Way of the future

The combination of a Dutch Act and other European legislation shows how European class actions could develop

The Dutch Collective Settlement Act, which was enacted on August 1 2005, has resulted in two court-approved collective settlements and a third one is on its way: the Royal Dutch Shell reserves re-categorization settlement was submitted for court approval on April 11 2007. The new rules were originally intended to apply only to the resolution of mass exposure and mass-disaster personal injury claims. This was true of the first collective settlement under the Act (DES), but not the second: the Dexia settlement relating to retail investment products, approved in January 2007. The Shell settlement is also a potential groundbreaker: it aims at achieving a worldwide settlement of a securities action with the exception of only US shareholders.

The globalization of class actions has attracted much attention. To give a few examples, an American Bar Association meeting in Rome last May entitled Class actions at the crossroads: Europe’s choice between its own and the American model. In June, the British Institute of International and Comparative Law organized an event in London called Product liability and mass torts in a global marketplace. On the same day, there was a seminar in London on collective redress in antitrust matters, following another event on that topic in Brussels in May. A brainstorming event on collective redress in consumer matters, initiated by the European Commission, took place in Leuven (Belgium) in June. In October, the first European chair in comparative mass litigation will be established at Tilburg University in the Netherlands. Last but not least, the World Conference on Class Actions, organised by Oxford and Stanford Universities, will be held in Oxford in December.

The Dutch approach to mass disputes is generally viewed by Americans and other Europeans with great curiosity, and sometimes with scepticism. The Dutch collective settlement procedure established under the 2005 Act resembles in many ways the US-style “court approved opt-out class settlements”, which makes Europeans feel uneasy, but there is one very important difference: collective procedures for monetary damages are unavailable in the Netherlands.

Given the cross-border implications of the pending court approval, the Shell settlement shows that the Dutch legislation on collective settlements may be of interest to other European countries too. It may therefore be useful to shed some light both on that legislation and the other rules governing collective actions and the resolution of mass disputes in the Netherlands, so the reader can make up his or her own mind about the effectiveness of the Dutch approach.

Collective actions

There are two sets of rules in the Netherlands that govern the resolution of mass disputes. The first came into force on July 1 1994. Those rules cover what are called public interest and group interest collective actions. They concern representative proceedings that must be started by a not-for-profit organization. Under Dutch law, individuals are not allowed to bring collective actions, or enter into collective settlements. But who is? A foundation or an association which represents the interests of a group of claimants in accordance with the objects described in its articles of association. To show that it is representative, an organization must be able to identify its members but it is not necessary that class members come forward individually (to opt-in). A representative organization may, for example, be an established investors’ or consumers’ organization but it could also be a special purpose vehicle. Often a collective action is the result of a coordinated effort by an established organization and one set up specifically in connection with the litigation. The foundation or association brings the claim – often seeking declaratory relief on the issue of wrongful act or breach of contract – in its own name and the judgment is only binding on it and the defendant, and not on the individual group members. The group members can still sue in their own right. This has many advantages for group members, but obviously many disadvantages for defendants, as they cannot win in a collective action, but can only avoid losing. The court-approved settlement procedure aims at overcoming this problem for defendants.

Public authorities are also entitled to bring collective actions but have so far not exercised this right, probably due to a lack of resources and know-how. To what extent will this change with the establishment of the new Dutch Consumer Authority, which qualifies as a representative party in both a collective action and a collective settlement, still remains to be seen.

All causes of action and forms of relief can be pursued in a collective action with one important exception: monetary damages. Damages cannot be awarded, and the same rule applies to a declaratory judgment on liability for damages. The latter was reconfirmed in a recent Supreme Court decision. The grounds for the restriction are that damage actions require an individual assessment of the claims. The legislature did not take into account that the damage assessment problems could, to some extent, be addressed through various case management techniques, as case management is a more recent phenomenon in Dutch civil procedure. In practice, the relief most commonly sought is either injunctive or declaratory in nature.

It is important to note that before starting a collective action, the representative organization must attempt to resolve the mass dispute out of court. Otherwise it runs the risk that the court will dismiss the action.

Collective settlements

The second set of rules came into force on August 1 2005. These cover the court approval of an (opt-out) collective settlement. If the parties agree to settle their dispute out of court, they can apply to the court to declare the settlement fair and binding even on non-parties to the agreement, on an opt-out basis.

To understand the Dutch legislation on...
collective settlements, it is useful to consider the very specific background against which the legislation was passed. In 1986 the DES litigation was initiated by six so-called DES daughters against 13 DES manufacturers, the daughters alleging that the use of the drug DES by their mothers during pregnancy had caused them medical damage. The crucial question was whether the rule on alternative causation could be applied to events that took place in the period covered by the litigation: the Dutch Supreme Court held that it could. The decision was highly controversial from a medical and judicial point of view and has been criticised by leading academics. Shortly after its publication, the DES registration centre was established and users were required to register at the centre in order to preserve future rights against the DES producers. Within six weeks it counted over 18,000 members: DES mothers, daughters and sons. There are estimates that the total number of people whose life may have been adversely affected by DES in the Netherlands is 440,000.

The pharmaceutical industry and insurers took the initiative and started negotiations for a final settlement. Seven years later, at the end of 1999, a settlement was reached and the DES fund, containing (35 million, was established. Half of the amount came from the industry itself and half from the insurers. There was one very important condition on the defendants’ side: that the settlement would be final for all Dutch victims. Under the rules for a collective action, finality requires that all victims opt in, which the industry believed was not a workable alternative. That is why it insisted on an opt-out procedure, which could only be achieved through new legislation.

The Dutch Ministry of Justice was very much inclined to facilitate the request. Although an attractive possibility was the enactment of ad hoc legislation providing for court-approved collective settlements specifically in the DES case, the legislature had been heavily criticised for enacting such legislation in the past. Furthermore, it was expected that mass tort cases would occur more often in the future, so legislation on the subject was very much needed and justified. The implication of all this was that a whole new law on court-approved collective settlements in general had to be prepared on short notice, driven by political pressure for the resolution of the DES matter. There was no time for lengthy public debate on the need for or content of the legislation.

During the period in which the Collective Settlements Act was being prepared, various interested parties including practitioners, judges and academics were consulted. The responses varied, but most were positive. The judiciary, on the other hand, was critical. A general comment was that the proposal placed too heavy a burden on courts, jeopardising their impartiality. The fact that civil law judges are traditionally less familiar and comfortable with case management and had to get used to the dynamics of mass litigation might have played an important role in their response. Nowadays the Dutch judiciary seems more and more comfortable with its new, more active role.

Some practitioners, mainly the defendant Bar, were quite positive about the proposal. They saw the legislation as giving them new tools for handling delicate situations without creating the risk of coerced or blackmail settlements. Others, mainly organizations of consumers and plaintiffs’ lawyers, were less excited about the new possibilities, pointing out that the proposed collective settlement procedure was probably only meaningful in connection with long-term mass torts (what others call mass exposure cases: claims involving pharmaceutical products, asbestos etc.), where the number of present and future victims and the impact of the disputed activity are unknown. The Dutch experience with short-term mass torts (or mass disaster accidents), such as fires, airplane crashes and firework accidents, has shown that where the number of parties is known and there is one single event that caused the damage, out-of-court settlements are common and feasible under the present system. Other plaintiff lawyers and the Dutch Consumers’ Organisation described the collective settlement proposal as “nice but useless”, on the grounds of the absence of the famous “shadow of the law”: the right to recover damages in collective actions.

Main features of the Act

The Collective Settlements Act was inspired by the US class settlements approach but, as mentioned above, does not provide for the recovery of monetary damages.

5Under this Act, defendants and representative organizations can try to reach a settlement out of court. It is important to note that several features of the Dutch legal system limit the risk of abuse of the collective settlement device. Those features are the so-called loser pays rules and the ban on contingency fees for members of the Bar. The characteristics of a representative organization for the purpose of entering into a collective settlement are the same as those described above in relation to a collective action.

If and when the parties succeed in reaching an out-of-court settlement, they can jointly petition the court to approve it. The Amsterdam Court of Appeal has exclusive jurisdiction as the court of first instance and final fact-finder in collective settlement cases, and in this way can develop case management expertise in this field. Its factual findings are not subject to review.

The Act introduces the so-called damage scheduling approach, under which compensation is awarded to claimants not on the basis of their personal characteristics, but rather on the basis of the characteristics of the subclass/group of which the particular individual claimant is a member. The agreement should describe the class and the various sub-classes and give information about (i) the number of class members, (ii) the amount of compensation that will be awarded, (iii) the eligibility requirements for compensation, (iv) the procedure by which the amount of compensation will be established and finally (v) the method of obtaining payment. The parties must be able to explain to the court how they will divide the money between the sub-classes or different types of plaintiffs. The damage scheduling approach makes it possible, and that is especially important in personal injury cases, for a tailor-made settlement to be designed.

Notice of the collective settlement must be published in a national newspaper and delivered by ordinary mail to the known members of the group. The notice...
requirement applies twice: once when the settlement is submitted to the court and once when the court has reached its decision. The first notice may be given by publication only, and not by mail, if the court approves this. Everyone who is included in one of the categories of the settlement has the opportunity to opt out within a certain period of time.

The requirements that must be met in order to obtain court approval are, among others: (i) the compensation amount may not be unreasonable, (ii) the defendant’s performance must be sufficiently guaranteed, (iii) the representative organization must sufficiently represent the class and (iv) the number of class members must be sufficient to warrant certification (numerosity). It is possible to see the sufficient representation test as a Dutch-style “adequacy of representation test”, although it must be stressed that under the Dutch test, the counsel to the representative organization does not have to meet quality requirements as is required under the US regime, and is not court-appointed.

When considering whether or not to approve a settlement, the court has to take into account the nature, cause and amount of loss, the simplicity and expediency of the payment method, the defendant’s asset base, the nature of the legal relationship between the defendant and the class members and the availability of insurance. The opt-out period for class members must be at least three months. It is important to note that the defendant is only entitled to opt out if a so-called blow clause is explicitly stipulated in the agreement. A defendant may wish to opt out if too many injured parties do so. The Netherlands is among the first EU countries to take steps to facilitate the settlement of mass damage claims using an opt-out regime.

If a settlement is approved, it will be deposited at the court registry, where it will be available for inspection and where copies may be obtained by interested parties. All known injured parties will be sent a copy of the decision by ordinary mail. In addition, any other information as the court sees fit will be published in at least one national newspaper, to be determined by the court. The court may order that the decision also be published or communicated by other means, which allows for flexibility and case-tailored approaches.

If the court decides to approve the settlement, everyone who is included in one of the categories of the settlement and does not opt out before the deadline is bound by that settlement, even if he or she does not know about it. In other words, class members become parties to the settlement agreement and are entitled to receive payment of the stipulated compensation amount. Review is only possible under restricted conditions. The petitioning parties can only jointly and under restricted conditions present their case to the Supreme Court, and no other review is possible.

The court’s power to interfere with the content of the settlement is limited: it can do so only if the amount of compensation awarded under the agreement or the process of determining the compensation is unfair. However, the Dexia settlement illustrates that the court can exercise certain discretionary powers, for example by appointing an expert witness with regard to the resolution of certain issues.

The Collective Settlements Act is being evaluated. The first experiences have been quite positive although there is room for improvement, such a freeze on certain individual proceedings during the opt-out period, better case management techniques and better funding arrangements.

**Exciting possibilities**
The Collective Settlements Act was drafted with a specific mass tort case in mind (DES). At the time of drafting, the Dutch legislature was not aware of the legislation’s full potential, not only in relation to the resolution of mass torts other than those involving personal injury claims but also in contributing to the resolution of European or worldwide mass disputes. The combination of the Collective Settlements Act with European legislation on the recognition and execution of foreign judgments opens new and exciting possibilities, not only for plaintiffs but also for corporate defendants.

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