipulation releasing a party to the agreement from an obligation, to the detriment of the persons entitled to compensation, is null and void after a declaration that an agreement is binding unless it gives the parties who have committed themselves by the agreement to pay the compensation the joint power to cancel the agreement no later than six months after the expiry of the period to be determined by the court referred to in paragraph 2, because the declaration that the agreement is binding affects too few of the persons entitled to compensation. In that case, cancellation shall be effected by an announcement in two newspapers and by means of written notification to the foundation or association referred to in Article 907(1). The parties who have cancelled the agreement shall ensure that written notice of the cancellation is sent as soon as possible to the known persons entitled to compensation, for which purpose the parties may use the last known places of residence of the persons entitled to compensation.

5. Once the agreement has been declared binding, the parties who concluded the agreement may not invoke the grounds for annulment referred to in Article 44(3) of Book 3 and Article 228 of Book 6, and a person entitled to compensation may not invoke the ground for annulment referred to in Article 904(1).

Article 909 of Book 7 of the Civil Code

1. A definitive decision taken pursuant to the agreement on the compensation due to a person entitled to compensation shall be binding. If, however, this decision or the procedure by which it was reached is unacceptable under the principles of reasonableness and fairness, the court shall have power to decide on the compensation.

2. If no decision is made on the awarding of compensation within a reasonable stipulated period, the court has power to decide on the compensation.

3. Once the agreement has been declared binding, the foundation or association referred to in Article 907(1) may demand performance of the agreement on behalf of a person entitled to compensation, unless that person objects.

4. The person entitled to compensation shall not receive compensation pursuant to the agreement that would place him in a clearly more advantageous position.

5. If the party or the parties who have committed themselves by the agreement to provide compensation for damage can meet their obligations under the agreement by payment of an amount stipulated in the agreement, and if it emerges that the total amount of outstanding compensation claims exceeds the total amount to be contributed, the subsequent outstanding claims shall be reduced, pro rata, to the amount still remaining. Depending on factors such as the nature and seriousness of the damage, the agreement may include a different method of reduction than the method prescribed in the first sentence. The payment of an outstanding claim may be suspended if, in connection with the provisions of the first and second sentences, there are reasonable grounds for doubt as to what amount must be paid.

Article 910 of Book 7 of the Civil Code

1. If other debtors besides the party or parties who have committed themselves, by the agreement, to compensate the damage are jointly and severally liable, Article 14 of Book 6 shall apply *mutatis mutandis.* Subject to evidence of a contrary intention, the agreement shall be deemed also to include a clause as referred to in that provision.

2. If the party or parties who have committed themselves, by the agreement, to compensate the damage have complied with their obligations under the agreement through payment of an amount stipulated in the agreement and, after payment of the persons entitled to compensation, there is a sum remaining, this party or these parties may jointly request the court which declared the agreement binding to order the person managing these monies to pay this remainder to the party, or if there is more than one party, to each party in proportion to their respective contributions. The court shall deny the request if it is not established to the court’s satisfaction that all persons entitled to compensation have been paid.

TITLE 14 of the Code of Civil Procedure

Article 1013

1. The petition whereby the request referred to in Article 907(1) of Book 7 of the Civil Code is filed shall state:

a. the name and place of residence of the petitioners;

b. a description of the event or the events to which the agreement relates;

c. the names and places of residence of the persons known to the petitioners on whose behalf the agreement was concluded, whereby it shall be sufficient to use their last known addresses;

d. a brief description of the agreement;

e. a clear description of the request and the grounds on which it is based;

2. The agreement shall be attached as an appendix to the request.

3. The Court of Appeal in Amsterdam shall have exclusive competence to take cognisance in first instance of a request as referred to in this article.

4. Notwithstanding the terms of Article 282(2), no copy of a statement of defence or the documents submitted is required to be sent to the persons on whose behalf the agreement was concluded.

5. The notice to appear shall be sent to the persons referred to in the first paragraph under c by ordinary post, unless the court determines otherwise. Notice shall also be given by an announcement in one or more newspapers to be designated by the court, by which legal entities as referred to in Article 1014 shall also be given notice to appear. In addition to the place, the date and the time of the hearing, each notice must also include a brief description of the agreement and the consequences of the granting of the request, presented in a manner to be prescribed by the court. The notice shall also state that the documents referred to in Article 290(1) are available for inspection at the court registry and that copies are available, and shall refer to the right to file a defence. Unless the court decides otherwise, the petitioners are responsible for giving notice pursuant to this paragraph. The court may order that the information referred to in this paragraph must also be announced in some other way.

6. If it determines the date and the time of the hearing, the court may also decide that, notwithstanding the terms of Article 282(1), defences must be filed by such time prior to the hearing as the court may decide.

Article 1014

A foundation or association with full legal competence which, pursuant to its articles of association, represents the interests of the persons on whose behalf the agreement was concluded may file a defence.

Article 1015

1. Ongoing proceedings concerning claims in respect of which the agreement provides for compensation shall, on request by a party to the agreement from whom compensation is being claimed in the proceedings, be suspended during the hearing of the request in accordance with Article 225(2), even if the date on which the judgment will be issued has already been determined.

2. The suspended proceedings shall be resumed in accordance with Article 227(1):

a. if compensation is being claimed in the proceedings that is not provided for in the agreement;

b. if the person entitled to compensation has submitted the statement referred to in Article 908(2) of the Civil Code;

c. if it has been established that the request will not be granted;

d. if the agreement is terminated pursuant to Article 908(4) of Book 7 of the Civil Code;

e. if, having regard to the interests of a person entitled to compensation and taking all the circumstances into account, the hearing of the request has taken unacceptably long and is likely to continue for an unacceptable length of time;

f. if either of the parties claims an order for the payment of the costs of the proceedings after the decision to declare the agreement binding has become irrevocable.

3. Article 907(5) of Book 7 of the Civil Code does not apply to claims in proceedings that are resumed pursuant to paragraph 2.

4. Except in those cases referred to in paragraph 2, after suspension of pending proceedings the case shall be removed from the cause-list at the request of either of the parties if the decision to declare the agreement binding has become irrevocable.

5. Article 225(2), second sentence and (3), and Article 222(2) and (3) shall apply.

Article 1016

1. The court may order that one or more experts shall make a report on points that are relevant for the request.

2. Subject to the application of Article 289, the court may decide that the costs arising from applying the provisions of this title shall be borne by one or more of the petitioners.

Article 1017

1. The court registrar shall send a copy of the decision to the petitioners as soon as possible by ordinary post.

2. The decision and the agreement declared binding by that decision shall be filed with the court registry where they will be available for inspection and where copies will be available for persons entitled to compensation.

3. A copy of the decision to declare the agreement binding shall be sent by ordinary post, as soon as possible after it has become irrevocable, to the persons known to be entitled to

compensation and to the legal entities referred to in Article 1014 that appeared at the proceedings, Furthermore, as soon as possible after this decision has become irrevocable, a notice to that effect shall also be published in one or more newspapers to be designated by the court. Each notice shall include, in a manner to be prescribed by the court, a brief description of the agreement, in particular the method by which compensation can be obtained and, if the agreement so provides, the period within which the claim for compensation must be made, as well as the consequences of the declaration that the agreement is binding and the period within which and the procedure by which persons entitled to compensation can free themselves from the consequences of the declaration that the agreement is binding. The notice shall also state that the decision and the agreement thereby declared binding are available for inspection at the court registry, Unless the court decides otherwise, the petitioners are responsible for sending the information and publishing the notice referred to in this paragraph. The court may order that the information referred to in this paragraph must also be intimated by some other method.

4. As soon as possible after the request to declare an agreement binding has been denied irrevocably, the petitioners shall ensure that the persons on whose behalf the agreement was concluded are notified to this effect in a manner to be prescribed by the court.

Article 1018

1. Appeal in cassation is only open to the petitioners and may only be brought by the petitioners jointly.

2. [A request for] revocation [of the decision] is only open to the foundation or association referred to in Article 907(1) of Book 7 of the Civil Code, and to the other petitioners jointly. If the foundation or association referred to in the first sentence is dissolved, [a request for] revocation is open to a foundation or association as referred to in Article 1014. Revocation of the decision at the request of a foundation or association as referred to in the first or second sentences shall have no consequences for a person entitled to compensation who objects to it.