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Mass claims in the Netherlands: a shift of paradigm?

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In the Netherlands, an increasing number of so-called "claim foundations" endeavors to recover damages arisen from misconduct by companies and (financial) institutions. Well known examples are claims for hidden charges in financial products sold to consumers (like the "Woekerpolis" and "DSB" claims), loss of investment (Shell reserves claim, the "Converium" matter) and misrepresentation of the qualities of consumer goods (like Volkswagen's diesel emissions).

The law allows a special foundation to seek a court order that holds the company liable for the loss incurred. The Dutch Act on Collective Settlement of Mass Claims (*Wet Collectieve Afwikkeling Massa-schade* or "*WCAM*") makes it possible that settlements between a foundation and the company are declared generally applicable to all parties who incurred loss by the Court of Appeals in Amsterdam. Under European regulations, the Court's decisions are acknowledged and eligible for execution throughout the European Union.

Since 2015, the Dutch legal community is discussing a new version of the *WCAM* that gives the court a more substantive role in the settlement of mass claims and allows the court to appoint an exclusive designated representative to represent all claimants in a particular matter. This should curb the sprawl of claim efforts by various claim foundations that are all seeking to recover the same damage.

The possibilities offered by the *WCAM* have attracted foreign investors and advisors to the Netherlands and put the Dutch *WCAM* practice in the international spotlight. A ruling by the Amsterdam District Court of 13 September 2017 shows us that the current practice of claim foundations meets competition from an entirely different claim form. In this cartel case, customers (shippers of goods) sought remedy for financial losses caused by a cartel of air cargo carriers that made forbidden (pricing) arrangements. Instead of setting up a special foundation (*claimstichting*), a Dutch special

purpose vehicle in the form of a limited liability company (*BV*) was established and started a court case against the cartel members to recover the loss. The *BV* in question is (indirectly) owned and controlled by an Australian law firm. The shippers transferred their claims to this *BV* against a deferred payment consisting of a percentage of the anticipated financial result of the litigation effort.

The transfer of the claim by the injured parties to the BV was fought vigorously by the lawyers representing the members of the cartel, who argued that the transfers were incomplete, invalid, and the set-up of the claim effort a violation of (Dutch) public order. In their ruling of 13 September 2017 the judges of the Amsterdam Court found the claim structure acceptable, and the transfers valid. They also ruled that the financial return for the external funders of the BV (20-40% of the proceeds) was not unreasonable and not a violation of law/public order. It may be too early to announce that this ruling sets the, or a, new standard for handling mass claims in the Netherlands, because we do not know if an appeal will be brought by the cartel members and what the outcome will be. It should also be noted that the matter was ruled upon in a dispute between the cartel members and the *BV,* to which the shippers were not a party.

Nevertheless, this interesting and important development may have lifted the veil of what the future of handling mass claims in the Netherlands has in store. It also puts the perceived benefits and limitations of the *WCAM* in a new perspective. Using a *BV* instead of a claim foundation appears to offer a more commercial approach to recover mass financial loss, more flexibility, and limit some of the procedural complications tied to the (new) *WCAM*. The flip-side is that using a *BV* means limited judicial oversight over the claims process and the claimant's interests. Ironically, more judicial involvement seems to be an important aspect of the new *WCAM*. In other words: the trends in legislation and market practice move in different directions.

The ruling of the court of 13 September 2017 can, and undoubtedly will, give rise to an interesting debate about mass claims in the Netherlands.

By Jan Pas – HBN Law Amsterdam offices
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SINCE 1938

CONTACT INFORMATION

For more information, please contact:

Jan Pas
Amsterdam
jan.pas@hbnlaw.com
+31 20 303 3020

Chris de Bres
Bonaire/Curaçao
chris.debres@hbnlaw.com
+599 717 6944

HBN Law Amsterdam
Concertgebouwplein 7
1071 LL Amsterdam, Nederland
T +31 20 303 3020
F +31 20 671 8008
info@hbnlaw.com

HBN Law Aruba
Beatrixstraat 38
Oranjestad, Aruba
T +297 588 6060
F +297 588 6668
info@hbnlaw.com

HBN Law Bonaire
Kaya Korona 40
Kralendijk, Bonaire
T +599 717 6944
F +599 717 5628
info@hbnlaw.com

HBN Law Curaçao
Huize Belvedère, L.B. Smithplein 3
Willemstad, Curaçao
T +5999 434 3300
F +5999 434 3355
info@hbnlaw.com

HBN Law St. Maarten
W.G. Buncamper Road 33
Philipsburg, St. Maarten
T +1 721 542 2272
F +1 721 542 4381
info@hbnlaw.com