The Dutch 'Class Action (Financial Settlement) Act' ('WCAM')

1. Introduction and legislative history

The Dutch 'Class Action (Financial Settlement) Act [WCAM] came into operation in the Netherlands on 27 July 2005.[1] These new rules enable the effective and efficient settlement of mass damages claims. They provide a facility whereby an agreement which provides for the settlement of a mass damages claim, and which is concluded between an organisation championing the interests of those who have sustained a loss and the responsible party or parties, may be declared binding by the court in relation to the entire group of victims. These victims can then arrange for payment of their losses by virtue of the agreement. The Dutch Act appears to have been a success during the brief period of its existence. Virtually all of the parties – courts, lawyers, interest groups, those who caused the losses in the first place and academics – are enthusiastic about the Act and the possibilities it offers. Now that the topic of 'mass damages' is high on the European agenda, it seems an appropriate time to provide information to those who might be interested in the background and contents of the Act, as well as in the initial experiences of involved parties with respect to the Act. This is all the more relevant because the Act opts for a collective settlement as the route for resolving mass damage claims – a unique approach in Europe, but one which seems to explain the success of the Act.

A collective settlement of mass damages using this path has important advantages for all parties involved. As far as the businesses and their insurers are concerned, it offers the advantage of avoiding a multiplicity of different proceedings, with the associated potential for high defence costs. Another benefit is the significant degree of certainty obtained from such an agreement regarding their financial obligations towards the aggrieved parties. For the aggrieved parties themselves, there is the advantage that they have the chance of obtaining realistic damages within a brief period without having to face years of legal proceedings. Proceedings can be a serious emotional burden for them, with continuing uncertainty as to costs and the prospects of success. The avoidance of the costs and effort associated with undertaking a large number of civil cases, in which identical issues have to be dealt with again and again, is also in the interest of society as a whole.

The immediate reason for the production of this Act was the 'DES' case, which will be discussed below. The specific choice was made to set up a general statutory framework that could be adapted for the effective and efficient settlement of other mass damage claims. In the brief period of its existence, the WCAM has been applied as a method of settling another mass damages claim, and a third case is currently before the courts (see section 5, below). The inspiration behind the formulation of the WCAM was primarily drawn from practice in America, which showed that the most successful method of resolving mass damages claims was the use of a collective settlement (see section 3, below).

2. Main points of the WCAM

The crux of the Act is the fact that the entire group of victims is bound by the agreement for payment of compensation as a result of the pronouncement of the court. See article 7:907, paragraph 1, Dutch Civil Code:

> "An agreement concerning the payment of compensation for damage caused by an event or similar events concluded between a foundation or association with full legal competence and one or more other

[1] The text of this Act is attached as an appendix.

parties who have committed themselves by this agreement to pay compensation for this damage may, at the joint request of the parties that 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.."

The agreement must therefore be concluded between one or more parties who have bound themselves in terms of the agreement to compensate the loss, and a foundation or association with full legal competence which, by virtue of its articles of association, represents the interests of the parties who have been adversely affected. These parties can then submit a joint request to the court to declare the agreement to be binding. The agreement must provide for compensation for losses caused by 'a single event or similar events'. Similar events might, for example, include putting a defective medication on the market, such as the sleeping pill Softenon in its day. It makes no odds that the nature and size of damages for each affected party are markedly different. The agreement must take this into account in the payments it awards (see below).

A declaration that an agreement is binding can only be justified if the interests of the victims are adequately safeguarded in terms of the agreement. In this context, paragraph 2 of Article 907 summarises the minimum provisions that must be included in the agreement, while paragraph 3 summarises the circumstances in which the court will reject the request. These paragraphs are in the following terms:

"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 notification 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 l 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."

The information required by sub-paragraphs a, c and d is necessary for a settlement using categories of loss ('damage scheduling'). This involves determining the appropriate category for a victim, using a number of factors. A victim will then make a claim for the corresponding

compensation payment. Paragraph 2.d requires the agreement to describe any conditions to be met by a victim in order to be eligible for such a compensation payment.

Paragraph 3 summarises those cases in which the court will reject the request to declare the agreement to be binding. Paragraph 3.b is crucial here, as it obliges the court to test whether the level of the amounts awarded is reasonable for each category of loss. Paragraph 3.b summarises a number of aspects for such an assessment, such as the size of the damages for those individuals allocated to a certain category. Another aspect mentioned in this sub-paragraph is the ease and speed with which the payment can be obtained. The significance here is the extent to which the agreement actually guarantees a speedy and simple settlement when compared with a settlement which is beyond the scope of the agreement. Without the agreement, a victim might have to face lengthy negotiations and might even have to embark on civil proceedings, with all of the associated costs. The uncertainty of any such a course of action is also important here, so that the actual value of the claim must also be taken into account when determining the level of the compensation being awarded.

If the court declares the agreement to be binding, it will no longer be possible for a victim to obtain compensation beyond that which falls under the scope of the agreement. Important legal principles are involved here, such as those set out in Article 6 of the European Convention on Human Rights, to the effect that everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law for the determination of his or her civil rights and obligations. With this in mind, it is possible for a victim to withdraw from being bound by the agreement within a specified period. This is what could be described as an 'opt out' facility. See article 7:908, paragraph 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.."

Those who avail themselves of this option therefore remain fully entitled to lodge their claim separately and go to court if needs be. It is also important that victims are offered the opportunity to be heard in the proceedings leading up to the declaration that the agreement is binding. This means that the court can take account of their comments and objections before issuing a verdict. This facility is offered to the victims by have them summoned to take part in the proceedings. There is no more detailed description of the procedure involved, although it should be noted that the Court of Appeal in Amsterdam has sole jurisdiction to deal with a request to have an agreement declared binding.

3. The American practice of class actions as a source of inspiration

The main source of inspiration for the WCAM was the American 'damages class action' procedure, and in particular the way it operates in practice. The WCAM is however different from its American counterpart in one essential area, in that it requires the parties to have reached an *agreement* for the benefit of a group of victims on the manner of settling the compensation, whereupon they may jointly approach the court with a request to declare the agreement to be binding. By contrast, a 'damages class action' procedure involves a representative victim asking the court to *order* the other party to pay compensation for the loss sustained by a group (the 'class'). In practice, it is usually a lawyer who takes the initiative for this in America, seeking out a representative victim with a view to submitting a damages class action on his or her behalf.

The WCAM opts for a collective settlement in order to avoid the complications that arise fairly often in American damages class actions. These happen because many of the issues connected with a compensation claim can only be answered individually. They might include, for example, issues of causality, contributory negligence and especially the extent of the damage. Once the legal issues in common have been dealt with, all of the individual victims then have toget involved in the proceedings so as to obtain answers to the issues affecting them individually. The result is that completion of a class action is quite often extremely complex and time-consuming.

Practice in America, which was the main source of inspiration, has shown that the parties often reach a settlement in order to avoid these problems. This is done to end a damages class action that is already under way, or else before the proceedings are even commenced. In the latter case, the parties then ask the court to declare the settlement to be binding. The advantage of this type of settlement of the damages – which is the system under the WCAM – is that it is done using categories of loss (*damage scheduling*). The settlement agreement contains parameters for allocating a victim to one of these categories. The victim then receives the corresponding payment, and only has to demonstrate which category he falls into. This method of settlement is significantly simpler because it no longer necessitates answering all of the individual legal questions pertaining to a particular victim.

This system also avoids another negative side effect of the American class action: *blackmail settlement*. This phenomenon involves those defendants in a class action who are not at all culpable, or only culpable to a limited extent, indicating that they would prefer to make a payment to get out of the class action. Potential loss of reputation and the prospects of endless and costly proceedings are factors that motivate defendants into paying their way out of a case. This phenomenon cannot occur under the WCAM, because the parties have to reach agreement first of all and then *jointly* ask the court to declare the agreement as binding. This removes the coercion inherent in an American-style class action, so that a defendant will not feel forced into concluding this type of agreement.

The WCAM system has other benefits as well. The Act sets up the legal infrastructure for a joint solution. It encourages settlements to be made more harmoniously, with all parties being more readily in a position to concede certain assertions or defences. It also avoids polarisation and perhaps even escalation of the proceedings. The initiative may even come from the party who has caused the damage – see the Shell case discussed below. It accordingly seems that the WCAM is not viewed as a threat to those who might potentially be liable, but rather as a useful mechanism for drawing uncomfortable events from the past to a close in a satisfactory manner, without the danger of potentially being forced into a settlement (*blackmail settlement*).

4. How is a settlement achieved in practice in the Netherlands?

The principle underlying the WCAM is that the parties must first reach agreement, after which they can *jointly* ask the court to declare their agreement to be binding. This might raise the question of whether the parties are always actually in agreement or whether the pressure inherent in, for example, a class action might not still be required to persuade the other party to pay compensation.

Achieving an agreement can be a very troublesome business in certain circumstances, for

instance if the parties have different answers to essential legal issues surrounding a mass claim. Furthermore, whoever (allegedly) caused the damage in the first place will not be prepared to talk about an agreement if there is a denial of liability. The collective right of action, which has existed since 1994 in the Netherlands, plays an important part here as a sort of preliminary phase (article 3:305a, Dutch Civil Code) since, if there is any uncertainty on how any essential legal questions should be answered, an interest group can ask the court, by way of a collective action, to make a decision in law on the issue.[2] One or more judicial pronouncements can then clarify matters and thus contribute towards a willingness to enter into negotiations and resolve matters.

Practice tends to show the benefits of this for the parties. During the brief existence of the WCAM, two cases have already been completed and a third is currently before the court. There are several reasons why those who cause damage are nevertheless prepared to talk about a settlement without any of the pressure inherent in a statutory facility for claiming collective compensation. One very powerful incentive is the otherwise unattractive prospect that litigating mass damages on an individual basis can take years, and is also much more expensive than a collective settlement. A settlement also offers a significant degree of certainty concerning financial obligations vis-à-vis the group of victims. Yet another potential encouragement consists of political and/or social pressure and the avoidance of loss of reputation. It seems in practice that, where necessary, there is scope for a heavyweight to act as mediator, in a position to impose controlled pressure in order to force a breakthrough.

In order to arrive at a situation where the maximum number of appropriate cases is actually resolved using the provisions of WCAM, research is presently being undertaken in the Netherlands into whether it might be useful for the court to have a facilitating role in connection with the finalisation of the agreement. What is being contemplated is a sort of obligatory pre-procedural appearance of the parties. The court would then be able to identify, along with the parties, any important legal issues and/or could appoint a mediator to assist the parties in their negotiations towards a settlement. The court would also be able to submit any preliminary issues to the highest court available, if answers to these issues would clarify the negotiating parties' legal positions. In addition, the suggestion has been made that a court might additionally prompt an unwilling party into negotiation, but conversely could also point out that the facts would not justify such a party having to pay compensation.

5. Initial experiences with the WCAM

The immediate reason behind the production of this Act was the ‘DES' case. This case has now been completed, using the WCAM. DES (diethylstilbestrol) was marketed by many manufacturers in the Netherlands between 1947 and 1976, and prescribed on a large scale to pregnant women to prevent premature birth and miscarriage. It subsequently became clear that there was a link between the use of DES and physical problems among the daughters born from these pregnancies. The physical complaints which became apparent among the DES daughters included abnormalities of the cervix, premature births/miscarriages and cervical cancer. Following negotiations between the DES Centre – an organisation protecting the interests of the DES daughters – and the pharmaceutical companies who had marketed DES, an agreement was finalised which provided for compensation for the DES daughters. Using the WCAM, the parties asked the court to declare this agreement to be binding. This

[2] As far as consumer law is concerned, these are the same interest groups who can go to court in a collective action within the context of Directive 98/27/EU against infringements of consumer law adversely affecting the collective interests of consumers.

request was granted on 1 June 2006, after a test had been made to ensure that the requirements under WCAM had been met. Only one of the DES daughters used her opt-out facility. The (other) DES daughters either have been or are now being compensated in line with the agreement.[3]

The second case settled under WCAM was the 'Dexia' case. Dexia and its legal predecessors offered various types of equity lease agreements to consumers from 1992 onwards. A total of 713,450 agreements were concluded with a total of 395,000 customers. These agreements involved the investment of borrowed money, with the expectation that the redemption of the borrowed money could be made from the proceeds of the equities that would be sold. This turned out to be a miscalculation when the share index (AEX) fell from 700 to 270 points between September 2000 and May 2003. All that was left was a pile of large debts. Dexia was blamed for not having alerted its customers sufficiently to the associated risks. After a number of collective actions, a settlement was successfully concluded in 2004 between the Dexia Bank on the one hand and the Lease Loss Foundation, the Eegalease Foundation, the Dutch Consumers' Association and the Dutch Equity Holders' Association on the other hand. Very briefly, this arrangement meant that the victims would be paid out all or part of their residual claims at the end of the contract duration. This involved settlement of about a billion euros' worth of debts. The Court of Appeal in Amsterdam was asked to declare this agreement to be binding, which it did in January 2007.[4]

The third case, currently before the Court of Appeal in Amsterdam, is the Shell case. Shell concluded a US $340 million settlement with the Dutch Equity Holders' Association, the Shell Reserves Compensation Foundation and others on 11 April 2007 for the benefit of Shell shareholders. This was prompted by the sharp fall in the price of Shell shares after it became known that Shell was holding more oil and gas reserves on its books than was permitted under accounting rules.[5] One peculiarity of this case is that the settlement was finalised on Shell's initiative, which indicates that those who cause the loss are also content to settle the losses they have caused by using this mechanism. The other peculiarity is that this is a worldwide settlement providing compensation for *all* shareholders, with the exception, however, of those resident in the USA. The proceedings have only recently been initiated at the Court of Appeal in Amsterdam, so that a judgement is not expected in the short term.

6. Conclusion

These experiences suggest that WCAM is a thoroughly appropriate tool in many circumstances where mass damages can occur. The scheme has already been deployed successfully within the law affecting shares and in consumer law, for example. Furthermore, for the successful application of WCAM, it makes no difference whether the mass damage consists of physical injury or financial loss. Mass claims other than mass damages may also be settled using this Act.

Unlike the USA, for example, there is no statutory scheme available in the Netherlands for claiming compensation on a collective basis. The WCAM offers, by contrast, a facility for having a collective settlement declared as binding by the court. Initial experience with the WCAM indicates that this was a sound choice. Nor should this be any great surprise, since experience in other countries has shown that legal proceedings under statutory schemes

[3] See www.descentrum.nl and www.desfonds.nl.
[4] See www.dexialease.nl and www.eegalease.nl.
[5] For further information, see www.shellvergoeding.nl. The settlement can be seen at www.shellsettlement.com

allowing for collective compensation claims are apparently so problematical and unpredictable that most of the mass damage claims still end up being settled. This accordingly seems to be a good reason for recommending the collective settlement as the prime mechanism to be used for setting claims, and for taking steps that might help to ensure that a settlement is actually finalised in appropriate cases.

The Dutch law on collective actions is of essential importance in this context. In mass damage cases, there are often many unanswered questions at the outset that can act as an obstacle to achieving a settlement. Dutch practice allows the interest organisations in such cases to take a collective action to the court for a declaration at law on these issues. One or more judicial pronouncements can then clarify matters and contribute towards a willingness to enter into negotiations and resolve matters. This combination of the ability in mass damage cases to ask for a declaration in law in a contested procedure, with subsequent negotiations between the parties towards a settlement of the losses, appears to be particularly effective in practice.