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## **DSW/BETTER FINANCE FOR ALL**

International Investors' Conference '*Shareholders  
Rights in Europe 2020*'

Wiesbaden, 9 December 2014

Prof.dr. Ianika N. Tzankova

## **A Dutch Treat for Europe?**

Cross-border Aspects of Group Actions and  
Collective Settlements under Dutch Law

## Topics

- Group actions under Dutch law
- Collective settlements under Dutch law
- International jurisdiction
- Recognition and enforcement

## How do Dutch 'group-actions' work?

Who can file (art. 3:305a NCC)?

- Foundation or an association
- Acting for the interests of other persons
- In accordance with the objects as described in the articles of association
- Generic investor's or consumer's organization or special purpose vehicle

- No individual lead plaintiff acting for the class
- Foundation/organization brings claim in its own name
- No court supervision over appointment of lead counsel
- No certification

## Other requirements

- Preliminary settlement talks
- Claim must seek to serve the protection of similar interests of other persons
- No standing if with the claim the interest of the group is insufficiently protected
- Informal requirement: Claim Code

## Similar interests

- Capable of being bundled
- Depends on circumstances of case
- Bundling only possible if for awarding the claim no individual issues need to be decided

## What claims?

- Performance of contract
- Dissolution of contract by the court
- Claim arising from undue payment
- Performance of obligation to undo
- Injunctive relief
- Opposition against split-off of legal entity  
→ not limited to consumer cases



## **No claim for damages in money!** **Art. 3:305a (3) NCC**

Instead: claim for a declaratory judgment that defendant acted wrongfully against group members.

However: late 2011 Parliament adopted a motion urging government to allow collective monetary damages claims.

In 2014, Parliament launched a consultation on a draft legislation. Consultation period ran until mid October 2014.

## **Scope of the judgment**

- Only binding between the plaintiff's organization and the defendant
- Thus: individual group members and other organizations can still sue
- Settlement requires active adherence by individual group members (opt-in)

## **Collective Settlement of Mass Claims Act 2005 (CSMCA)**

Origin:

- Dutch DES hormone case
- Inspired by US practice of global settlement

## Objectives of CSMCA

- Providing general statutory framework for...
- ...court approval of collective settlement agreement for mass claims, resulting in...
- ...the agreement being binding on all class members...
- ...unless opt-out option is exercised

## **CSMCA in action**

8 cases decided:

- Product liability (DES-hormone, June 2006/June 2014)
- Retail financial services (Dexia Bank Nederland re securities leasing, January 2007)
- Securities (Shell Reserves Recategorization, 2009; Vedior, 2009, Converium, 2012)
- Bankruptcy/Life insurance (Vie d'Or, 2009)
- Bankruptcy/Bank (DSB, November 2014 after the court requested parties to amend settlement agreement)

## **International dimension**

- Shell, Vedior and Converium settlements also for non-Dutch shareholders
- Leading cases for international scope of CSMCA

## Other noteworthy developments

- BP Foundation
- SC decision in Deloitte: a 305a-organization can bar the statute of limitation with a letter to the defendant
- New draft proposal on collective actions on damages
- Third party litigation funding entering market

## Settlement agreement

- Between plaintiff's organization and defendant
- Agreement should describe:
  - group and sub-groups
  - number of group members
  - amounts of compensation
  - eligibility of compensation
  - method of determining compensation amount
  - method of obtaining payment



## Requirements for court approval

- Compensation amount should not be unreasonable
- Defendant's obligations must be sufficiently guaranteed
- Sufficient representation of the class by plaintiff's organization
- Number of class members must be sufficient to warrant collective approach

## **Reasonable compensation**

Court to take into account:

- Nature, cause and amount of loss
- Simplicity and expediency of the payment method
- Asset base of defendant
- Nature of the legal relationship between defendant and group members
- Availability of insurance

## Procedure

- Joint request
- Exclusive national jurisdiction Amsterdam court of appeal
- Announcement
- Individual group members and other organizations can file objections
- Hearing
- Court order on approval
- Notification

## Opt-out period

- Class members: at least 3 months upon court order becoming final
- Defendant : no longer than six months after expiry of group member's opt-out period
- Defendant opt-out only if stipulated in agreement

## **Effects of court approval**

Group members become:

- Parties to the settlement agreement
- Entitled to receive payment of compensation amount

## **International jurisdiction**

Jurisdictional rules to be applied in civil or commercial matters:

- EU Regulation 44/2001 on jurisdiction and recognition and enforcement of judgments, or
- Lugano convention, or
- Dutch code of civil procedure

## **International jurisdiction of Amsterdam Court of Appeal in collective settlement procedure**

The Amsterdam court has based jurisdiction on:

- If defendant (beneficiary of the settlement) is domiciled in NL
- If several defendants (beneficiary of the settlement): if one of them is domiciled in NL, provided claims are closely connected
- In matters relating to a contract: if the place of performance of the obligation under the collective settlement agreement is in NL

## Recognition and enforcement of judgments

In civil and commercial matters:

- Judgments from another EU or EEA member state will be recognized and enforced without relitigation on the merits, unless:
  - judgment manifestly contrary to public policy
  - when given in default: if defendant was not duly served
- Discussion: will courts in other member states recognize Amsterdam court order?



**Thank you**

Prof.dr. Ianika N. Tzankova  
tzankova@uvt.nl