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Amsterdam, 24 September 2007

Memorandum

To:

Prof. Deborah Hensler
Judge John W. Ford Professor of Dispute
Resolution
Stanford Law School

Dr. Christopher Hodges
Head, Research Programme on Civil Justice
Systems
University of Oxford

Re:

Class Actions, Group Litigation and Other Forms
of Collective Litigation Dutch Report

1. As background for consideration of the context within which your country's group litigation operates, please briefly describe your civil litigation system (e.g. common law, civil law)?

1. The Dutch civil litigation system belongs to the 'civil law' family. It originates from the continental European Romano-canonical procedure and hence has the same origin as, for example, French and German procedural law. If these two are distinguished from one another within the family – for which there is reason – one has to say that, historically and as regards its content, Dutch procedural law belongs to the French subfamily. Dutch procedural law was greatly 'Frenchified' in the early 19th century.¹ With the introduction in 1838 of its own legislation, including the current Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*), Dutch procedural law has, however, undergone further independent development and so has gradually taken on a character of its own.²
2. Jurisdiction in civil matters in the Netherlands has, since the beginning of the nineteenth century, and following the French model, been entrusted in

¹ From the end of the eighteenth century until 1813 the Netherlands was a French vassal state (from 1811 actually a group of departments in the French empire) and French legislation was introduced.

² WDH Asser, H.A. Groen, J.B.M. Vranken, I.N. Tzankova, A New Balance, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894841 where you can also find information about various initiatives that were undertaken for the modernisation of the Dutch law of civil procedure between 1865-2002. For general information about the Dutch judiciary and legal system see also: <<http://www.rechtspraak.nl/Gerechten/RvdR/Information+in+English/>>.

the first instance to cantonal judges and district courts, on appeal (*de novo*) to the courts of appeal and in cassation to the Supreme Court. The judges are appointed and not elected (no jury) and there are no punitive damages nor US or English style discovery. There are limited possibilities to obtain documents but there are other means to obtain information through various court orders.³

2. **What formal rules for representative or non-representative group litigation have been adopted in your country? Please include both statutory rules and rules adopted by the judiciary, and include both private law and public law mechanisms (e.g. *partie civile*). Describe briefly the policy debate and political context for the consideration and adoption of different forms of group litigation, including if relevant the decision to adopt a non-representative form of group litigation and/or a limited form of representative litigation, as alternative(s) to a broadly available representative litigation procedures, along the US model. For each litigation mechanism, please describe what types of claims the mechanism pertains to (for example, all multi-party claims or only some specific type of claims, such as antitrust, consumer protection, investor/shareholder protection, environmental, etc.) and when the rules were adopted. If there have been important amendments to the governing statutes or rules since their adoption, please identify these, describe them briefly and if possible describe why amendments were adopted. Please attach copies of the statutory provisions and/or rules, and an English translation, if possible.**

Two set of rules for representative litigation: collective actions and collectieve settlements

3. There are *two set of rules* in the Netherlands that govern the resolution of mass disputes. The first one came into force on *1 July 1994*.⁴ Those rules are laid down in the Dutch Civil Code (art. 3:305a-c CC) and cover so-called public interest and group interest collective actions. They concern representative proceedings that must be commenced by representative organisations (see also answer to question 4). All causes of action and forms of relief can be pursued in a collective action with one important exception, an action for monetary damages. It is not possible to obtain monetary relief, including a declaratory judgment on liability for sustained damages. The latter was confirmed once again in a recent Supreme Court decision⁵. The grounds for the restriction are that actions for damages require individual assessment of the claims. The legislature

³ With respect to (expert)witnesses, or to provide with certain documents under the the so called "exhibitieplicht", the so called "enquete procedure" in commercial litigation.

⁴ Stb. 269 en 391.

⁵ In the Vie d'Or-litigation where the former policyholders of life insurance company Vie d'Or held the Dutch Central Bank and Deloitte liable for the bankruptcy of Vie d'Or.

did not take into account that the damage/claim assessment problems could, to some extent be addressed through various case management techniques, as case management is a more recent phenomenon in the practice of civil procedure. However, in practice the relief most commonly sought is either injunctive or declaratory in nature.

4. It is important to note that before starting a collective action, the representative organisation is obliged by law to attempt to resolve the mass dispute out of court first. The organisation otherwise runs the risk that the court will dismiss the action. The "law in action" shows, however, that this obligation is a mere formality.
5. The second set of rules came into force on *1 August 2005*. Those rules are laid down in the Dutch Civil Code (Art. 7:907-910 CC) and in the Dutch Code of Civil Procedure (Art. 1013-1018 CCP) and cover the court approval of an (opt-out) collective settlement. If the parties agree to settle the 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. The new legislation has already produced two court-approved collective settlements. A third one is on its way: the Royal Dutch Shell reserves recategorisation settlement was submitted for court approval on 11 April 2007 (see also answer to question 6). The new rules were originally intended to apply only to the resolution of mass exposure and mass disaster personal injury claims. This was indeed true of the first collective settlement under the Act (Des), but not the second: the Dexia settlement relating to retail investment products was approved in January 2007. The (Shell) reserves recategorisation settlement, whose approval is now pending, is also a potential groundbreaker: it aims at achieving a world-wide settlement with exception of US-shareholders.

Policy debate and political context

6. **Article 3:305a-c CC (collective actions)**

The arguments for introducing this type of collective action were the usual ones:

- to enable people with individual non-recoverable claims to bring actions;
- to enhance access to justice;
- prevention.⁶

⁶ MvT, 22 486, nr. 3, p. 2.

7. **Articles 7:907-910 CC and Articles 1013-1018 CCP (collective settlements)**

Background

To understand the Dutch legislation on collective settlements, it is useful to consider the very specific background against which the legislation was passed, i.e. the DES litigation that was initiated in 1986 by 6 'DES daughters' against 13 DES manufacturers. There are very good reasons to consider that background more extensively. The DES daughters alleged that the use of the drug DES by their mothers during pregnancy had caused them medical damage. Of particular importance in this case was the fact that none of the claimants could prove exactly which of the DES manufacturers during the relevant period was responsible for the production and distribution of the specific medicine that was taken by their mothers. The crucial question in the DES litigation was whether the rule on "alternative causation" could be applied in the litigated period. The Dutch Supreme Court held that it could. The Supreme Court's decision was highly controversial from a medical and judicial point of view and has been criticized by leading academics. In the literature, the ruling has been considered to be a gesture to the "victims" and "socially desirable". Shortly after the publication of the Supreme Court's ruling, the DES register centre was established. DES users were required to register at the centre in order to preserve future rights against the DES producers. Within 6 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.

8. 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 was final for all Dutch victims. However, in order to achieve this, new legislation was needed. As stated above it is not possible to obtain monetary relief, including a declaratory judgment on liability for sustained damages. When representative organisations start a collective action, they do so in their own name and the judgment binds only the organisation and the defendant, but not the individual class members. Under that regime, a settlement option would require active adherence by the individual class members (opt-in). The industry believed that this was not a workable alternative. That is why

they insisted on an (opt-out) settlement solution that could only be achieved through legislation. The idea came in other words from the industry.

The role of politics

9. Considering the delicacy of the issues involved in the DES settlement, 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. Although the Minister set up a commission of three distinguished Dutch civil procedural lawyers to review the Dutch Code of Civil Procedure, including collective actions, the commission's report could not be awaited.
10. Considering all this, the Dutch legislature handled the matter very intelligently. In fact, the very existence of the Act is an achievement in itself since the Dutch government, like most other European governments, has always been very wary of developments in the direction of "the American litigious society" and collective actions of any kind are seen as a tool that promotes such a society.⁷

Reactions

11. During the period in which the Act was being prepared, various interested parties, including practitioners, judges and academics, were consulted. Interestingly enough, the Dutch Consumers Organisation, which is a very important player in the Dutch collective litigation field, was not consulted at that early stage: this later turned out to be an omission. The reactions of the various parties consulted can be summarised as follows:

⁷ For example, the former Dutch Minister of Justice had cancelled a no-cure-no-pay pilot that was initiated by the Dutch bar in the field of personal injury claims for that very same reason: "contingency fees" is seen as another problematic tool, from an ethical point of view: see also answer to question 12.

- The reaction of the judiciary can be described as resistant. A general comment was that the proposal placed too heavy a burden on judges, jeopardising their impartiality. They claimed that a task which should be performed by the legislature, namely to solve a problem caused by a particular event and adversely affecting a huge group of people, had been assigned to them. They also argued to find it very difficult to assess the fairness and adequacy of the settlement. That claim can be supported by insights from law and economics (bounded rationality and information asymmetry). 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 reaction. As we will discuss later, the judiciary seems nowadays more and more comfortable with her new, more active, role.
 - Some practitioners, mainly the defendants' bar, were quite positive about the proposal. They saw the legislation as giving them more possibilities to handle delicate situations without really having "the trouble" of coerced or black mail settlements. Others, mainly the plaintiffs' bar, were less excited about the new possibilities, pointing out that the proposed collective action was probably only meaningful in connection with "long-term" mass torts (and 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. There have been some examples of "short-term" mass torts (or mass disaster accidents) in the Netherlands (fires, air crashes, firework accidents etc.) and experience has shown that in those cases 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", by which they refer to the absence of the famous "shadow of the law": the right to recover damages in collective actions.
 - Numerous comments concentrated on the "opt-out" issue in relation to the fundamental "day in court" right. Improvements in the notification requirements were, among other things, meant to address those concerns.
3. **For each litigation mechanism identified above, please provide a general description of the process contemplated by the formal rules. *In most legal systems, there are significant differences between "the law on the books" and***

“the law in practice.” For this item, we are interested in “the law on the books”; later we will ask about actual practice, and about specific issues, such as standing, appointment of legal counsel, and who is bound by outcomes of the litigation.

Collective actions

12. See the answer to question 2, nrs. 3-4, 8 and the answer to question 4. If there isn't an existing representative organisation that defends the group interests in question, then one must be (ad hoc) established. The law requires that the interest of the group members are similar enough (a kind of a commonality test) to be handled in a collective action. The court's practice is that standing could rather easily be obtained by representative organisations as the collective action is sought not for monetary damages (see also the answer to question 2, nr. 3).

Collective settlements

13. The main features of the Dutch Act on Collective Settlements, which was inspired by the US class settlements approach, can be summarised as follows:
- a. Defendants and representative organisations as described above can try to reach a settlement out of court. It is not possible to put pressure on a defendant who is unwilling to settle as it is under the US class action regime through the commencement of a damages class action;
 - b. 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 in first and final factual instance over collective settlement cases, and in this way can develop case management expertise in this field;
 - c. The Act introduces the "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 class/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 (by estimation), (ii) the amounts of compensation, (iii) eligibility for compensation, (iv) the method of determining of the compensation amount and finally (v) the method of obtaining payment. The parties must be able to explain to the court how they divided the money between the

sub-classes or different types of plaintiffs;

- d. The collective settlement must be published in a newspaper and everyone who is included within one of the categories of the settlement has the opportunity to opt-out within a certain period of time. The notice requirement that applies twice, (see below), has to be met on an individual basis, which I believe is a significant difference from North American style class action regimes and has cost consequences/implications. It is, however, important to mention that notice to known injured parties can be given by ordinary mail; first announce may be by advertisement only, if the court approves this.
- e. 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 organisation 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 organisation does not have to meet quality requirements as is required under the US regime, nor is he 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 3 months. The opt-out period for the defendant may continue no longer than 6 months after the expiry of the opt-out period for the class members. It is important to note that the defendant is only entitled to opt-out if this is explicitly stipulated in the agreement. Defendants might wish to do so if too many injured parties opt-out from the settlement. The Netherlands is among the first EU countries to take steps to facilitate the settlement of mass damage claims using the opt-out regime;

- f. 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, the decision and such 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;

- g. 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 on time 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. There is no possibility for appeal and only the petitioning parties can jointly and under restricted conditions present their case to the Supreme Court. One could say that there is not a realistic possibility of appeal but there is a realistic option for a final solution;
- h. The court's power to interfere with the content of the settlement is limited: it can only do so if the amount of compensation awarded under the agreement or the process of determining the compensation is unfair. However, the Dexia settlement illustrated that the court can exercise certain discretionary powers.

Summarised

- 14. The court-approval procedure consists of the following steps:
 - Negotiations between representative organisation(s) and defendants;
 - Joint petition for court approval of settlement by negotiating parties;
 - First notification of the known class members;
 - Filing of objections by individual class members and/or other (competing) representative organisations;
 - Fairness hearing;
 - Court-approval granted and determining of the opt-out period;
 - Second notification (if settlement has been approved);
 - Opt-out period expires/settlement becomes binding.

4. **In representative litigation**, who may come forward to represent groups of claimants, in what circumstances? Must class members all come forward individually (“opt in”) to join the litigation, in some or all circumstances? *What interests and organizations have availed themselves of the procedure? What roles have public justice officials and private lawyers played in prosecuting cases? What are the barriers to individuals and groups using the representative mechanism (e.g. funding problems, difficulty communicating with potential class/group members, lack of independence of officially-appointed representatives, judicial attitudes)? Are there features of your country’s civil litigation system that either facilitate or deter representative litigation?*
15. Under Dutch law, individuals are not allowed to bring collective actions at all. Who is? A foundation or an association which represents the interests of other persons in accordance with the objects described in its articles of the association: so-called "representative organisations". This could, for example, be a generic investors' or consumers' organisation but also a special purpose vehicle. This also means that two or more organisations can bring separate collective actions in respect of the same issue if they are both found by the court to be representative with respect to the issue in dispute. The foundation or association brings the claim in its own name and the judgment is only binding on it and the defendant, and not on the individual class members. The class members can still sue in their own right.
16. To show that it is representative, an organisation must be able to identify its members but it is not necessary that class members come forward individually (to opt-in). This is a requirement only for collective settlement and not for collective litigation purposes. This has many advantages for groups members, but obviously many disadvantages for defendants as they can "only loose" in a collective action. If they win the individuals may still start an action on their own. The court-approved settlement procedure aims at overcoming this problem for defendants. For the problem of funding see also the answer to question 12.
17. On 1 January 2007 the new Dutch Consumer Authority was established. The attached document contains an explanation of the background and the powers of the new authority. It is important to note that the authority is a regulatory agency that can also exercise enforcement powers. Although it has administrative enforcement powers as well, here we will only discuss the role of the authority in relation to the private enforcement of consumer law.

As discussed earlier, the Consumer Authority has the power to enter into collective settlements. However, the authority has announced that it will exercise this power with restraint because it believes that private law enforcement should be left to private parties, such as the Dutch Consumer Organisation (Consumentenbond). In addition, there are a number of disadvantages that make private law enforcement by such regulatory agencies inherently inadequate. In our opinion, these include:

- There are several other Dutch regulatory agencies that can potentially operate in the same substantive field as the new Consumer Authority, including, for example, the Dutch Competition Authority. This could raise questions of competence/jurisdiction. This means that coordination problems with those other authorities can be expected.
- The combination of regulatory and enforcement powers is associated with the well-known phenomenon in the literature on the functioning of regulatory agencies, "Chinese Walls". A recent example illustrates the problems which the combination of regulatory and enforcement powers can cause. In May 2007 the Consumer Authority started an investigation into the services being provided by a particular telecom provider. While the investigation was going on, an official of the authority accepted an invitation to participate in a TV consumer programme (see also the answer to question 12). The programme confirmed that there were a lot of consumers who were dissatisfied with the services and marketing behaviour of the relevant telecom provider. After the broadcast, the Consumer Authority posted on its website information (or links to information) regarding how consumers could pursue their complaints and/or terminate their contracts with the provider in question, as informing consumers about their rights is also one of the authority's tasks. The telecom provider started preliminary relief proceedings against the Consumer Authority to require it to remove the information (or links) from its website and his action succeeded. The court ruled that the Consumer Authority should be very careful during the course of an investigation, as it is a public official and statements and declarations (on its website or otherwise) by such an official have much more impact than the statements of private law enforcers. This was not a good start for the Consumer Authority.
- Another possible unwanted side effect of granting enforcement powers to a regulatory agency is that businesses might be hesitant to approach the authority with a potential compliance problem because of their fear of an investigation, whereas that problem might otherwise be resolved simply

through consultation with the authority. This has in any event been the experience of certain other Dutch regulatory agencies in the past. Opportunities to achieve legal compliance without involving the judiciary, which is in fact one of the ultimate goals of prevention, could therefore be lost.

- US studies on the functioning of regulatory agencies raise doubts about whether they are as cost-effective as one would expect or want them to be. This can be especially problematic if the fines that are imposed in the event of non-compliance are used to finance the agency, which is always (directly or indirectly) the case. If a private law enforcer operates on a no cure, no pay basis, the same kind of "agency problem" arises, but the situation there is, in our opinion, less "problematic" since the relationship between private law enforcers and the enforced is probably more equal.

18. Public authorities are also entitled to bring collective actions⁸ but have so far not exercised this right probably due to the lack of resources/capacity/policy and (probably) know how. To what extent this will change for the better with the establishment with the new Dutch Consumer Authority⁹ remains to be seen.

5. **In non-representative group litigation, who may initiate group litigation, and in what circumstances? In what types of cases have parties/lawyers attempted to use the group litigation process? What role have judges played in conferring group litigation status on cases? What are the barriers to parties/lawyers using the group litigation mechanism (e.g. funding problems, difficulty determining whether group litigation would be efficient & effective, judicial attitudes)? Are there features of your country's civil litigation system that either facilitate or deter group litigation (presence or absence of contingency/speculative fee system, limits on lawyer advertising, etc.)?**

19. The Dutch legal system does not provide for non-representative group litigation.

6. **How many lawsuits have proceeded in each litigation form over the past 5 years? If representative or group litigation requires judicial approval, please indicate the number of representative or group actions that have been attempted and the number in which approval was granted. Please indicate the source of any numbers you provide. If no "hard" numbers are available, please provide estimates.**

⁸ Article 3:305 b CC.

⁹ More information in English about the new Dutch Consumer Authority can be found at <<http://www.consumentenautoriteit.nl/ca/content.jsp?objectid=5335>>

20. We provide the requested information in two tables. You will find there only the matters that have been resolved through the two set of rules we discussed earlier and that have been reported in legal journals.

Published Collective Actions 1994-2007			
Case	Background claim	Instance and date	Claim
Pensionado's	The price of the health insurance was raised by these insurers because the customers lived abroad.	Court, summary proceedings, January 2006, NJ 2006/199	Declaration that the raising of the price is unlawful
Asylum seekers	This case was about the 48-hours procedure designed by the Dutch Government concerning asylum seekers.	Supreme court, September 2004, NJ 2006/28	Declaration that the '48-hours procedure' was unlawful
SGP I	The SGP is a religious political party which didn't accept women in active political functions.	Supreme court, September 2004, NJ 2005/474	Declaration that the party was acting unlawful
SGP II	The Dutch government subsidized this political party whilst it didn't accept woman in active political functions. The Dutch government was thus violating the UN Women treaty	Court, September 2005, NJ 2005/473	Injunctive that the government stops the subsidy
Case	Background claim	Instance and date	Claim
Mp3 music	This case was about linking to web pages offering free mp3 files	Court, may 2004, NJ 2004/357	Injunctive to stop linking to mp3 web pages
Dumeco	Labour law, reconstitution of a group of companies, laying off a group of employees	Cantonal judge, December 2003, NJ 2004/158	Injunctive to stop the lay off of a group of employees
Pig farming	Reconstitution of Dutch pig farming	Supreme court, June 2002, NJ 2003/689	Declaration that a part of the 'wet herstructurering varkenshouderij' was unlawful
Legionella	Legionella bacterium on the West Friese Flora causing the Legionnaire's disease to various visitors of the Flora	Court, December 2002, NJ 2003/68	Declaration that there was a wrongful act
Kuipers Logistics	Concerning a dispute about a collective labour agreement	Supreme court, March 1998, NJ 1998/709	Injunctive to pay a certain compensation to employees
Philips	The shareholders of Philips NV sued Philips because the financial forecast was not as positive as stated by Philips. Loss of share value	Supreme court, November 1997, NJ 1998/268	Declaration that Philips acted wrongful by advertising the way it did
Pyramid scheme	Pyramid scheme, dissolving agreements	Court of appeal, October 1997, NJ 1998/251	Declaration that the agreement is invalid

Nuts	Health insurance, raising the price of the health insurance	Court of appeal, December 1995, NJ 1997/214	Declaration that the raising of the price is unlawful
Coberco	Concerning the annual accounts of Coberco	Court of appeal, October 1996, NJ 1997/113	Declaration that the annual account is invalid
Notary	Notary's duty to provide for the mortgagees	Supreme court, September 1995, NJ 1996/629	Declaration that the notary acted unlawful by violating his duty of care
Coop AG	Lead manager's liability, issuing of bonds	Supreme court, December 1995, NJ 1996/246	Declaration that the lead manager acted unlawful by advertising the way it did
Pig vaccination	Vaccination against a pig disease	Court of appeal, October 2002, NJ 2003, 116	Declaration that the pig breeders undue paid the ministry of agriculture
World Online (WOL)	Misleading prospectus by market introduction of WOL	Court Amsterdam, May 2007, JOR 2007/154	Declaration that the banks and WOL are liable to the shareholder for the misleading information in the prospectus
Vie d'Or	Bankruptcy of Vie d'Or	Supreme Court, October 2006, JOR 206/297	Declaration that actuary is liable for keeping up the appearance of solvability of Vie d'Or
Vie d'Or	Bankruptcy of Vie d'Or	Supreme Court, October 2006, JOR 206/296	Declaration that accountants are liable for their approving declaration
Vie d'Or	Bankruptcy of Vie d'Or	Court of Appeal The Hague, May 2004, JOR 2004/206	Precedent to cases JOR 206/29 and JOR 206/296
Case	Background claim	Instance and date	Claim
Vie d'Or	Bankruptcy of Vie d'Or	Court The Hague, June 2001, JOR 2001/215	Precedent to JOR 2004/206
World Online (WOL)	Misleading preliminary prospectus by market introduction of WOL	Court Amsterdam, October 2004, JOR 2004/329	Injunction for bank to pay damages to misled shareholders
World Online (WOL)	Misleading prospectus by market introduction of WOL	Court Amsterdam, May 2007, JOR 2003/174	Injunction for bank to pay damages to misled shareholders
Fortis Bank	Asset manager did not have a licence at his disposal	Supreme court, December 2005, JOR 2006/20	Declaration that the bank violated its duty of care
Fortis Bank	Asset manager did not have a licence at his disposal	Court of appeal Amsterdam, February 2004, JOR 2004/110	Precedent to JOR 2006/20
Fortis Bank	Asset manager did not have a licence at his disposal	Court Haarlem, February 2002, JOR 2002/102	Precedent to JOR 2004/110 and JOR 2006/20
Via Net	Market introduction of Via Net on AEX and Nasdaq	Court Amsterdam, December 2005, JOR 2005/279	Declaration of misleading advertising

BeFra	Asset management without a licence	Court Amsterdam, September 2005, JOR 2005/277	Declaration that the AFM and the banks acted unlawful
Ahold	Annual accounts	Court Amsterdam, April 2004, JOR 2004/131	Demand to issue the annual accounts
ABN AMRO/ WOL c.s.	Prospectus liability	Court Amsterdam, December 2003, JOR 2004/79	Injunction for bank to pay damages to misled shareholders
VEB/HIM	Public offering	Court Rotterdam, February 2000, JOR 2000/57	Demand for information
Consumentenbond/ASR	General terms	Court of appeal 's-Gravenhage, august 1998, JOR 1999/78	Declaration that the general terms are unreasonably

Court-approved collective settlements since the inception of the Dutch legislation in 2005			
Case Name	Background of the Claim	Highlights/Significance	Status
DES	Use of DES-drug during pregnancy and effects DES might have on unborn female and male children.	Fund consisted of 35 million euro. This was the first court approved opt out class settlement ever in the Netherlands and in Europe.	Settlement was approved on 1 June 2006.
Dexia	The Dexia case involved re securities leasing by the Dexia Bank. Re securities leasing is an investment product enabling retail investors to buy listed stock with borrowed money. The allegations have been made that the Bank has given misleading or at least inadequate information about the product and its risks.	The Dutch Act on Collective Settlements was originally meant for the resolution of mass exposure claims and mass disaster personal injury claims like in the DES case. In the Dexia case it became clear that it could be also used with relation to financial products or services.	The opt out settlement was approved by the Court on 25 January 2007; the opt out period expired on 1 August 2007. There have been 24.700 opt outs, whereas 400.000 individuals have purchased different types of those kind of financial products.
Shell	Drop down of Shell shares after re-categorisation of Shell reserves and announcement about that in the media.	This settlement can be seen as a pilot that explores the potential of the Dutch legislation on collective settlements to contribute to the achievement of a Pan European settlement in addition to a class settlement for United States claimants. Up to now those issues have been entirely resolved in the US.	Still pending

7. **In representative litigation**, must possible class members be informed of the initiation of the litigation and, if so, how? *Do courts have oversight authority for the notification process? Please provide any information you have about the types of notification used, their scale, and costs. If parties are required to opt-in, what has been the experience with regard to that? What are the barriers to participation in representative suits? How are class members kept informed of*

developments, and to what extent can they exercise control over decisions, or take part in the process if they wish?

21. Only in relation to court-approved collective settlements there is judicial oversight of the notification process. ICT turns out to be of a great importance in the communication with plaintiffs and other interested parties. In the Vie d'Or, Dexia and DES-matter for example websites have been designed where information about the process can be obtained in addition to the Courts' Services website where all relevant court documents can be found. The websites of The Dutch Consumers' Association and the Dutch Shareholders' Association play also an important role in the communication with group members.
22. An (underestimated) barrier in representative litigation seems to be funding and the related "free rider"-problem rather than participation of class members. Another obstacle – that sometimes turns out to be negative for defendants and sometimes for plaintiffs - seems to be the absence of a case management technique like "subclassing". It is interesting to note that the media, more specifically consumer-oriented television programmes, proved to play an important role with respect of the participation rate of consumers (see also the answer to question 12, nr. 26). It remains to be seen what the role with this respect will be of the earlier mentioned Consumer Authority.
8. **In non-representative group litigation, must the named parties be informed that the litigation is proceeding in group form? Can parties/lawyers whose cases are similar to others that are proceeding in group litigation form exclude themselves from the group litigation and proceed independently, and if so how? Are group members kept informed of developments, and to what extent can they exercise control over decisions?**
23. The Dutch legal system does not provide for non-representative group litigation.
9. **In group litigation, are there special case management procedures (e.g. case pleadings, scheduling, development of evidence, motion practice, test cases, preliminary issues)? Are there features of your country's civil litigation system that either facilitate or hinder the development of cases that proceed in representative or non-representative group form?**

24. There aren't specific procedural rules for collective actions and collective settlements other than the ones discussed in the answers to questions 3 and 7. No specific motions, presentation of evidence etc. However some court practises seem to emerge with respect to the resolution of mass disputes in the Dexia matter, like setting case management conferences where logistics are being dealt with, appointing an expert witness with respect to issues in controversy and recently (in April 2007) rulings in "3 test cases". The latter "practice" has met criticism as the test cases have been selected by the court on its own, without informing the parties. The court's hope has obviously been that the rulings in the test cases would lead to "mass individual settlements". It is too early to say whether the court's intention succeed. A "Dutch typicality" is probably the involvement of the politics with the resolution of concrete mass disputes. Sometimes it leads to the ad hoc appointment of a kind of "special masters" (in Dexia: 2 times), sometimes to inquiries by the Parliament that lay the basis for negotiations with defendants or for ad hoc administrative solutions (Bijlmer Amsterdam air crash wasn't really litigated). This stems obviously from the idea that mass disputes are something extraordinary that has to be dealt with in a different way. As mass disputes occur more and more often and become less extraordinary it is to be expected that the current collective action/settlement devices will be (improved and) used more often.

10. In group litigation, what proportion of cases is resolved through party/attorney negotiation and settlement, and what proportion is resolved through judicial or jury decision? If cases are settled, who participates in negotiating settlements? Does the court or do other public officials have responsibility for assuring fairness of any negotiated outcomes, and if so what procedures exist to address the fairness issue? What has the experience of oversight been? Have there been controversies over the fairness or reasonableness of settlements? If cases are tried, how is evidence presented on behalf of the class or grouped claimants?

25. See the answers to question 2 (numbers 7-11), question 3 (number 13) and question 4 (number 15). In the Des and the Dexia settlements there have been some comments that the settlements are not fair. In the Des case because the settlement excludes some groups. In the Dexia settlement because the "settlement amounts" were perceived to be too low (mainly organisations that operate on no cure no pay basis claimed that) and because the settlement differentiation scheme doesn't differentiate enough (academics).

- 11. What remedies are available in representative and non-representative group litigation? When group litigation is resolved with the payment of monetary damages, how are damages allocated among claimants? Do judges exercise oversight of fairness or process of allocation? Please provide data on outcomes of representative and non-representative group litigation over the past five years. Please indicate the source of any outcome data you provide. If no "hard" data are available, please describe the diversity or range of outcomes to the best of your ability.**
26. See the answer to question 2 (number 3): collective actions for damages are not allowed under Dutch law. The allocation process of payments resulting out of court approved collective settlements is an aspect that has to be considered by the court when it decides about the fairness of the settlement (see also the answers to question 3 (nr. 13, c, e and h). The Des settlement provides for example in ADR in case class members do not agree with their submission to a certain damage category. The "AD-Resolutors" that are being appointed by the parties involved are being perceived by the public as distinguished, impartial and capable "public figures".
- 12. Who funds group litigation: the state, legal services organizations, NGOs, private lawyers, or the claimants themselves? Is funding perceived to be a problem, and if so, is the problem perceived as too much funding or too little? What problems have those who wish to proceed in representative or non-representative group litigation encountered in obtaining funding?**
27. Funding and cost aspects always raise important questions from an access to justice point of view, but are even of a greater importance in collective actions because of the free rider problem that is in fact an important cost-sharing problem in mass litigation. In the Netherlands, lawyers who are members of the bar are not, or at least not yet,¹⁰ permitted to charge contingency fees, so entrepreneurs fill the gap. Various funding models have been developed where actions are brought through special purpose vehicles, as referred to above. One example is where a company or a foundation makes a contingency fee arrangement with individual plaintiffs and instructs lawyers on a lodestar basis. Although there have been some mass disaster accidents in the Netherlands funded largely through legal aid and legal insurance, their involvement was on an ad hoc

¹⁰ The new Dutch Minister of Justice and a former Professor of Administrative Law at Tilburg University (E. Hirsch Balin) announced in May 2007 that he is considering a new pilot with contingency fees but not in the area of personal injury claims if it depends on him. http://www.volkskrant.nl/binnenland/article431007.ece/Experiment_met_no_win%2C_no_fee_in_a_dvocatuur>. His predecessor and fellow party member (CDA) Minister Donner put a ban on a pilot of the Bar in the field of personal injury claims. The pilot looks more like the UK-style conditional fee agreement than the US-style no cure, no pay (whereby the fee is a percentage of the award).

basis. It is not possible to speak of a conscious policy development in this field, although some initiatives seem to be emerging that aim at better coordination and cooperation between legal aid departments and legal expense insurers in mass litigation matters. However, those initiatives are at a very early stage. Both legal aid departments and legal expense insurers face the same kind of problems when they try to handle the resolution of mass claims expeditiously and efficiently. Under the relevant statutory provisions, for example, the client has the right to a lawyer of his own choice. Collective resolution has many advantages but has also some disadvantages: the client's decreased influence on the litigation strategy is one of those.

28. Another funding method is being applied in the Dexia case, where the 90,000 injured people who supported the action paid €45 to a foundation and this funding was used to start collective actions. However, this method obviously causes logistic problems connected with collecting the contributions and making initial contact with the group members. Also, the donation is voluntary, which leaves open the possibility for free riders. A clear trend is that the media and, more specifically, consumer-oriented television programmes¹¹ are playing an increasing role in the initial phase in which contact is made between group members and lawyers and other legal service providers.
29. The Dutch Consumers' Association and the Dutch Shareholders' Association (VEB) can be seen as "professional funders" of collective actions but their possibilities are limited as they have to finance the actions from membership fees and donations. It must be noted that the resources of the Consumers' Association seem to be more limited than those of the VEB.
30. The above-mentioned funding solutions are not optimal from a plaintiffs point of view so this is an area that could be improved. There is still resistance to introducing no cure, no pay funding arrangements, as the public and thus the political perception is that this would encourage a US-style litigation culture. Interestingly enough, recent empirical research on the Dutch litigation culture shows that such a development is absent. The number of lawsuits is not increasing, although higher damages are being claimed, such as for pain and suffering. The highest amount ever awarded for pain and suffering in the Netherlands was € 191,949. This was awarded in 1991 to a person infected with the HIV

¹¹ Like Radar (<http://www.trosradar.nl/>) and Kassa! (<http://kassa.vara.nl/portal>).

virus during a hospital treatment.¹² Punitive damages are unavailable in the Netherlands.

31. In the academic literature there is an increasing recognition of the advantages offered by no cure, no pay from an access to justice perspective. It is rather odd that lawyers who are members of the bar are not allowed to enter into such arrangements while lawyers who are not members of the bar are allowed to do so in mass claim cases, without being subject to any adequate external control or supervision¹³. There are also some authors who propose a more structured and centralised way of financing collective actions through legal aid¹⁴ and legal insurance, as the latter is increasing in popularity in the Netherlands.
 32. In principle, the Netherlands applies the English (loser pays) rule. There is, however, a big difference between the way this rule is applied in both countries. Whereas in the UK the loser in principle runs the risk, as we have heard, of having to pay all of the winning party's real costs, under the Dutch regime the loser pays only a small portion of those costs. The amount awarded is based on figures fixed by the courts and based on the amount in dispute and the number of court-related activities. Under the Dutch rules on costs, the winning party is entitled to recover legal expenses incurred in the pre-trial phase if those are reasonable.¹⁵ This test has been further developed in case law.
13. **Costs and benefits. *How are attorneys in group litigation paid? Please indicate whether there are special rules for paying attorneys in representative and non-representative group litigation that do not pertain in ordinary civil litigation. Do courts have responsibility for determining or approving fees in these cases? How do the private costs of group litigation compare to the costs of ordinary civil litigation, or any other available methods for resolving such situations? Do attorneys make more, the same, or less, in proportion to their time, effort and risk, by comparison to ordinary civil litigation? How do costs compare with the outcomes achieved? Please provide any quantitative data available on litigation costs over the past five years, and any available data comparing costs to outcomes Please indicate the source of any cost and outcome data you provide. If no "hard" data are available, please describe the range of costs to the best of your ability, and share your perceptions of the relationship between costs and outcomes.***

¹² Smartengeldgids 2006, p. 127.

¹³ Representation by members of the bar is not required at certain courts.

¹⁴ Similar on the UK practise of the Multi Party Litigation Fund.

¹⁵ The "dubble fairness test": art: 6:96 lid 2 b and c CC.

33. In the Netherlands there is very little transparency and publicly available information regarding either the costs or the outcomes of mass dispute cases. With respect to the three collective settlements that have been submitted for court approval, certain figures about the outcomes are known. The settlement fund in the DES case was €35 million, in Dexia € 1 billion and in Shell (if the settlement is going to be approved): \$ 448, 6 million (conditional). There is no requirement that attorneys' fees in collective actions be approved by the court as is the case in the US. We have requested numerous legal aid departments and legal insurance providers, as well as the Dutch Board for the Judiciary, to provide us with some figures, but they could not provide us with the requested data as their administration systems are not tailor made to file that kind of information (yet). See also the answer to question 12.
- Costs judiciary:
34. In the Dexia matter the Amsterdam Court of Appeal established a team of 30 people (10 of whom are judges) to deal with the individual claimants who opted out of the collective settlement. The opt out rates in the Dexia-case are consistent with the average opt out rates in the US.¹⁶ It is not clear yet whether all out outs will result in individual actions.
- 14. Is the burden that group litigation places on the court more, the same, or less, than in comparable non-representative, non-group litigation? What is the average time to dispose of a group case, and how does this compare to comparable non-representative non-group litigation? Please provide any quantitative data available on court costs and time to disposition over the past five years. Please indicate the source of any data you provide. If no "hard" data are available, please describe the range of outcomes to the best of your ability.**
35. Such data are not available. The impression is that dealing with mass claims by the judiciary not using the existing collective action/settlement devices places much greater burden on the courts than "simply" using those devices. There has been a recent research by the Ministry of Justice about the average time to dispose an ordinary civil claim,¹⁷ but the information that is given there is not of much use if it can not be compared with statistical data about the disposition of collective actions. In the Vie d'Or litigation the collective action procedure (incl. Supreme

¹⁶ T. Eisenberg & G.P. Miller, "The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues", N.U.Y. Law and Economics Research Paper No. 04-004, 2004.

¹⁷ In 49% of the ordinary civil cases the court rules within one year: R. Eshuis, Sneller procederen: empirisch onderzoek naar de afdoening van civiele bodemprocedures, Rechtstreeks nr. 2, 2005.

Court judgement) lasted 13 years and it is not resolved yet. The last two collective settlements were handled relatively expeditiously.

15. What are the current debates in your jurisdiction over the application of collective litigation rules and their consequences? *How intense are the debates, how pressing is any need for reform? Have there been important evolutionary steps or trends? What major developments might follow?*

36. The current debates are framed by the interim and final reports of the above-mentioned commission that reviewed the Dutch Code of Civil Procedure, more specifically its recommendations and the spin off of it in a recent dissertation of one of the members involved. The decision of the Supreme Court in *Vie d'Or* that was mentioned earlier is also significant in this respect.

37. The debates concern mainly: (i) funding, (ii) the question whether collective actions for damages should be allowed under certain conditions, (iii) the need for an "adequacy of representation" test for the class lawyers, (iv) the question how to handle large-scale small claims litigation and (v) the recent developments on EU-level (consumer and anti trust). Much thought is also given to the question how to make sure that the collective settlement is fair and reasonable and offers defendants at the same time "finality". The Dutch Ministry of Justice is going to start with the evaluation of the new Act on collective settlements in the autumn of 2007.

16. Overall, how would you evaluate the mechanism(s) success in achieving major changes in behaviour, activities or policy, relative to the costs incurred by public and private actors?

38. It is hard to say whether the collective treatment devices achieve major changes in behaviour. The experiences with the new collective settlement device are however mainly positive if one evaluates them in terms of achieving fast and reasonable compensation for claimants and offering final resolution to defendants, however many things can be improved. The potential of devices like the one provided under the Dutch Act on Collective Settlements in achieving pan-European solutions is noteworthy keeping the Shell settlement in mind and requires further exploration. It is an emerging topic: the last word has not been said yet.