The Dutch Collective Settlements Act and Private International Law

Aspecten van Internationaal Privaatrecht in de WCAM

Dr. Hélène van Lith

Supervisor: Prof. Filip De Ly

Co-Supervisor: Dr. Xandra Kramer

Research Assistant: Steven Stuij LLM

ERASMUS SCHOOL OF LAW
ERASMUS UNIVERSITEIT ROTTERDAM

© 2010 WODC, Ministerie van Justitie. Auteursrechten voorbehouden.

Executive Summary

Topic and Central Research Question

This report analyses the relationship between private international law and collective settlements concluded for the benefit of foreign interested parties under the 2005 Dutch Collective Settlements Act or WCAM. It examines aspects of international jurisdiction, cross-border notification, representation of foreign interested parties, international recognition and applicable law. The principal object of the research was to assess the suitability of existing private international law instruments at the national, European and international levels for the application of WCAM in transnational mass damage cases.

Research Methodology

The research was conducted by analyzing both literature and the results of fifteen interviews with professionals directly involved with WCAM collective settlements. The research includes – where necessary – comparative observations in relation to jurisdictions such as the U.S. and Canada that are familiar with collective or group actions based on an opt-out mechanism like the WCAM procedure.

The Dutch Collective Settlements Act and Private International Law

The WCAM came into force on 27 July 2005. It provides for collective redress in mass damages on the basis of a settlement agreement concluded between one or more representative organisations and one or more allegedly liable parties for the benefit of a group of affected persons to whom damage was allegedly caused. Once such a collective settlement is concluded, the parties may jointly request the Amsterdam Court of Appeal to declare it binding. If the Court grants the request, the agreement binds all persons covered by its terms and represented by the representative organization, except for any person who has expressly elected to opt out within a specific period. Any person having opted out retains his right to initiate individual proceedings against the defendant. While the proceedings regarding the binding declaration are pending, any other proceedings concerning claims in respect of which the agreement provides for compensation are suspended at the request of the alleged liable party.

When a WCAM collective settlement is concluded by representative organizations for the benefit of foreign interested parties, various aspects of private international law come into play. These include aspects of international jurisdiction, cross-border notification, recognition, applicable law and representation of foreign interested parties. This research analyses all of these matters but focuses on the applicability of WCAM settlements to transnational mass damage cases involving interested parties domiciled outside The Netherlands.

Private International Law and the Suitability of Existing Instruments

The analyses of the *international jurisdiction* of the Amsterdam ourt to declare binding a WCAM settlement over foreign interested parties establishes that the Court's jurisdiction under the jurisdiction rules of European instruments is ill-founded and based on a 'mismatch' of concepts such as 'interested parties' and 'persons to be sued'. However, a choice of forum

in favour of the Amsterdam Court, incorporated into the settlement agreement, would provide a practical solution. From a European Union policy perspective, the uncertainties surrounding the jurisdiction question in collective settlements may deserve and require clarification through preliminary rulings from the Court of Justice of the European Union. New legislation at the European level specifically dealing with collective redress may also be advisable (see Section 2 and Recommendation 7.1).

Whether a WCAM collective settlement binds foreign interested parties involves the question of *recognition* of a binding declaration of a WCAM settlement by the Amsterdam Court outside The Netherlands. The current terminology employed by European private international law instruments leaves uncertainty as to whether a binding declaration of a WCAM settlement should be considered as a judgment or as a court settlement. Several recommendations are made in order to clarify the ambiguity in the current text of the WCAM with respect to collective settlements concluded before the Amsterdam Court is requested to approve them (Recommendation 7.2). It is furthermore recommended that a decision to declare a WCAM settlement binding as a judgment should be automatically recognized within the scope of European instruments. The consequences are two-fold: 1) The binding effect of collective settlements given by the WCAM on foreign interested parties will be the same as in a Member or Contracting State in which enforcement of the settlement is sought. As a consequence, other Member or Contracting States have to recognize the preclusive effect of the WCAM settlement declared binding by the Amsterdam Court and this prevents re-litigation of the claim settled under the agreement. 2) A binding declaration may not be recognized on the basis of one of the four grounds of refusal of recognition embodied in the European instruments, including when the interested party has not properly been notified or when the WCAM opt-out procedure results – in a concrete case – in the manifest infringement of a fundamental right and therefore violates the *ordre public* of the recognizing State (Section 5).

Cross-border notification to interested parties outside The Netherlands of proceedings in an Amsterdam Court and of the opt-out procedure raises questions as to whether current European and international instruments are well-equipped to notify large numbers of foreign known and unknown affected persons. Is notification by registered mail or by the publication of announcements in daily newspapers and websites still an adequate method of notification and do they comply with fundamental fair trial standards? The research demonstrated that the current European and international instruments are adequate to deal with the notification of large numbers of known interested parties in collective settlements, but that doing so is a laborious task which involves considerable cost. Unfortunately the European and international instruments dealing with cross-border notification do not regulate the notification of unknown interested parties. This is therefore left to the notification provisions of the WCAM. The latter do not explicitly regulate the notification of foreign interested parties, but the Court retains discretion to prescribe the proper method to notify these persons on a case-by-case basis. It is recommended that this discretion is made explicit so that the Court can, during a pre-trial hearing, order or approve specific methods of notification (see Section 3 and Recommendation 7.3).

Representation of foreign interested parties is not a classic issue of private international law. However, due to its importance in WCAM collective settlements, the question of representation of foreign interested parties was considered in order to determine whether foreign known and unknown interested persons are sufficiently represented. The research concludes by recommending that the Amsterdam Court should explicitly consider and approve the adequacy of the method(s) chosen by the parties to guarantee the sufficient representation of foreign parties and that this may be anchored in WCAM itself (Section 4 and Recommendation 7.4).

When a collective settlement is concluded for the benefit of foreign interested parties, the *law* governing specific issues may be *foreign*. This may be the case with the reasonableness of the agreed compensation and of the validity and interpretation of the settlement agreement. Regarding the assessment of reasonableness, it is recommended to require the inclusion of a damage scheduling clause in the settlement agreement which takes into account differences in applicable law as to the compensation awarded. This implies a brief inventory of applicable laws during the negotiation of the settlement agreement instead of during the court proceedings for a binding declaration. Nonetheless, the Court is left to appreciate the eventually applicable mandatory provisions of the *lex fori* (Section 6 and Recommendation 7.5).