Dutch report on Transnational Litigation and Elements of Fair Trial

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Due Process and Transnational Litigation: The Netherlands

In this paragraph some features of Dutch law on civil procedure will be discussed in the context of the standards of due process. This will be supplemented, where relevant, with comparisons between Dutch law and the Principles of Transnational Civil Litigation (PTL).

Like in all matters concerning transnational litigation, the concept of due process covers several phenomena. In the first place, the questions that arise with concern to transnational litigation itself: how can be guaranteed that every party has equal access to court? To an important extent, this is covered by international treaties. Secondly, it is important to realize that each jurisdiction has its own peculiarities, some of which touch on matters relating to due process. Some Dutch peculiarities will be discussed. In the third place, especially within Europe special procedures have been devised exclusively for transnational litigation, especially the European Payment Order (Regulation (EC) No 1896/2006) and the European Small Claims procedure (Regulation (EC) No 861/2007).

I. Due process in transnational litigation: the main conditions for equal access to a fair hearing and some remarks on public order

As is the situation in other European jurisdictions, Dutch law on civil procedure is bound to fulfill the obligations following from Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Therefore, the starting point to describe due process in transnational litigation is Article 6 ECHR and its application in the Netherlands. The most obvious obligations in this respect are naturally those relating to the access to court. Therefore, we will focus on these.

Beside the case law of the European Court of Human Rights, an indication of the problems that rise in an international context can be found in the regulations and soft law that are especially relevant for the way Article 6 ECHR works for foreign or transnational litigants. The European Agreement on the Transmission of Applications for Legal Aid of 27 January 1977 is aimed at removing existing economic obstacles to civil proceedings and to permit persons in an economically weak position to exercise their rights in member States more easily. It mainly provides for a window to apply for legal aid in the State where a litigant is habitually resident. It was followed by an additional protocol in 2001.[1] According to this Protocol, the right to have the assistance of an interpreter if the litigant cannot understand or speak the language used in court and in order to be able to communicate with a lawyer, also applies to civil types of proceedings, although Article 6 ECHR only mentions this right explicitly for criminal cases.[2] An important novelty in this

[1] Adopted by the Committee of Ministers on 8 June 2001, http://conventions.coe.int/treaty/EN/Reports/HTML/179.htm
[2] The protocol refers to the *Kamasinski v. Austria*, judgment of 19 December 1989 (Series A, No. 168) and the *Artico v. Italy*, judgment of 13 May 1980 (Series A, No. 37). Moreover, in the *Luedicke, Belkacem and Koç* case (paragraph 48),

protocol is due to the ever growing demand for efficiency in litigation; an application for legal aid should be processed within six months.

Other examples of relevant regulation are Resolution (76) 5 on legal aid and advice in civil, commercial and administrative matters, Resolution (78) 8 on legal aid and advice, Recommendation No. R (81) 7 on measures facilitating access to justice and Recommendation No. R (93) 1 on effective access to the law and to justice for the very poor.
From this regulation it appears that in the context of transnational litigation, two guarantees for a fair trial deserve the most attention and will be discussed below in the national context. In the first place, litigants have to be able to find a lawyer that they can afford and if necessary, they should be provided with legal aid. If they do not possess the nationality of the country where they live, this should not hinder their possibilities to apply for legal aid. Also, the right to a fair trial within a reasonable time implies speedy processing of applications for legal aid. This idea can be traced in the PTL, in Principle 4, concerning the right to engage a lawyer. Secondly, very often in transnational litigation there exists a language barrier that has to be overcome, and it should be guaranteed that the litigant will understand what happens in court, can communicate with his lawyer and will thus be able to influence court proceedings. This idea can also be found in the PTL, especially in Principle 5.2 on the language of documents intended for the court proceedings (like a statement of claim or of defense).

We will make two final remarks to conclude this introduction. To have effective legal assistance and if necessary assistance to overcoming the language barrier in litigation are therefore the main prerequisites for a fair trial in the meaning of Article 6 EVRM with regard to transnational litigation. However, addressing the need for legal assistance and language aid does not exhaust the problems of transnational litigation. Sometimes for example, legal systems entail rules that are based on deliberate discrimination. One may think of the *cautio iudicatum solvi*, the surety only asked of foreign nationals. Principle 3.3 of the PTL prohibits this kind of unequal treatment. Nevertheless, it is still a feature of Dutch civil procedural law though with limited meaning as a result of international treaties.[3]

According to Dutch law, the fundamental values that fall under the protection of Article 6 ECHR are also protected in a transnational context as a result of the *ordre public*-test that is applied for the recognition or enforcement of foreign judgments. These judgments will not be executed in the Netherlands if they are violating the principles of a fair trial and justice that are considered fundamental.[4] This may be caused by the result in itself, apart from the application of the national law in the country where the judgment was delivered. But also the perspective of procedural justice is relevant: how was the judgment reached?[5] Especially regarding this latest question, the principles that are applied concur with the demands for a fair trial in Article 6 ECHR.[6] One has to bear in mind that according to Dutch law the *ordre public*-exception is considered an *ultimum remedium*. One of the rare, but recent and interesting examples where the Dutch courts did not

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Judgment of 28 November 1978, Series A, No. 29, the Court explains that the provision of paragraph 3.*e* is "construed in the context of the right to a fair trial guaranteed by Article 6".

[3] W. Hugenholtz, W.H. Heemskerk, Hoofdlijnen van Nederlands burgerlijk procesrecht, Utrecht: Lemma, 1991, p. 174; H.J. Snijders, M. Ynzonides and G.J. Meijer, Nederlands burgerlijk procesrecht, Deventer: Kluwer 2002, p. 176.

[4] HR 2 May 1986, NJ 1987, 481.

[5] See the Conclusion of Advocate-General Strikwerda for HR 19 April 1991, NJ 1991, 592.

[6] This follows from ECJ 28 March 2000, case C-7/98, *Krombach/Bamberski*; see also HR 10 September 1999, NJ 2001, 41 where the Hague Convention on Civil Procedure 1954 was applied. This convention does not know a public order-clause, but nevertheless the enforcement of a judgment from Argentina was prevented due to reasons based upon the Dutch public order.

recognize a foreign judgment, concerns a Russian case in which Yukos Oil[7] was involved.[8] After the dismantling of the Yukos-concern, Yukos Capital started arbitral proceedings against Yuganskneftegaz before the International Court of Commercial Arbitration in Moscow. This arbitrator decided in 4 awards that Yuganskneftegaz had to pay to Yukos Capital a total of 13 billion ruble. Later, when government-owned company Rosneft had acquired Yuganskneftegaz, these awards were set aside by the Arbitrazh Court of the City of Moscow that belongs to the Russian State judiciary. The execution of the arbitral awards based on the Treaty of New York 1958 (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards) was brought before the Dutch courts. One of the questions the Court of Appeal (*Gerechtshof*) had to answer was, whether this latest judgment (setting aside the awards) had to be recognized. The Court of Appeal quotes several sources from politicians, journalists and other Dutch and foreign courts and concludes from this that the Russian court that had set aside the awards had to be considered partial and dependent of the government. Therefore, recognizing the setting aside of the arbitral awards would violate the Dutch public order.

I.a. Legal Aid in the Dutch legal system

In general, the availability of the assistance of a lawyer manifests itself as a problem for people who can not easily afford to hire one in national as well as in transnational litigation.[9] More wealthy litigants will be able to hire an able lawyer in most cases. Therefore, we can focus on the rules on State financed legal aid. In the Netherlands, the basis of the existing system was laid in 1957, when the so called *pro deo* legal aid was regulated by law and became a state-run scheme.[10] Very often the legal aid thus provided was limited to cases where legal representation was mandatory, as is the rule in Dutch civil procedure. Before this 1957-Act, litigants were given the right to start court proceedings without having to pay court fees if they had no adequate means, but it was the legal profession that had to bear the costs of providing legal aid. Legal aid was literally *pro deo* and the lawyers providing it were not rewarded in this life; they simply did their honorable duty. Since the introduction of the 1957 Act, lawyers that provided legal aid received payments from the State. This is due to the new idea that it was a government responsibility to ensure that legal aid is available.[11] This is also the basic idea of the current Legal Aid Act (*Wet op de rechtsbijstand 1993, Wrb*). It guarantees that anyone seeking legal advice may apply for legal aid. The Explanatory Memorandum with the Bill explicitly refers to the obligations that Article 6 ECHR puts on the State.[12] Whether or not legal aid will be granted, is not based on the nationality of the applicant nor does the applicant have to be resident in the Netherlands; the law only demands that the legal interests involved fall within the Netherlands' legal sphere (Article 12 Wrb). This is not limited to cases before a Dutch court but may also apply to cases in other countries that touch on the Dutch legal sphere and where, consequently, a Dutch lawyer has to be involved.[13] In 2005 a new Chapter was added to this Act (Articles 23a – 23k), in order to

[7] The company that belonged to Chodorkovski before he attracted the anger of former president Putin because of his political aspirations.
[8] Gerechtshof Amsterdam 28 April 2009, Jurisprudentie Ondernemingsrecht 2009, 208.
[9] See also on this subject, the CCBE Recommendations on Legal Aid of 22 October 2010, on www.ccbe.org.
[10] Wet rechtsbijstand aan on- en minvermogenden, 4 July 1957, Stb. 233.
[11] MvT bij de Wet op de rechtsbijstand aan on- en minvermogenden, TK 1953-1954, 3266, nr. 3, p. 2 (it refers to the 'recent' Legal Aid and Advice Bill 1948 in England and Wales).
[12] MvT bij de Wet op de rechtsbijstand, 1991-1992, 22609, nr. 3, p. 4.
[13] See e.g. Afdeling Bestuursrechtspraak Raad van State 1 juli 2009, LJN BJ1112. According to this case, legal aid will also, to a certain extent, be given for cases before the ECHR against the Netherlands. One may keep in mind the situation as described in Principle 4.2 of the PTL, "A party has the right to engage a lawyer of the party's choice, including both representation by a lawyer admitted to practice in the forum and active assistance before the court of a lawyer admitted to practice elsewhere."

implement a 2003 European Directive of the Council.[14] The idea was to improve access to justice for foreign nationals, seeking justice in the Dutch legal sphere, even when they themselves live in another Member State. Although it is worth mentioning this new chapter because it illustrates the adaptation of the law to the growing need to address problems that may result from transnational litigation, in practice the impact was not very large. Already before the Directive was implemented, the Legal Aid Act offered extensive possibilities for any applicants litigating or seeking legal advice in the Dutch legal sphere.

It should be remarked that, as a rule, continental legal systems require the presence of legal representation in civil procedure. While in the common law adversarial procedure legal assistance is primarily seen as a means for the parties to have their case presented as strong as possible, continental systems like in Germany and the Netherlands historically require the presence of a lawyer primarily with a view to efficient and orderly proceedings. Still, this does not fully explain the differences between the legal aid systems in for example Germany, England (and Wales) and the Netherlands. An important aspect that might help explain differences is the high percentage of households in Germany that have legal insurance.[15]

I.b. The Language barrier

The second obstacle that has to be removed in order to guarantee access to justice in transnational cases, is the language barrier. Within Europe, this problem had been dealt with for example in Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, now repealed and replaced by Regulation (EC) Nr. 1393/2007.[16] As said before, we will not deal with this and other European regulation as such, since this is a national report. However, to illustrate the problems that may occur, it is worth mentioning the national Dutch case from which the ECJ-ruling of 8 November 2005 (C-443/03) originated. A writ had been served by bailiff at the office of Berlin Chemie's lawyer in 2001, concerning an appeal from an earlier court case in The Netherlands. Berlin Chemie did not appear in the court in Arnhem, since it refused to accept the writ and later documents on the ground that a German translation or the writ lacked. Since it is an obligation based on the aforementioned Regulation to translate the writ, served in Germany, in German or into a language comprehensible for the intended recipient of that writ, the Dutch court (*Gerechtshof*) refused the plaintiff's application for judgment in default. In the following procedure before the Supreme Court (*Hoge Raad*), this court referred questions to the ECJ and the ECJ ruled: when the addressee of a document has refused it on the ground that it is not in an official language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, it is possible for the sender to remedy that by sending the translation of the document in accordance with the procedure laid down by the Regulation and as soon as possible – a period of a month may be regarded as appropriate but this period can be determined by the national court according to the circumstances (for example if it is a very long text). All is well that ends well: the plaintiff in this case was given a month, starting from the Supreme Court ruling, to deliver a translation.

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14 Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, *Official Journal L 026 , 31/01/2003 P. 0041 - 0047*

15 See the report of June 2010 at http://www.riad-online.eu (European insurance companies). No less than 45 % of the premiums on the whole European market for legal insurances is earned in Germany (in 2008).

16 OJ 2000 L 160, p. 37; for cases relating to non-member states, the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention) still applies. This Convention allows the Central Authority mentioned in Article 2 to require the translation of documents (*vide* Article 5). See also Article 55 Brussels I Regulation 44/2001.

We already mentioned the new chapter in the Legal Aid Act. According to the new Article 23e, an applicant for legal aid may also request payment for the official translation of documents if the judge orders that these documents be presented to the court and insofar as these costs are related to the transnational nature of the dispute.

Finally, an interesting detail in the context of this contribution on Dutch law, although perhaps for the topic of translation not so important, is consideration (8) in the preamble of the new Regulation (EC) Nr. 1393/2007, stating that it "should not apply to service of a document on the party's authorized representative in the Member State where the proceedings are taking place regardless of the place of residence of that party." Apparently this consideration was included because in some circumstances the Dutch law on civil procedure (Article 63 CCP) allows a writ to be served at the office of the lawyer who had acted for the addressee before. If for example a German company has a Dutch lawyer that had acted for him, serving the writ for appeal at the lawyer's office is an interesting shortcut.[17] It is still uncertain if under the same circumstances but outside the European Member States bound by the Regulation on the service of documents, the Hague Service Convention may also be circumvented.[18]

II. Some peculiarities of due process in Dutch civil procedure

Dutch civil procedure has gone through a similar development as other jurisdictions within Europe but also outside Europe. To prevent prolonged duration and unnecessary complexity and to limit costs, civil procedure has become less adversarial and more judge-centered. Although it is still up to the parties to decide whether to start proceedings and what the subject matter of the dispute will be, to a growing extent it is the responsibility of the judge to guarantee efficient proceedings. The judge has become a case manager. Therefore in the Netherlands, like in many other countries, after a first round of written statements, comparable to a statement of claim and a statement of defense, there will be a hearing where parties with their lawyers will discuss the case with the judge. It will be the judge who sets the agenda for this hearing. To prevent legal, but also psychological uncertainty, judges have put their heads together to develop a soft law scenario for the preparation of this hearing. One reason for this is that some courts upheld an unwritten rule that the lawyers and their parties only had to answer questions from the judge, while other courts expected the lawyers to plead and preferably according to a written notice. Now all courts more or less adhere to the scenario they collectively devised. The status of this kind of coordinated judge-made law is uncertain. It need not be law, but it does bind the judges. Although it undeniably serves a purpose and is often useful, it lacks a satisfying democratic legitimacy. At first, the soft law scenario that had been developed for the preparation of the hearing was not published outside the courts; the idea was that judges needed it but it was felt that lawyers should not be given the opportunity to appeal to this scenario and to bind the judge. Now it has been published after all.[19]

An important feature of Dutch procedural law is the development of the summary proceedings, the *kort geding*, to one of the most popular forms of litigation. What makes this special compared to similar proceedings in other countries, is that the popularity of the *kort geding* is, inter alia, based on the fact that in most cases these summary proceedings are not followed by ordinary proceedings. Therefore, in practice the provisional ruling looses its provisional character. This is

[17] See HR 18 December 2009, NJ 2010, 111.
[18] See HR 27 June 1986, NJ 1987, 764 (WHH) and the annotation of P. Vlas under HR 18 December 2009, NJ 2010, 111.
[19] At www.rechtspraak.nl, the site where the judiciary publishes information on courts, regulations, addresses, recent case law etc. The English section of this site only provides a general introduction.

important, especially for the defendant because often there is only one opportunity for him to state his case, that is in court *vis à vis* the judge. However, both parties must take into account that there will not necessarily be given an opportunity to hear witnesses and that the judge in most cases will not allow adjournment of the proceedings to await an expert opinion. Also, the normal rules of evidence may be ignored because of the special character of these summary proceedings. That means that there is a swift and relatively cheap procedure, often lead by experienced judges, in which normal rules of procedure and evidence may be ignored. As a result of this the discretionary powers of the judge are very high and there is more legal uncertainty. In the pragmatic Dutch legal culture it has become a very popular means of litigation and the disadvantages are often taken for granted. In an international or transnational context however, it may not be so self-evident that ordinary rules of civil procedure are set aside and a provisional verdict is in fact often taken as final. Quite often the consequences of (not) following a summary verdict can not be made undone or repaired, other than by paying damages.[20]

In the third place, we will pay some attention to what might be considered one of the effects of the increasing use of arbitration in the Netherlands: the appearance of the anti-suit injunction.[21] Often, litigated cases with a transnational character are not brought before the state courts but are dealt with in arbitration. This is especially the case in corporate litigation. Like their British counterparts, Dutch law firms and arbitration institutes aim at conquering the market of international arbitration. If the place of arbitration is in the Netherlands, the so called Arbitration Act applies.[22]

Possibly as a result of the popularity of international arbitration, the common law anti-suit injunction has made an entrance in arbitration and even in strictly national civil litigation. Quite recently Dutch courts have given rulings in a national context that are comparable to anti-suit injunctions.[23] The legal basis in these cases is that further proceedings against the party who requests the injunction would constitute abuse of process. In cases where parties agreed to an arbitration clause, a legal basis might also be found in the contractual obligations.[24] This raises the question, whether a Dutch court could be expected to give an international anti-suit injunction. Imagine a claimant, who finds his way to the reasonably cheep and expedient Dutch proceedings obstructed because the would-be defendant anticipated a claim and in bad faith brought a case before a foreign court with a dubious reputation regarding the length of proceedings, or brought a case before a court in violation of an existing arbitration clause. So far, we know not of a Dutch court giving a anti-suit injunctions regarding a foreign court and one may wonder if a Dutch court ever will (even outside a European context). It might be considered an interference in the law of another state, despite the fact that the injunction would be addressed towards the private person (or legal entity) and not to the foreign court. Several authors on the subject do not exclude this possibility.[25] However, in a European context an international anti-suit injunction is considered incompatible with the Brussels I Regulation (Regulation (EC) No 44/2001). There are several reasons for this. In the first place it is deemed incompatible with the

[20] The *kort geding* has been criticised by J.J. Brinkhof, Lessen uit de Europese toetsing van het kort geding, in: E.H. Hondius, A.W. Jongbloed en R. Ch. Verschuur (eds.), Van Nederlands naar Europees procesrecht?!, Liber amoricum for P. Meijknecht, Deventer: Kluwer 2000, p. 37-49.
[21] See M. van Hooijdonk, P. Eijsvoogel, Litigation in the Netherlands, Deventer: Kluwer 2009, p. 101 ff.
[22] In fact this a part of the Code of Civil Procedure, book IV.
[23] E.g. the President of the District Court The Hague, 5 Augustus 2004, *NJ* 2004, 597 (*Medinol/Cordis*).
[24] M.C. van Leyenhorst, Anti-suit injunctions in nationaal en Europees perspectief, Tijdschrift voor Arbitrage 2009, p. 69-74.
[25] E.g. J.J. van Haersolte-Van Hof, Arrest Turner/Changepoint. Weg met de anti-suit injunction!, *NTER* 2004, p. 228-230; X.E. Kramer, De harmoniserende werking van het Europees procesrecht: de diskwalificatie van de anti-suit injunction, Nederlands Internationaal Privaatrecht, 2005, p. 130-137; M.C. van Leyenhorst, Anti-suit injunctions in nationaal en Europees perspectief, Tijdschrift voor Arbitrage 2009, p. 69-74.

trust which the Member States accord to one another's legal systems and judicial institutions, on which the Convention is based.[26] Additionally, in the case-West Tankers, the ECJ ruled that an anti-suit injunction is contrary to the general principle that every court seized itself determines whether it has jurisdiction to resolve the dispute before it.[27] In this case the English House of Lords noted that anti-suit injunctions have a long history in the United Kingdom. In the context of arbitration, as in this case, it allows the court of the seat of arbitration to exercising supervisory jurisdiction over the arbitration. Therefore, according to the House of Lords, adaptation of this practice by the courts in other Member States would make the European Community more competitive in comparison to renowned international arbitration centers like New York. On may assume that an institute like the Netherlands Arbitration Institution will not be fully unaffected by this argument, since it claims it prospers due to providing excellent administration of international arbitral proceedings. However, this argument could not convince the European Court.

III. European procedures in The Netherlands

As mentioned before, some attention will be paid to the European Payment Order (Regulation (EC) No 1896/2006) and the European Small Claims procedure (Regulation (EC) No 861/2007). Only some remarks will be made how they relate to the national situation and how they have been implemented. The obvious reason not to discuss the pros and cons of the European Regulations exhaustively is that this is a national and not a European report.

In the Netherlands, unlike in Germany, there is no *Mahnverfahren* procedure and other than in England, there is no real small claims procedure either. That means that European law has introduced new phenomena in the arena of Dutch civil procedure. So far these procedures are not much used. Most Dutch lawyers rarely encounter transnational litigation.[28] Perhaps precisely the problem with the new procedures is that these are of a too limited nature: the procedures may only be used in cases with a transnational, European character. However, some say that there is an urgent need for a Payment Order procedure and a simple, effective small claims procedure for cases that do not have a transnational component. Creditors will not claims their debts in court, because it is too complicated to litigate without legal assistance and in the same time, the costs involved when there is a need for professional assistance, appears prohibitive. When claims have a transnational character, of course the costs and uncertainty are even higher. One might say that in transnational cases, the plaintiff is better of than in strictly Dutch cases.

Legal assistance is not mandatory in the procedure for a European Payment Order. It appears that the Dutch implementation of this procedure is 'fool proof'. To facilitate the use of it, it is determined by national law that every plaintiff can file his case at the court of The Hague. Therefore the plaintiff will not be hindered by uncertainty on which court to address or what section of the court may handle the case. Even if he is mistaken, the case will automatically be redirected to the The Hague court and documents already filed will be sent to The Hague. If the defendant files a statement of defense, the case will be handled according to Dutch civil procedural law. There are provisions in the law to provide for a smooth transition to another court, if necessary according to the national or international rules[29] on jurisdiction of the court.

[26] Case C-159/02 *Turner v Grovitt*. The same principle applies within North-American states but did not prevent the use of interstate anti-suit injunctions, G.A. Bermann, The Use of Anti-Suit Injunctions in International Litigation, Columbia Journal of Transnational Litigation 1990, [p. 589-631,] p. 599.
[27] Case C-185/07 *Allianz (formerly Riunione Adriatica di Sicurta Spa) and Others v West Tankers Inc.*; Kramer, op. cit., observes that in Germany the working of (foreign) anti-suit injunctions is considered as contradictory to the public order.
[28] See M. Freudenthal, Op weg naar Europees procesrecht, NJB 2007, footnote 23.
[29] Like EC Regulation Brussels I (44/2001).

Also, a plaintiff living in another country will be allowed a prolonged term to inform the court how he wishes to proceed. Since the reform of Dutch civil procedure in 2002, when a case is brought before the wrong court or wrong section of the court, this court will 'switch' the case to the right track. The idea behind this is of course to improve access to court by eliminating unnecessary formalism. It goes without saying that parties not familiar with the Dutch national law may benefit from this development.

There are no special rules concerning the small claims procedure. It has been implemented of course, and the *kantonrechter* will deal with small claims. The *kantonrechter* can historically be compared with the *juge the paix*, but nowadays a section of the district court (the ordinary court, *rechtbank*) will handle *kantonzaken*, cases for the *kantonrechter*. Because the *kantonrechter* has a reputation for swiftness and efficiency, it is the wish of the legislator that as of 1 July 2011 all civil cases will be handled by the *kantonrechter* if the amount at stake does not exceed 25.000 Euro. This might cause such an overload, that the advantages of the judge, specialized in relatively small cases,[30] will be watered-down. Another effect, that is intended, is that mandatory representation will in effect no longer be maintained as a principle feature of Dutch civil procedure.

Topic V

The Dutch Class Action (Financial Settlement) Act in an international context: the Shell case

1. Introduction

The Dutch Class Action (Financial Settlement) Act (*Wet Collectieve Afwikkeling Massaschade*, WCAM) came into effect in July 2005. This act was written for cases of mass damages claims involving numerous aggrieved parties and where there are one or more liable parties. The WCAM makes it possible to have a collective settlement declared binding. The consequence of having a settlement declared binding is that the entire group of victims is bound to the settlement, unless they make use of the opt-out facility. The WCAM has been applied in five cases since it came into force.[31]

Large-scale losses are not confined by national borders. However, little attention was paid to international aspects when the legislation was drafted. This remained so until mid-2009. In the settlement of the Shell case in May 2009, there was an emphasis on international aspects of the WCAM.[32] We begin with a brief discussion of the non-existence of the concept of class action in the Netherlands, and the system of the WCAM. We will then discuss the recent decision in the Shell case, in particular some related international aspects.

2. No real class action

[30] Since 2002 the limit has been 5.000 Euro. Labor and lease cases were also brought before the *kantonrechter*
[31] Court of Appeal Amsterdam 1 June 2006, *NJ* 2006, 461 (DES), 25 January 2007, *NJ* 2007, 427 (Dexia), 29 April 2009, LJN BI2717 (Vie'dor), 29 May 2009, *NJ* 2009, 506 (Shell) and 15 July 2009, LJN BJ2691 (Vedior).
[32] Court of Appeal Amsterdam 29 May 2009, *NJ* 2009, 506.

In Dutch law there is not really such a thing as class action. Interest organizations that meet certain conditions can bring a claim that extends to the protection of similar interests of other persons.[33] Such a claim can extend to a ban for example. However, a collective damages claim in a similar vein is not possible.[34] The technical legal complications of such a provision are considered to be too great. The provision on the collective right of action and the prohibition on damage claims came into effect in July 1994. During the preparation of the WCAM in 2004, the Minister for Justice explicitly considered the possibility of allowing claims for damages by means of collective action. He chose not to do so, because all manner of individual circumstances can hinder an efficient conclusion in a collective action. The minister considered the proposal for the WCAM to be a more desirable supplement to the possibilities that existed at the time for claiming damages in a collective action.[35]

3. Outline of the WCAM

The WCAM assumes that a collective settlement will be reached. This relates to an agreement concerning payment of damage for damage caused by an event or similar events between, on the one hand, one or more parties who have committed themselves by the agreement to pay compensation and, on the other hand, organizations that represent the interests of the victims. The organizations representing the interests of victims must satisfy certain conditions. The agreement must specify, for example, on behalf of which group or group of persons it has been concluded. In the agreement, the victims can be categorized according to the nature and seriousness of the losses (damage scheduling). The agreement must also be as precise as possible in terms of the number of people who belong to the group, the compensation allocated to the victims and the conditions that the victims must satisfy in order to qualify for compensation. If such a settlement is reached, the parties to the agreement can then submit it to the Court of Appeal in Amsterdam (hereafter 'the Court' or 'the Amsterdam Court') with a request to declare it binding.

The WCAM contains various provisions regarding the subsequent procedure. For example, all known victims must be called upon and given the opportunity to give their opinion of the case in a statement of defence. The summons to appear is issued in principle in an ordinary letter or in an announcement in one or more newspapers. In addition, while the request is being dealt with, all proceedings at various courts relating to claims within the meaning of the agreement are suspended. The Amsterdam Court must then thoroughly assess the agreement. It must assess whether the settlement agreement fulfils the conditions mentioned and, for example, whether the amount of compensation awarded is reasonable.[36]

If the Court then complies with the request and declares the agreement binding, all victims to whom it relates are in principle bound by the settlement agreement. This means that they are not entitled to instigate an action themselves against the parties that commited themselves to compensation, but are entitled to receive the compensation

[33] Art. 3:305a Dutch Civil Code (BW).
[34] Art. 3:305a par. 4 BW.
[35] Explanatory Memorandum (MvT), TK 2003 – 2004, nr. 3, p. 5.
[36] The Court must assess several aspects, see art. 7:907 par. 2 and art. 7:907 par. 3 BW.

specified in the agreement. Victims who are not in agreement with this have the right to opt out.[37] The agreement must specify whom victims must notify if they wish to opt out, and the Court's pronouncement must specify the period of time in which they are permitted to opt out.[38] The victims who wish to make use of the opt-out mechanism retain the right to make a claim themselves against the party or parties that are committed to paying compensation.

4. Shell case

The Shell case of 29 May 2009 involves losses incurred by shareholders resulting from, among other things, information that Shell made public about the recategorization of its oil and gas reserves. The price of Shell shares had risen due to information previously provided about the reserves that was possibly incorrect. The disclosure of the possible irregularities and the recategorization caused share prices to fall. As a result, shareholders may have incurred losses. Shell entered into negotiations with parties including a number of organizations representing the interests of shareholders. The resulting settlement agreement provides for the payment of compensation to certain shareholders.[39] Parties to the agreement are two Shell companies (one Dutch and one English), the Dutch Association of Shareholders (*Vereniging van Effectenbezitters*, hereafter 'VEB') and a number of pension funds. These applicants estimated that more than 500,000 legal entities worldwide will fulfil the definition of 'participating shareholder' within the meaning of the settlement agreement. The majority of the shareholders is domiciled abroad. In April 2007, the parties to the agreement filed a request with the Amsterdam Court to have it declared binding. In late May 2009, after proceedings in which the Dexia Bank submitted a statement of defence, and after hearings relating to the request, the Amsterdam Court declared the settlement agreement binding.

With regard to international aspects of the WCAM, several facets are particularly relevant: international jurisdiction and recognition. After a discussion of these topics we will briefly deal with the summons to appear and representativeness.

5. Jurisdiction

An important question in cross-border mass claims is whether the Amsterdam Court is competent to rule on a request to declare a settlement binding. In the Shell case, the Court considered itself competent.[40] The general art. 1013 par. 3 of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*, Rv) states that the Court shall have exclusive competence, but this provision relates to national absolute and relative competence. The provision does not grant international jurisdiction, as the Court rightly points out in the Shell case. The Court ultimately considered itself competent. The Explanatory Memorandum (*Memorie van Toelichting*, MvT) to the WCAM stated at the time that the WCAM is not really intended for damage cases arising outside the

[37] Art. 7:908 par. 2 BW.
[38] This must be at least three months (art. 7:908 par. 2 BW).
[39] American shareholders are excluded from the agreement.
[40] Amsterdam Court of Appeal 29 May 2009, sub 5.15-5.27.

Netherlands.[41] This was not, however, explained in terms of jurisdiction but in terms of whether foreign courts will recognize judgements of the Amsterdam Court and whether Dutch interest organizations will be sufficiently representative of the interests of victims outside the Netherlands.

Closely connected

In its judgement on international jurisdiction, the Court distinguishes between various categories of interested parties. In the case of victims outside Europe, the Court derives its jurisdiction from one of the general provisions on jurisdiction in the Dutch Code of Civil Procedure.[42] For shareholders in Europe, the EEX Regulation is relevant.[43] The Court finds that this WCAM procedure belongs to 'civil and commercial matters' within the meaning of art. 1 of the EEX Regulation. For victims resident in the Netherlands, jurisdiction can be derived from art. 2 par. 1 EEX Regulation. In the case of interested parties who are not domiciled in the Netherlands, but within Europe, when the application is filed, the Court refers to article 6 of the EEX Regulation. On this basis, a person domiciled in a Member State, who is one of a number of defendants, may also be sued in the courts for the place where any one of the defendants is domiciled. Condition is 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. After extensive deliberations, the Court concludes that this condition has been met. In that context, the Court considers among other things that the other contracting states do not provide for such a 'claim' to have a settlement declared binding, and that, with respect to these countries one might consider claims aiming for a declaratory judgement that the victims are only entitled to claim under the Settlement Agreement and that Shell is not additionally liable for wrongful act. According to the Court it is evident that, in the case of adjudication of these disputes in separate countries, and even by different courts within a single country, there will be divergence and conflicting and irreconcilable judgements. The Court considers it of importance to know that the facts on which the claims will be grounded did not take place in all separate countries, but only in the Netherlands and England.

In the parliamentary history of the WCAM, international jurisdiction has not been dealt with explicitly. However, shortly after the implementation of the WCAM, Croiset van Uchelen wrote that the requirement for a close connection appears to be met in the EEX Regulation. In 2006, Poot also wrote that, under article 6 EEX Regulation, the Dutch court is competent to take cognizance of claims from respondents from other Member States.[44] The Amsterdam Court considered itself competent to take cognizance of the request in the Shell case.

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[41] Explanatory Memorandum (MvT), TK 2003 – 2004, no. 3, p. 5. 15-16; compare A.R.J. Croiset van Uchelen and B.W.G. van der Velden, 'Het internationale debuut van de Wet collectieve afwikkeling massaschade, Shell-shocked?' in: *Tijdschrift voor de ondernemingsrechtpraktijk* 2009, p. 255.

[42] In the case of proceedings commenced by an application, the Dutch court has jurisdiction if one or more of the applicants is domiciled in the Netherlands (art. 3 Rv).

[43] Council Regulation (EC) No. 44/2001; or the EEX Regulation or the EVEX Convention.

[44] M.F. Poot, 'Internationale afwikkeling van massaschades met de Wet collectieve afwikkeling massaschade' in: *Geschriften vanwege de Vereniging Corporate Litigation 2005-2006*, Deventer: Kluwer 2006, p. 176/177.

6. Recognition

Will a court in a country other than the Netherlands recognize a binding declaration by the Amsterdam Court? This is an important topic, but the answer is not entirely clear. As yet there is no case law relating to this question. In the Shell case, the Amsterdam Court does not deal explicitly with the question of whether courts in other countries are in general bound to recognize the binding declaration. Given the way in which its decision is formulated, the Amsterdam Court appears to assume that a court in another EU Member State must recognize the binding declaration. The Court considers the circumstance that the shareholders in the English company would no longer have (complete) access to the English court that would otherwise be competent, unless an opt-out statement is passed.[45] A consequence of this would be that if a party committed to paying compensation under the settlement that has been declared binding is sued by a foreign shareholder who has not opted out, the party must be able to invoke the provisions of the settlement agreement.

The literature from before and after the decision in the Shell case shows that there is no generally accepted view in the Netherlands on this point. In the Explanatory Memorandum, the Minister for Justice remarked that, when the WCAM was conceived, he did not expect that a foreign court would have to accept a binding declaration by the Dutch court.[46] In his note under the Shell decision, Leijten also questions whether the implicit view of the Court on this point is correct.[47] After the decision too, it was commented that, in principle, courts in other Member States will have to recognize a binding settlement without any judicial process.[48]

If courts in other countries recognize the decision, the ground for this can be found in article 33 of the EEX Regulation. Under this provision, decisions given in a Member State are recognized without any judicial process. However, they will not be recognized if article 34 of the EEX Regulation applies. For the WCAM, this will relate mainly to incorrect notification or service to foreign investors and incompatibility with public order.[49] If prompt and correct attention is payed to notification or service this exception will not be applied easily.

Will a foreign court reject a judgement by the Court for reasons of public order? Article 6 ECHR might play a role in answering this question. Article 6 ECHR is dealt with extensively in the parliamentary history of the WCAM. That is understandable: When a settlement is declared binding, the victims to whom the agreement relates lose the right to

[45] Amsteram Court of Appeal 29 May 2009, sub 5.23. See A.F.J.A. Leijten, Case note at Court of appeal Amsterdam, *JOR* 2009/7-8, no. 9.
[46] Explanatory Memorandum (MvT), TK 2003 – 2004, 29 414, no. 3, p. 16.
[47] A.F.J.A. Leijten, Case note at Court of appeal Amsterdam 29 mei 2009, *JOR* 2009/7-8, no. 9.
[48] A.R.J. Croiset van Uchelen and B.W.G. van der Velden, 'Het internationale debuut van de Wet collectieve afwikkeling massaschade, Shell-shocked?' in: *Tijdschrift voor de ondernemingsrechtpraktijk* 2009, p. 257.
[49] A.R.J. Croiset van Uchelen and B.W.G. van der Velden, 'Het internationale debuut van de Wet collectieve afwikkeling massaschade, Shell-shocked?' in: *Tijdschrift voor de ondernemingsrechtpraktijk* 2009, p. 257.

bring before a court a party that is committed to paying compensation under the settlement. In principle, the victims to whom the agreement relates only have a right to the compensation specified in the settlement. The loss of access to court can affect article 6 ECHR. One of the guarantees that the legislator has included in order to avoid violation of article 6 ECHR is the opt-out mechanism. Victims who opt out retain the right to seek recourse in court. After a settlement has been announced, a victim has a period of at least 3 months in which to give written notification that he does not wish to be bound by the settlement.[50] In the Dexia case (on the first WCAM cases) the Amsterdam Court ruled explicitly that there is no violation of article 6 ECHR.[51] If courts in other countries will adopt the same view violation of art. 6 ECHR will be no valid ground for rejecting a judgement for reasons of public order.

7. Summons to appear

The proper summons of victims is a condition for declaring a settlement binding. Victims must be informed about the proceedings and have the opportunity to respond with regard to the request to have the settlement declared binding. Proper notification is just as important in the case of victims in countries outside the Netherlands. The Amsterdam Court dealt with notification in detail in the Shell case. The following can be deduced from the considerations of the Court.[52]

The persons on whose behalf the agreement is concluded, and who are known by the applicants to be domiciled in the Netherlands, are notified by ordinary letter. The Court decided that the applicants could send notification by a bailiff in the case of persons who were not domiciled in the Netherlands but had a known address outside the Netherlands. In the case of persons with a known address in a state to which the EC Service Regulation applied, notification was allowed by letter, taking account of art. 14 par. 2 of that Regulation. In the case of persons domiciled in any other state to which a relevant Service or Civil Procedure convention applied to which the Netherlands is a party, notification was by letter, taking account of the conditions under which the relevant state accepts notification of legal papers and documents by mail (or by a means permitted by the relevant convention).

In the Shell case, a total of 111,588 notifications to appear were sent out. The Court confirmed that it is certain that almost 73,000 notifications reached the addressees. However, there were a considerable number of interested parties whose address was unknown.[53] The Court considered that this was the case for more than 400,000 interested parties. The Court had stipulated, as specified in the WCAM, that the notification to appear should be announced in certain newspapers and on websites.[54] The summons for hearings was published in 47 newspapers in 22 countries. The announcement of the

[50] The period is stipulated by the court (art. 7:908 par. 2 BW).
[51] Court of appeal Amsterdam 25 januari 2007, *JBPr* 2007, no. 39, with case note Chr.F. Kroes, sub 5.7 and 5.8.
[52] Sub 5.2-5.14. See H.B. Krans, Des en Dexia: de eerste ervaringen met collectieve afwikkeling van massaschade, *NJB* 2007/41, p. 2603.
[53] This includes interested parties whose address was initially known, but in retrospect it must be assumed that the domicile data were incorrect (e.g. because the letters were returned).
[54] Art. 1013 par. 5 Rv.

hearings was placed on several websites, and was also sent via the Routing Information Service. A press release in English was issued by ANP Pers Support. The Amsterdam Court judged that, through these and other publicity-related activities, the requirements of law, regulations and conventions had been sufficiently fulfilled. With regard to the notifications to appear, the Amsterdam Court concluded that the requirements of the law, regulations and conventions had been met.

8. Representativeness

In mass claims to which the WCAM is applied, recognition of the binding declaration and the summons of victims are important aspects, but not the only aspects deserving of attention. In WCAM cases, the parties contracting on behalf of victims must be sufficiently representative of the interests of persons on whose behalf the agreement is concluded.[55] This also applies in cases with an international dimension: the contracting party must also be sufficiently representative of the interests of foreign shareholders. In the Explanatory Memorandum to the WCAM, the minister remarked at the time that an agreement concluded by a Dutch foundation or association can normally only apply to victims in the Netherlands, because such an organization cannot 'normally' be expected to be representative of the interests of a group of foreign victims.[56] In the Shell case, the Court considered that the VEB was representative of the interests of shareholders in the broadest sense of the word. The Court deemed the VEB representative. The WCAM does not require, the Court considered, that every foundation represents the interests of all persons to whom damage has been caused.[57]

9. In conclusion

When the WCAM was being formulated it was clear that there was some lack of clarity regarding its international aspects. This did not prevent legislators from implementing the WCAM. Through the Shell case the Amsterdam Court declared the settlement binding, although most of the victims are domiciled outside the Netherlands. If such a decision is recognized by foreign courts, this means that victims domiciled abroad are also bound by the binding declaration. There are entitled to the compensation mentioned in the settlement agreement and are no longer entitled to file a claim against the parties who commited themselves to compensation in the agreement, unless they use the possibility to opt out.

[55] Art. 7:908 par. 2 BW.
[56] Explanatory Memorandum (MvT), TK 2003 – 2004, no. 3, p. 16.
[57] Two pension funds (ABP and PGGM) were also applicants in this action. The Court considered, however, that their statutory object could not be understood to include the representation of the interests of aggrieved shareholders.