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Issues regarding jurisdiction and the recognition and enforcement of judgments in cross-border mass disputes relating to financial services

M.W.F. Bosters

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Contents

Glossary/Abbreviations

ADR	Alternative dispute resolution
Collective redress mechanism	Procedural mechanism through which a mass dispute can be resolved
DCC	Dutch Civil Code (or *Burgerlijk Wetboek* (*BW*))
DCCP	Dutch Code of Civil Procedures (or *Wetboek van Burgerlijke Rechtsvordering* (*RV*))
ECJ	European Court of Justice or Court of Justice of the EU
HR	Dutch Supreme Court (*Hoge Raad*)
KapMuG	German Capital Market Model Case Act (*Kapitalanleger Musterverfahrensgesetz*)
Mass dispute	Disputes involving numerous claimants by means of a single action or procedure
NIPR	Journal of Dutch Private International Law (*Nederlands Internationaal Privaatrecht*)
PIL	Private international law
Plaintiff	A victim that has started a collective procedure to resolve a mass dispute
Interest group	Entity promoting the interests of the various individual claimants/victims in a mass dispute (e.g. the foundation or association that represents the interests of a group of victims in both the collective action procedure and the WCAM procedure)
Standard redress mechanisms	Redress mechanisms used in disputes between two parties
WCAM	Collective Settlement Act (*Wet collectieve afwikkeling massaschade*)

Chapter 1
Introduction

Abstract There are many types of mechanisms to resolve a mass dispute. Before analysing the private international rules in relation to the use of collective redress mechanisms, the types of collective redress mechanisms are structures first. In addition, the structure of this book will be clarified in this chapter.

Keywords Types of collective redress mechanisms · Goals of collective redress · Goals of the Brussels Regulation

1.1 Collective Redress and Cross-Border Mass Disputes

Collective redress is a term used in the European Union to describe a variety of judicial mechanisms for resolving mass disputes, i.e. disputes in which numerous claimants bring a single action or procedure.[1] Although actual collective redress mechanisms have existed since the 1960s[2] in the US, it was not until the late 1990s that these mechanisms really started to evolve in Europe.[3] At first, most mass disputes seemed to be confined within national borders, resulting in the resolution of mass disputes on a national level. However, the global increase in cross-border trade and financial transactions—further fuelled within Europe by the formation of both the European Union and the European Economic and Monetary Union, as well as the use of modern telecommunications technologies such as the internet—has led

[1] The use of the term collective redress has a political background and is intended to avoid the negative connotation that class actions have in Europe. See for example Hodges 2014, pp. 67–89 and Hodges 2008, pp. 1–7 for general information on collective redress.
[2] Although there were some procedures that had 'collective elements' before 1960, the current US class action—which is seen as one of the first real collective procedures—attained its current form in 1966. For an extensive study on the history of collective proceedings see Yeazell 1987; Yeazell 1977, pp. 868–869.
[3] See Hodges 2008, pp. 4–5.

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to the increase of cross-border mass disputes, including in the field of financial products and services.[4]

This overall increase in cross-border mass disputes has given rise to new legal issues.[5] The standard dispute resolution mechanisms[6] are based on a two-party conflict, whereas a defendant in a collective redress procedure is not confronted with a single claimant but either with a representative entity representing the interests of a group of claimants, or with a formal joinder of plaintiffs or a group of individual plaintiffs. This has raised various fundamental questions. What about the preclusive effect in the case of a collective procedure which is lodged by an interest group? Should it be possible for an interest group to claim damages on behalf of individual plaintiffs? How should the damage be calculated?

This radical departure from simple two-party disputes has also raised questions for cross-border mass disputes. The rules of private international law too are based on the notion of a two-party conflict and are not designed for cases involving numerous claimants. So, in what way could the private international law rules be applied in cross-border mass disputes? Which court could assume jurisdiction over a cross-border mass dispute if, for example, the defendant is a Dutch company registered on the London Stock Exchange and the claimants include not only Dutch shareholders but also German, Belgian and French shareholders? As there are various grounds on which a court can assume jurisdiction in a two-party conflict, what rule can and/or should be used to assume jurisdiction in a collective redress procedure? And is there any difference between the way the rules on private international law apply to the various collective redress mechanisms?

Besides questions regarding the rules on which a court bases its jurisdiction, the European rules that deal with the recognition and enforcement of judgments also give rise to new issues. When a mass dispute is resolved in the Netherlands, for example, what force does the Dutch judgment have in Germany (which, for example, has a different resolution mechanism than the Netherlands) and does it make any difference if some parties had commenced a collective redress procedure in Germany to resolve the same mass dispute?[7] Is it possible to have the Dutch collective redress judgment recognised and enforced in Germany? And does this depend on the type of collective redress mechanism that is used, or on other factors?

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[4] EC Directorate-General for Health and Consumers (DG SANCO), *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union,* Berlin: Civic Consulting 2008, p. 44. See also Hensler 2009. It is expected that globalisation will also lead to mass disputes in different fields of law, such as product safety and intellectual property. See Hensler 2011, pp. 249 et seq.

[5] Issues that will arise in relation to cross-border mass disputes are for example the role of the judiciary, opt-in mechanisms versus opt-out mechanisms, and issues concerning the possible ways of financing a collective redress procedure. In relation to such issues see for example: Layton 2012; Muir Watt 2012. See also Karlsgodt 2012, pp. 155–168.

[6] For example, a simple claim for monetary damages based on tort.

[7] The same dispute with the same group of victims and the same factual grounds.

These are just a few of the issues that have to be considered in relation to cross-border mass disputes. EU policymakers have been dealing with collective redress and cross-border mass disputes for some time.[8] In June 2013, the European Commission issued a recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law,[9] and a communication on a horizontal framework for collective redress.[10] This recommendation is especially interesting, as it is the first step in determining common principles or guidelines which can be used to regulate and harmonise collective redress mechanisms in the EU. For example, it states that the common principles should be used by Member States to enact laws that contain collective redress mechanisms and thus, because they have been drafted using the common principles in the recommendation, share the same basic principles, take account of the legal traditions of the Member States and safeguard against abuse. The recommendation addresses many issues in relation to collective redress, including issues relating to the structure and organisational aspects of interest groups, the funding of collective redress actions and the use of alternative dispute resolution. In 2017, the Commission will assess whether any further legislative action is required in order to ensure that the recommendation's objectives are met. Although both the communication as the recommendation address cross-border mass disputes, neither of them, contain any proposals relating to cross-border mass disputes and private international law issues, as it is concluded that special rules are not necessary (see Sect. 15.2).

Recently, besides the EU's recommendation on the drafting of laws relating to collective redress as outlined above, there has also been a re-evaluation of the Brussels Regulation. On 10 January 2015, Brussels I-bis replaced the old Brussels Regulation dating from 2000. In spite of a minor reference to collective redress in the Commission proposal, Brussels I-bis does not contain any provision relating to collective redress. As a result, many questions regarding cross-border mass disputes and the private international law issues remain unanswered and unsolved.[11]

As will be explained in the following chapters, the collective redress mechanisms that exist in the EU differ. Due to the differences between European national laws on civil procedure (the principle of procedural autonomy of Member States),[12] the complexity of mass disputes and the fact that this area of the law is still in its infancy, private international law is not framed to cope with mass disputes.

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[8] For an overview of recent developments in the EU see Hodges 2014, pp. 67–69.

[9] Commission Recommendation of 11 June 2013 on common principles for collective redress mechanisms in the Member States for injunctions against violations of EU rights and claims for damages arising from these violations. COM (2013) 3539/3, 11.6.2013.

[10] European Commission document COM (2013) 0401 [11.06.2013]. See for an analysis of the Recommendation in relation to representative actions Tillema 2014 and Duivenboorde 2013.

[11] Stadler 2013, pp. 483–488. See for example the recent publication in relation to collective redress in Europe: Nuyts 2013.

[12] See for example Tzankova 2011.

1.2 Parameters of This Book

The focus of this book is on 'European' mass claims that concern financial products or services.[13] Because the rules on private international law make a clear distinction between contractual and tortious disputes, this book will only be focused on two specific types of financial mass disputes in order to illustrate the functioning of various collective redress mechanisms and to identify the various private international law issues that those raise. The first type of dispute that will be studied concerns the so-called tortious 'securities cases' in which misleading information on or statements by a company registered on one or more of the EU's stock exchanges causes a fall in the share price. These are the so-called misrepresentation cases, where either misleading statements were made or important information was withheld from the market/the investors. The Deutsche Telekom, Shell and Converium cases are important examples of this type of securities mass disputes. The second type of financial mass dispute that will be studied concerns contractual 'financial product/services cases', where a financial institution sells a product or service to its customers without sufficiently disclosing information about the qualities or the characteristics of the product, which later turns out to be much riskier than anticipated. Strictly speaking, the customers can also be companies (SMEs, not only individuals).[14] Examples of this type of dispute in the Netherlands are the Dexia[15] and Vie d'Or consumer cases. The case against RBS and the rating agency S&P[16] is an example of this type of financial disputes in the non-consumer setting.

These two types or categories of mass disputes cover two main categories of financial mass disputes: those grounded in tortious claims (the securities disputes) and those grounded in contractual claims (the financial product disputes).[17] Since only collective redress mechanisms[18] and therefore civil procedure will be covered in this book, the substantive aspects of these two examples of mass disputes will not be dealt with.[19] This book only covers financial mass disputes as opposed to

[13] Products or services offered by insurance companies, banks, pension funds, credit card companies, consumer finance companies, stock brokers and investment funds.

[14] In the European context the term consumer refers to an individual and not a company. For the definition of the term consumer see Article 17 Brussels I.

[15] For a summary of the Dexia case see Tzankova 2012, pp. 577 et seq.

[16] For more on this matter see, for example: http://www.bloomberg.com/news/2013-12-04/rbs-and-s-p-sued-by-european-cpdo-investors-over-losses.html and http://www.ft.com/cms/s/0/59652f84-27dc-11e2-afd2-00144feabdc0.html (last accessed 30 January 2017).

[17] Although it should be noted that this distinction is not always that strict in practice. Often the same set of facts can serve as a basis for a claim based both on tort and contract.

[18] The mechanism or procedure used to resolve a mass dispute.

[19] The various laws in the EU Member States on which a mass claim can be based, for example prospectus liability, will not be covered in this book. See for an extensive study on the substantive aspects of the liability of listed companies pursuant to—among others—a misleading prospectus Arons 2012.

product liability actions for defective drugs or medical devices, for example, and neither will it cover financial claims resulting from anti-trust damages actions. In geographical terms, the content of this book is limited to the EU, more specifically to those Member States that are party to the Brussels Regulation.

In some countries it is not possible to obtain *monetary damages* collectively. In such a case, often a so-called two-stage approach[20] is followed or applied, where a declaratory judgment that a tort or contractual breach has been committed is collectively obtained (first stage). That judgment serves as a basis for following up individual actions (second stage), where a causal link and damages need to be established. This book will not only cover mass claims resulting in a judgment for monetary damages but also collective redress mechanisms aiming to obtain such a declaratory relief. However, no matter what type of a collective redress mechanism is used, the ultimate goal of such declaratory judgments remains financial compensation.[21] Mass claims that can achieve only injunctive relief have been excluded from the contents of this book, among others because such claims are seen as problematic in the EU, especially from the perspective of private international law.[22]

As is set out in Sect. 1.4, there are roughly three types of collective redress mechanisms with which a claimant might obtain financial compensation: (i) the model case procedure, (ii) the collective action and (iii) the collective settlement. These will be discussed in more detail in Chaps. 2, 3, and 4, together with the application of the grounds of jurisdiction and the rules on recognition and enforcement of judgments in the three types of collective redress mechanisms. In this book, prototypes of the three types of collective redress mechanisms are used in order to analyse the application of the above mentioned private international law. A prototype of the model case procedure is the German KapMuG procedure that was introduced in 2005. A prototype of the collective action is the Dutch collective action that was introduced in 1994. A prototype for the collective settlement procedure is the Dutch act on collective settlement (WCAM) that was enacted in 2005. These specific prototypes are used because they have all been used in practice to resolve disputes concerning financial services (in relation to both contractual and tortious claims). In addition, these various mechanisms are chosen because they all

[20] Such a two-stage approach is also seen in the English representative action, which can be found in Part 19.II of the Civil Procedures Rules. See also Tzankova 2007, p. 34 for a short comparison between the two stage approach of the English representative action and the Dutch collective action. See also Tzankova 2009, pp. 115 et seq.

[21] Applying for a declaratory judgment is therefore just one stage in collective redress proceedings. I will also consider the possibility of claiming monetary damages by means of a declaratory judgment, for example through a "second-stage" individual procedure (see Chap. 3).

[22] See for example the various reactions to the consultation 'Towards a coherent approach of collective redress', which is discussed in Sect. 15.2. See also the Commission proposal on the recast of the Brussels Regulation, in which the abolition of the exequatur procedure did not apply to collective redress proceedings, as there are too many differences in this type of procedure between the various Member States (see Chap. 15).

differ making the application of the relevant rules of private international law different. The difference between these mechanisms makes it possible to analyse the effect the goals of collective redress and the Brussels Regulation have on the various mechanisms and the application in a cross-border setting and make a comparison. Although the conclusions that will be presented in this book apply to the general type of collective redress mechanism,[23] these specific national collective redress mechanisms have their own particular characteristics, and therefore their results might differ.

The only private international law rules[24] covered in this book are those concerning jurisdiction and the recognition and enforcement of judgments as set out in the Brussels Regulation.[25] The application of the conflict of laws in relation to collective redress mechanisms forms an important part of private international law issues that need to be studied further. For practical reasons and due to the fact that the rules on the conflict of laws can be found in various regulations, the conflict of laws will not be covered in this book. Although the conflict of laws is not covered in this book, it does play a role in relation to courts that have jurisdiction in mass disputes. Once a court can assume jurisdiction in a mass dispute, two questions arise with respect to conflict of laws: (i) which law of procedure is applicable/can be used to resolve the mass dispute and (ii) which law—in the case of a private law collective redress action—is applicable in relation to the actual claim and questions regarding liability and the amount of damage? The latter field of private international law, to which questions the Rome I and Rome II Regulations provide solutions, are not dealt with in this book.[26] It does, however, cover the first field concerning the applicability of the law of procedure. When examining questions regarding jurisdiction in relation to certain collective redress mechanisms, it is required to determine which law of procedure applies, as otherwise a court would not know which collective redress mechanism is applicable and can be used. (If it is determined that the Dutch court can assume jurisdiction in a certain mass dispute, it is necessary to determine in relation to which collective redress mechanisms that court can decide). In private international law, the 'lex fori processus' rule[27] determines which law of procedure is applicable in a certain procedure. This, however, does not completely answer the question of which collective redress mechanisms can be applied by a court that has jurisdiction. This is because there are various different views regarding the question of which rules fall under the category

[23] Model case procedure, collective action and collective settlement.

[24] Private international law rules can be divided into rules concerning jurisdiction, rules concerning the recognition and enforcement of judgments, and rules concerning the conflict of laws.

[25] This book does not cover national rules of private international law.

[26] For an overview of the issues concerning applicable law and collective redress see: Arons 2012, pp. 281–308; Stadler 2012, pp. 191–214; Michaels 2013, pp. 111–144; with respect to the WCAM procedure, Van Lith 2011, pp. 137–150; Kramer 2014, pp. 271–276.

[27] The law of procedure of the Member State of the court that has jurisdiction applies. See for example Article 10:3 DCC.

'law of procedure'.[28] However, such views are not covered in this book.[29] With respect to collective redress mechanisms in the EU, it is assumed that the rules regarding these mechanisms are procedural rules which are applicable pursuant to the lex fori processus rule. This was, for example, also the case in the matter in which the District Court of The Hague decided in the collective action between Royal Dutch Shell PLC and an interest group aimed at environmental protection ('Milieudefensie')[30]: the court decided that the rules concerning the Dutch collective action have to be seen as procedural rules.

In this book the possible effect of private international law rules on the resolution of a mass dispute, specifically the goals of collective redress, will be covered. Collective redress mechanisms, like any other mechanism or law, are made with a certain goal in mind. As will be set out in Sect. 1.5, the cross-border use of the mechanisms used as an example in this book was not considered when the specific mechanisms were developed. Hence, it is important to determine whether the goals can even be complied with when the mechanisms are used in a cross-border context. If this proves not to be the case, this could mean that not only the rules on private international law require modification, but also the rules concerning the mechanisms themselves. This analysis also works the other way around; if the goals of collective redress are complied with when the mechanism is used in a cross-border context, but the goals of the Brussels Regulation are not, it could mean that the Brussels Regulation's goals and the goals of collective redress are mutually exclusive, which would mean that to some extent these mechanisms cannot be covered by the Brussels Regulation.

As will be set out in Sect. 1.5, compared to standard redress mechanisms, collective redress mechanisms have to provide more effective and efficient legal protection and they have to reduce the courts' workload. In addition, opt-out collective redress mechanisms are (more than opt-in collective redress mechanisms) aimed at providing finality to all parties, but especially to the defendant. The collective claim with which the defendant is confronted will be resolved with regard to all possible plaintiffs (except those who opt out). To measure the effect of private international

[28] It could, for example, be that merely the rules that determine which powers a court has or which terms need to be taken into account fall under the law of procedure. Alternatively, law of procedure could also encompass the types of procedure a claimant must start in order to claim damages. See also Kramer 2014, p. 276.

[29] There can be some discussion about whether, for example, the rules concerning a collective redress mechanism must be seen as procedural law or as material law. The rules concerning the Dutch WCAM procedure for example are laid down in both the Dutch Code of Civil Procedure and the Dutch Civil Code. Hence it is difficult to determine whether the rules concerning the WCAM fall under the category 'law of procedure'. With respect to the WCAM procedure, it must, however, be concluded that in practice most settlements contain an explicit choice for Dutch law. Hence Dutch law and the rules relating to the WCAM procedure apply. See Van Lith 2011, p. 139.

[30] Court of The Hague, 14 September 2011, ECLI:NL:RBSGR:2011:BU3535, para 4.4. The district court—based its judgment on—among others—Parliamentary Documents (Kamerstukken II 26 693, nr. 3, pp. 5, 6 and 8). See for an analysis of this judgment Van der Heijden 2013.

law rules, the extent to which the above-mentioned goals are met in a cross-border mass dispute has to be analysed.

To examine whether, for example, national collective redress mechanisms present more efficient legal protection by offering a procedure that is less costly and less time-consuming than standard redress mechanisms requires—as mentioned earlier—empirical evidence. This is difficult, however, as only a small number of actual mass disputes are resolved through a collective redress mechanism. Moreover, it is hard to get a clear picture of the costs and time involved in a combination of standard redress mechanisms and collective redress mechanisms.

The effect of private international law rules on a cross-border mass dispute can, however, also be measured in a different way. When examining the rules concerning jurisdiction and the recognition and enforcement of judgments, in this book the possibility of recognising or enforcing a judgment in a certain collective redress procedure are set out. If the recognition or enforcement of a collective redress judgment is not possible, this automatically means that extra costs and time are necessary to resolve the dispute. The same goes for jurisdiction issues. Should a court that is dealing with one of the three collective redress mechanisms not be able to assume jurisdiction for some of the plaintiffs in the group, two courts will probably have to assume jurisdiction. To achieve final compensation, the group of plaintiffs would have to spend more time and money on the resolution of the mass dispute (compared to when just one court would have jurisdiction). Moreover, the subsequent judgments of both these courts could be contradictory, with all the attendant legal complications and problems.

Although common goals can be distilled from legal history, because of the difference between the three types of collective redress mechanisms, the common goals will of course be achieved differently; the KapMuG procedure is able to provide more efficient legal protection in relation to a mass dispute than a regular procedure. The level of efficiency will nevertheless be different compared to when a mass dispute is resolved through use of the WCAM. It is, however, not the goal of this book to compare the types of collective redress mechanisms and therefore the same goals will be assumed for each mechanism.

1.3 Book Structure

This book consists of several parts. This first chapters deal with the scope of the topic that is covered in this book and provides general information about its parameters and specific focus. It will also deal with the goals of collective redress and the goals of the Brussels Regulation.

The first part examines three different types of collective redress mechanisms. These mechanisms are described by reference to examples of actual proceedings at national level, in order to identify the effect of applying rules on private international law. Since the focus of this book is on mass disputes caused by the defective provision of financial services and securities, the mechanisms that will be analysed

are the German Capital Markets Model Case Law (KapMuG) procedure, the Dutch collective actions and the Dutch WCAM procedure. All of these mechanisms have been used in practice to resolve disputes concerning financial services.

The relevant grounds of jurisdiction that can apply in a mass damage claim are discussed in the second part, by analysing which grounds can be used in the three collective redress mechanisms in order for a court to assume jurisdiction. This part will also cover whether these rules are to affect the goals of collective redress and, if so, how. Collective redress mechanisms are designed to achieve certain goals.[31] Can these goals also be achieved in a cross-border context and through the application of the grounds of jurisdiction that have been set out in the same chapter? This book will also analyse whether the use of collective redress mechanisms is in line with the goals of the Brussels Regulation.[32]

The third part examines the application of the grounds for recognition and enforcement of the judgments that follow from the three collective redress mechanisms. It also considers what effects the application of these rules will have on the goals of collective redress mechanisms and the goals of the Brussels Regulation.

This book will conclude in the fourth and final part by recommending how the use of collective redress mechanisms in the EU could be improved by taking on board the goals of collective redress and the goals of the Brussels Regulation. In addition, this part describes the current developments in the field of collective redress and private international law in the EU.

1.4 Typologies/Classifications of Collective Redress Mechanisms in the EU

1.4.1 Public Law Mechanisms and Private Law Mechanisms

It is important to realise that not all mechanisms that can be used to resolve a mass dispute are the same. Because this book focuses specifically on mass disputes in which financial services are part of the cause of the mass dispute and financial compensation is the ultimate goal, it excludes some well-known resolution mechanisms.

As mentioned briefly in this chapter, the development of mechanisms to resolve mass disputes really started in the 1960s, with the rise of Western consumerism. Over time, various distinct mechanisms for consumer protection were created, with a clear difference between (i) government- or public law-oriented mechanisms, which can be used only by specific government-controlled public authorities, such

[31] These goals will be set out in Sect. 1.5.

[32] These goals will be set out in Sect. 1.6.

as a consumer authority and (ii) non-governmental or private law-oriented mechanisms, which can be used by everyone (consumers, companies, or governments).

In several EU Member States, public consumer authorities have been made responsible for defending consumer interests. Some notable examples are the UK Office of Fair Trading ("OFT"), the UK Financial Services Authority ("FSA") and the Consumer Ombudsman (based on the Nordic model).[33] These public authorities are bound by the framework of rules and procedures which confer authority on them and are designed to protect consumer interests. These rules are different for every public authority. For example, the Nordic Consumer Ombudsman usually takes action through a special tribunal, usually called a Market Court, before it can issue an injunction.[34] By contrast, the UK's OFT is often assisted by local authorities, other authorities, or enforcers,[35] most of which have autonomous powers of enforcement but which may not apply to a court for an enforcement order unless they have first consulted the OFT.[36]

The public authorities are bound by a certain set of rules (most of the time a law), which define the authority's purpose and its specific procedures and powers. These rules set out, for example, what remedy the authority can use to enforce a given norm. The enforcement of norms is, in most cases, the primary goal of these public authorities. Some authorities have the power to file for compensation[37] but not for damages. Nevertheless, such public law-oriented mechanisms, especially those that are comparable to the Nordic model, which is seen as a form of consumer ADR, are seen as efficient and effective mechanisms to resolve, among others, mass disputes.[38]

Only the predefined public authorities can use these rules and procedures that are part of the law establishing the authority: a privately founded association, for example, cannot use the powers and authorities available to the British OFT. Although more and more government-controlled public authorities are being founded and thus more and more public law-oriented mechanisms are being used to prevent or fine perpetrators of mass disputes,[39] these public law-oriented

[33] A public authority that supervises marketing and standard contract terms. These Nordic state authorities have greater powers to enforce consumer protection than other consumer organisations. The Nordic Consumer Ombudsmen use a special Market Court to impose injunctions.

[34] Hodges 2008, pp. 27–28.

[35] Enforcers may be designated by the Secretary of State (e.g. the Civil Aviation Authority, the Water Services Regulation Authority and the Financial Services Authority) or are Community enforcers (Community enforcers are qualified entities for the purposes of Directive 98/27 on injunctions for the protection of consumers' interests and are specified in the list published in the *Official Journal of the European Communities*. See Hodges 2008, p. 20.

[36] Hodges 2008, p. 20.

[37] The FSA (see above) has extended powers to file for a compensation order. See: Financial Services and Markets Act 2000, ss 283 and 282.

[38] See Hodges 2014, pp. 67–89. See also Hodges 2012.

[39] For various examples of recent founded public/government-controlled authorities see Hodges 2008, pp. 16 et seq.

mechanisms will not be covered in this book, as these rules cannot be used directly by individuals and as claiming damages and acquiring financial compensation for the individual victims is not an aim of public authorities. In addition, public authorities are always confined by budgetary constraints and by public policy which might not always have financial compensation as the ultimate goal. In my opinion, it always remains necessary to have a usable set of private law rules, in order to resolve a mass dispute collectively. Victims must always have a proper means to claim damages, which means that they also require a usable set of rules for claiming damages collectively when this is more effective and efficient than claiming damages individually. As a result, the focus of this book will be on private law oriented collective redress mechanisms rather than on public law mechanisms.[40]

The contents of this book are therefore confined to private law-oriented redress mechanisms. Although these mechanisms can be used by individuals or specific interest groups, they may also be used by private organisations such as consumer or trade associations. Such organisations tend to fill the gap caused by the possible absence of an effective public organisation for the protection of consumer interests. For example, in the Netherlands the *Vereniging van Effectenbezitters* (Dutch Investors Association) has the task of protecting the interests of shareholders. These private law-oriented mechanisms are not limited to enforcing norms or filing for a compensation order. They can also be used to collectively claim damages.

1.4.2 Aggregate Litigation and Representative Litigation

Generally speaking, there are two main procedural techniques for accommodating mass disputes. Firstly, there are the more traditional procedural devices, such as joinder of parties, assignment of claims and mandates/power of attorney, where two or more claimants band together to bring their claims before a court that will view them as individuals and not as a group. This type of resolution of mass disputes is called aggregate litigation.[41]

Secondly, there are specific procedural devices that have been developed to deal with mass disputes. In the literature, they are called representative actions,[42] but the term is somehow misleading since it aims also to cover devices as the Dutch collective action that is, strictly speaking, not a representative action. A ruling in a Dutch collective action, for example, will bind only the organisation that initiated the action, and not its members. In representative litigation, the action is started by or on

[40] For the European debate on possible options in relation to collective redress see also: Fairgrieve et al. 2012, pp. 15–41.

[41] See Hensler 2009, p. 8.

[42] As Hodges defines it, a representative action is 'a procedure for combination of multiple individual claims in which a single claim or entity represents the group. A US class action and a claim brought by a European interest group are both examples, albeit different ones'. See Hodges 2008, p. xiv.

behalf of a group of claimants with a shared interest. The claimants are not always all individually identifiable and the action is often started by a single representative claimant or an entity that claims to represent the entire group. The group action is controlled by the representative party or interest group. Unlike in aggregate litigation, the individual member of the group has little control over the action.[43]

This book focuses on the second category of procedural devices: the so-called group actions in its various appearances or shapes across the EU.[44] Within representative collective redress/action devices, one of the distinctions that can be made is between opt-in and opt-out mechanisms. In an opt-in procedure, the claimant must take a positive step to assert its right and formally join a coordinated procedure.[45] In an opt-out procedure, an individual claimant or a representative entity can represent a group of claimants and resolution of a single case will be binding for the entire group of claimants. The individual claimants that are bound by the representative resolution were not required to opt in, but do have the possibility to opt out of the group and thus the representative resolution.[46]

When looking at the types of collective redress mechanisms/group actions throughout the EU, and specifically at the mechanisms that can be used to claim for damages in relation to a mass dispute regarding a financial product/service and securities, roughly three types can be identified: model case procedures, collective actions and collective settlements.[47] All three have a different set-up and possibly different effects on the mass dispute. Contrary to the above-mentioned standard instruments, collective redress mechanisms have different underlying goals that make them more suitable for resolving a mass dispute than the standard instruments.[48] Because these three types of collective redress mechanisms all constitute a specific mechanism that is used in one or more Member States and because their application in practice has raised some private international law issues, this book will deal only with the three categories of collective redress mechanism that will be covered in the next subsections.

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[43] See Hensler 2009, p. 8. In order to avoid confusion, the term "group action" will be used in this book to describe the representative action.

[44] When the term collective redress is used in this book, it refers to group actions (more specifically, the three types of collective redress mechanisms that are examined in this book: the model case procedure, the collective action and the collective settlement).

[45] Hodges 2008, p. 119.

[46] Ibid.

[47] The model case procedure is seen as a hybrid form of aggregate and representative litigation. See Hensler 2009, p. 15. As is already stated, it is also possible to use a different manner of distinguishing the various types of collective redress mechanisms. Nuyts for example distinguished group actions, representative actions and class actions (See Nuyts 2013, pp. 69–70). These typologies have, however, been inspired by international collective redress mechanisms, including US mechanisms. Since this book focuses on collective redress in Europe, a comparable but slightly different typology is used that is easier to relate to the European mechanisms and the mechanisms that can be used specifically in relation to mass disputes regarding financial products, services and securities.

[48] See also Sect. 1.5.

1.4.2.1 Model or Test Case

The first type of collective redress mechanism that will be covered in this book is the model or test case procedure. In this type of redress mechanism, one case is selected from the cases of a large group of victims who have suffered damage caused by the same event. This one case serves as a model for the resolution of all other individual disputes. The proven facts and the answers given to the various legal questions in the model case will also apply in the rest of the individual cases. In this way, the court needs to look at fewer matters in the remaining individual disputes. As a result, the model case procedure is a hybrid action between aggregate action, in which individual procedures are distinguished, and a group action, since the model case is used as an example for the entire group of mass dispute plaintiffs. As the German KapMuG has been specifically drafted to deal with mass disputes concerning financial services, it will serve as an example of the model case procedure.[49]

1.4.2.2 Collective Action

A collective action is brought by a group of plaintiffs who put their relationship on a formal footing by establishing themselves as a class or a foundation/association of victims. Such a group can, for example, bring an action for damages (e.g. monetary damages) or to obtain a declaratory judgment (to establish the accountability or illegality in respect of an act) or an injunction. A court will deal with this collectively, as the different plaintiffs constitute one group. The single judgment then delivered by the court could apply to every individual victim, depending on whether the action is based on an opt-out or an opt-in system and on how the action is further structured.

In the following chapters I will use the Dutch collective action as an example of a collective action redress mechanism. The use of the opt-in system in the Dutch collective action will be described in Chap. 3. Other well-known collective actions mechanisms are the US class action, the Swedish Group Proceeding[50] and the Danish and Finnish class actions.[51]

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[49] The UK and Austria also know model or test case procedures. See Karlsgodt 2012, pp. 169 et seq. (UK), pp. 252 et seq. (Austria). Because the KapMuG has recently been evaluated and modified and because it specifically relates to securities mass disputes, the KapMuG will be used as an example mechanism in this book instead of, for example, the UK or Austrian mechanisms.

[50] Karlsgodt 2012, pp. 202 et seq.

[51] Karlsgodt 2012, pp. 186 et seq. (Denmark mechanisms), pp. 214 et seq. (Finnish mechanism). For reasons of practicality (including the availability of case law and literature) the Dutch collective action will be used as an example of the collective or representative/group action.

1.4.2.3 Collective Settlement

A collective settlement is comparable to a collective action. Again, victims organise themselves by formally establishing a representative group. In the case of a collective settlement, however, the victims do not bring a collection action—for example, for monetary damages. Instead, they try to negotiate a settlement in which they are compensated for the loss or damage they have suffered. To reach a final settlement, the certified group may sometimes have to use a collective action as a means of coercion. Depending on which system the negotiated settlement is based upon, the settlement may apply to all victims (in the case of an opt-out settlement) or only to the victims who are formally part of the group (in the case of an opt-in system) .

The Dutch collective settlement system, which has been applied in various disputes concerning financial services, will be used as an example of a collective settlement mechanism. It is an interesting case to examine because numerous private international law issues/questions have been raised in relation to the cross-border use of the WCAM.[52]

1.5 Goals of Collective Redress Mechanisms

1.5.1 Introduction

Every procedure is based on certain goals. The same goes for collective redress mechanisms: these procedures have been made to achieve a certain goal. Their goals make them different and in some cases more favourable than standard procedures.

Next to the applicability of certain private international law rules on jurisdiction, recognition and enforcement, this book will also examine whether the applicability of these rules influences the goals of collective redress mechanisms. If a collective redress mechanism functions at a national level but not across borders, the question arises of whether that collective redress mechanism is made to resolve cross-border cases. Most procedures, however, should be usable in a cross-border context. Analysing the effects the application of the current rules of private international law will have on collective redress mechanisms will enable an evaluation as to whether these rules are suitable for use in cross-border mass disputes.

To identify what the goals of these types of procedures are, the German KapMuG, the Dutch collective action and the Dutch collective settlement will be taken as a basis. In the following sections their legislative history will be analysed and their common goals will be discussed. The goals that are described in the following sections were found in all three collective redress mechanisms, thus no

[52] See among others Van Lith 2011; Tzankova et al. 2012, pp. 67–91; Halfmeier 2012, p. 179.

distinction with regard to the goals of collective redress will be made between the three mechanisms. The goals used in this book are not exhaustive. Legislators may have had various other goals for other collective redress mechanisms. Moreover, the goals of, for example, public-oriented collective redress mechanisms can differ from those of private law-oriented collective redress mechanisms. Such differences will, however, not be taken into account here, for practical reasons. The focus of this book is on the most important goals that led legislators to enact the various collective redress mechanisms that are used as examples in this book.[53]

1.5.2 Efficient Legal Protection

Offering efficient legal protection to all of the parties in a mass dispute is the first important goal of collective redress mechanisms. When a single action causes a group of thousands of individuals to suffer damage, standard redress mechanisms cannot offer an efficient way to resolve the resulting mass dispute, because they would require the individual plaintiffs to file their claims individually. This might be an efficient way to resolve a dispute when there are only ten plaintiffs (as parties are not confronted with complex forms of litigation), but it is not the case when the dispute involves thousands or tens of thousands of plaintiffs. It was this need for an efficient redress mechanism that was the reason for creating the KapMuG,[54] the collective action[55] and the WCAM[56] in the first place.[57] In the DES case (in reference to the WCAM) and the Deutsche Telekom case (in reference to the KapMuG),[58] in which thousands of victims were/are involved, parties were confronted with the lack of an efficient redress mechanism. As a result, the Dutch and German legislators conceived of the WCAM and KapMuG to resolve these specific cases. The parliamentary documents relating to the WCAM and KapMuG mention the need for an efficient mechanism as one of the main reasons for creating these collective redress mechanisms.[59] The same holds for the

[53] For a more extensive analysis of collective redress goals in general (public and private-oriented) see Hodges 2008, pp. 187–222.

[54] Gesetzentwurf der Bundesregierung zum KapMuG, BT-Drucks, 15/5091, pp. 16–17 (German KapMuG).

[55] See Parliamentary Documents II, 1991–1992, 22486, nr. 3, pp. 3, 5, 7, 22–23 (Dutch collective action).

[56] See Parliamentary Documents II, 2003–2004, 29414, nr. 3, pp. 2, 5, 6 (Dutch collective settlement).

[57] See also Tzankova et al. 2009, pp. 110 et seq., who also use offering efficient legal protection as a goal for collective redress (next to offering effective legal protection).

[58] These cases will be discussed in Chaps. 2 and 4.

[59] Parliamentary Documents II, 2003–2004, 29414, nr. 3, pp. 2, 5, 6 (Dutch collective settlement). Gesetzentwurf der Bundesregierung zum KapMuG, BT-Drucks, 15/5091, pp. 16–17 (German KapMuG).

collective action.[60] Collective redress mechanisms need to be more efficient than regular redress mechanisms, in order to actually provide efficient legal protection. What is meant by efficient legal protection is, however, not clear. The Dutch and German legislators have both pointed out that efficient legal protection would be related to savings in cost and time.[61] By joining forces, victims are able to reduce the costs of legal representation. Regarding the time aspect, it is widely assumed that it will be quicker to use a single collective redress mechanism to resolve the entire mass dispute rather than for the individual victims to bring their claims separately.[62] Hence, with regard to the goal of offering efficient legal protection, I will examine the aspects of time and costs. They will have to be examined with respect to the entire group of parties in a mass dispute. In this book, the costs and time needed for an individual to achieve compensation through use of a collective redress mechanism is not covered. Moreover, it is not possible to actually look into the specific costs and time parties will spend on a cross-border mass dispute, because there are simply not enough collective redress proceedings pending. Thus, due to the lack of empirical data and the fact that this book was not aimed at analysing empirical data on the costs of collective redress proceedings, the basis for my analysis is the standard theoretical debt items parties could expect in proceedings.[63]

Finality also plays an important role in collective redress mechanisms and the effective legal protection for which these mechanisms have been created,[64] because the legal protection can be seen as being more effective when a mass dispute is resolved entirely through use of a single procedure. This applies more specifically in opt-out collective redress mechanisms such as the WCAM. As stated earlier, opt-out mechanisms lead to a mass dispute being entirely resolved after the end of the period in which people can opt out of the court decision. Consequently, the victims can lay claim to the agreed compensation and, because they will no longer

[60] Although there was no specific case that led to the creation of the Dutch collective action, the parliamentary documents state that efficient legal protection is one of the important goals. See: Parliamentary Documents II, 1991–1992, 22486, nr. 3, pp. 3, 5, 7, 22–23 (Dutch collective action).

[61] Ibid.

[62] With respect to the goals of the Brussels Regulation, the sub-goal of "resolving a dispute before the most appropriate court" also relates to procedural economy and offering efficient legal protection (as will be set out in Sect. 1.6.5, an appropriate court is often the court of the defendant's domicile, as this court has first-hand knowledge and access in relation to the dispute). In addition, the court that can assume jurisdiction pursuant to Article 8(1) Brussels I-bis for example could offer efficient legal protection due to the consolidation of proceedings which can be achieved by assuming jurisdiction based on Article 8(1) Brussels I-bis.

[63] If plaintiffs in a mass dispute have their domicile in Germany, while the court of the domicile of the perpetrator (France) has jurisdiction, one of the standard debt items is legal representation in France and the translation work that is necessary. Another example could be extra administrative work necessary, for example, to enter a choice of forum agreement in mass dispute or to serve the opposing foreign parties the specific legal documents.

[64] For example, see Karlsgodt 2012, p. 547.

be able to file a similar claim individually, the defendant will not have to face future court proceedings.

1.5.3 *Effective Legal Protection*

Another important goal that is inherent to the use of collective redress mechanisms is effective legal protection.[65] Besides offering a cost- and time-efficient procedure and thus guaranteeing that the legal protection that is being offered is also efficient, a collective redress mechanism is also aimed at being a more effective redress mechanism in a mass dispute than standard procedures. German and Dutch legislators alike have argued that the above-mentioned collective redress mechanisms could also offer a more effective legal protection.[66] Whereas plaintiffs could be left empty-handed if they have to use standard procedures, collective redress mechanisms could offer a solution if the plaintiffs have an individually non-recoverable claim. As plaintiffs would have no incentive to start an individual procedure, because any possible compensation would simply not cover the costs, a collective action would be cheaper. Hence, efficient legal protection is used as a criterion to examine whether a procedure also offers effective legal protection. Another criterion is the possibility to actually use a collective redress mechanism in a cross-border mass dispute (usability factor). A collective redress mechanism can offer effective legal protection only when, for example, a court can assume jurisdiction in relation to all the parties in a mass dispute.

Part of the effectiveness of the above-mentioned legal protection is the finality that is also part of the efficiency of the legal protection the collective redress mechanisms should offer. The finality aspect namely prevents contradictory judgments. Because all the victims in a dispute fall under the outcome of the decision, other procedures are not necessary.

1.5.4 *Reduction of the Administrative Burden on the Judiciary*

Courts have only a limited capacity to resolve disputes. If mass disputes could be resolved solely through the use of standard procedures, courts would be confronted with a large number of similar procedures and as a result would become

[65] See also Tzankova et al. 2009, pp. 110 et seq., who also use offering effective legal protection as a goal for collective redress (next to offering efficient legal protection).

[66] Parliamentary Documents II, 2003–2004, 29414, nr. 3, pp. 2, 5, 6 (Dutch collective settlement). Gesetzentwurf der Bundesregierung zum KapMuG, BT-Drucks, 15/5091, pp. 16–17 (German KapMuG). Parliamentary Documents II, 1991–1992, 22486, nr. 3, pp. 3, 5, 7, 22–23 (Dutch collective action).

overburdened. Moreover, the resolution of these separate cases could take longer, since the risk of irreconcilable judgments would have to be taken into account.

Collective redress mechanisms are intended to prevent that courts can no longer offer the necessary legal protection because they are overburdened. If the claims of various victims are bundled in one action, courts are confronted with only a single procedure. Hence, from the viewpoint of the judiciary, this goal can also be seen as an efficiency requirement. Reducing the court's workload is also mentioned in the considerations of the German and Dutch legislators.[67]

1.6 Goals of the Brussels Regulation

1.6.1 Introduction

To better understand the possible positive or negative effects of the use of the grounds of jurisdiction and the grounds for recognition (or its refusal) and enforcement, the underlying goals of the provisions of the Brussels Regulation will have to be analysed. These goals will give an insight into the origins of the effects the provisions of the Brussels Regulation will have on the goals of collective redress. The most important goals of the Brussels Regulation will be discussed in the analysis of the legislative history of the Brussels Regulation and ECJ case law presented in the next section.

When the preamble of the Brussels Regulation is reviewed, several important goals can be distilled. These goals can be grouped under four main goals:

- Free movement of judgments
- Guaranteeing the rights of the defence
- Guaranteeing legal certainty
- Ensuring disputes are resolved in an appropriate court

In the following subsections, the meaning of these goals is set out. As will be clarified in these subsections, the goal (for example of free movement of judgment) relates more to the rules on the recognition and enforcement of judgments than the grounds of jurisdiction. Hence, when this book goes into the question of whether the use of collective redress mechanisms in a cross-border mass dispute is still in compliance with these goals, only the goals relevant to the specific set of rules in the Brussels Regulation will be covered. In relation to the grounds of jurisdiction, the goals of guaranteeing legal certainty and of ensuring that disputes are resolved in an appropriate court will be covered and analysed in this book. In relation to the recognition and enforcement of judgment, only the goals of free movement of judgments, the rights of the defence and, to a certain extent, the goal of guaranteeing legal certainty will be analysed in this book.

[67] Ibid.

1.6.2 Free Movement of Judgments

The first important goal is the goal of free movement of judgments in civil and commercial matters.[68] To achieve a situation in which judgments can be moved freely between the Member States of the Brussels Regulation, there must be mutual trust in the administration of justice in these Member States. Mutual trust makes it possible to automatically recognise judgments from other Member States without the need for any procedure, except in disputed cases.[69] This has also been affirmed by the ECJ in Coursier v. Fortis,[70] in which the ECJ stated that the then Brussels Convention was intended to facilitate the free movement of judgments by establishing a simple and rapid procedure for enforcement.[71] Jenard saw the free movement of judgments as the ultimate objective of the Brussels Convention.[72] This objective of the Brussels Regulation also led to the abolition of the exequatur procedure.[73] Should, for example, a judgment in a collective redress procedure not be recognised in another Member State, it would not comply with this principle of the Brussels Regulation.

1.6.3 Rights of the Defence

The objective of a free movement of judgments cannot, however, be seen as an absolute.[74] This objective is limited by the goal of respecting the rights of the defence.[75] As is stated in the preamble of the Brussels Regulation, the defendant should, for example, be *able to appeal in an adversarial procedure, against the declaration of enforceability.* The rights of the defence also relate to the *right to be properly served with the decision delivered*. Other interpretations of the rights of the

[68] See (6) in the preamble of the Brussels Regulation.

[69] See (26) in the preamble of the Brussels Regulation. Although 'mutual trust' can also be seen as a principle/goal of the Brussels Regulation (see e.g. Hess et al., Report on the Application of Regulation Brussels I in the Member States (hereafter: 'the Heidelberg report') 2001, p. 28 and see Kramer 2011, p. 215), it will not be used as a goal in this book, as it is more of a general principle for regulation in the European Union, rather than a principle specifically of the Brussels Regulation.

[70] Also see Case C-116/02 Gasser v. MISAT [2003], ECR I-14693, para 67.

[71] See Case C-267/97 Coursier v. Fortis [1999], ECR I-2543, para 25.

[72] See Jenard report, p. 7.

[73] In the explanatory memorandum of Brussels I-bis (COM (2010) 748 final [14.12.2010], p. 3) the objective of the free movement or circulation of judgments is reaffirmed. Although the exequatur procedure has been abolished, it is still possible to prevent a judgment from being enforced. The grounds on which the recognition of a judgment can be refused also applied in the procedure to prevent the enforcement of a judgment.

[74] For example, see Case C-125/79 *Denilauler v. Couchet Frères* [1980], ECR 1554, paras 13–14. See also Pontier and Burg 2004, p. 43.

[75] See (29) in the preamble of the Brussels Regulation.

defence are the *right to a proper service of the document instituting the proceedings,* the right to be heard in an appropriate court, the right to an inter partes hearing, the right to be defended by a lawyer and the right to submit a defence on the substance of the case.[76] Many of these rights, such as the right to be defended by a lawyer, relate both to jurisdictional issues and to recognition and enforcement. This has been confirmed in Denilauler v. Couchet Frères, where the ECJ stated that:

> All the provision of the Convention, both those contained in Title II on jurisdiction and those contained in Title III on recognition and enforcement, express the intention to ensure that, within the scope of the objectives of the Convention, proceedings leading to the delivery of judicial decision take place in such a way that the rights of the defence are observed.[77]

The protection of the rights of the defence must be considered as an overall interest of the Convention/Regulation as a whole.[78]

1.6.4 Legal Certainty

The third goal of the Brussels Regulation can be described in general as the goal to guarantee legal certainty in proceedings.[79] Although this goal actually comprises several goals, the goal of guaranteeing legal certainty has also been mentioned as an explicit goal of the Brussels Regulation by the ECJ in Besix v. Kretzschmar.[80] In this case the ECJ stated that the ECJ repeatedly held that the goal of legal certainty is one of the objectives of the Brussels Convention.[81] The *rules of jurisdiction, for example, must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile*.[82] The Regulation also states that there must be a *link between the proceedings and the territory of the Member State* bound by this regulation. Next to the defendant's domicile there should be alternative grounds of jurisdiction based on a close link between the court and the action. Transparency of these rules is important, to guarantee legal certainty.[83] In Handte v. TMCS, the ECJ argued that:

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[76] See Pontier and Burg 2004, pp. 62 et seq.

[77] Case C-125/79 *Denilauler v. Couchet Frères* [1980], ECR 1554, para 13. See also Pontier and Burg 2004, p. 45.

[78] Case C-125/79 *Denilauler v. Couchet Frères* [1980], ECR 1554, paras 12 and 13. See also Pontier and Burg 2004, p. 22.

[79] See (15) of the preamble of the Brussels Regulation. See also Nuyts et al. 2013a, b, pp. 29–30.

[80] Case C-256/00 *Besix v. Kretzschmar* [2002], ECR I-1699. The goal of legal certainty has been reaffirmed by the Commission in the recast of the Brussels Regulation. See COM (2010) 743/final, pp. 3–4, 17. See also Grušić 2011/2, p. 337.

[81] Case C-256/00 *Besix v. Kretzschmar* [2002], ECR I-1699, para 24.

[82] See (15) in the preamble of the Brussels Regulation.

[83] See (15) in the preamble of the Brussels Regulation.

> (…) the application of the special jurisdictional rule laid down by Article 5(1) of the Convention to an action brought by a sub-buyer of goods against the manufacturer is not foreseeable by the latter and is therefore incompatible with the principle of legal certainty.[84]

Legal certainty should also be provided for by *avoiding further multiplication of jurisdiction* as regards one and the same legal relationship[85] and by *avoiding irreconcilable decisions*. The smaller the chance of multiplication of jurisdiction and of irreconcilable judgments, the more harmonious the administration of justice is and the more legal certainty can be guaranteed.

1.6.5 Resolving a Dispute Before an Appropriate Court

The idea that there needs to be a connecting factor between the proceedings and the court that has jurisdiction is not aimed at the goal of guaranteeing legal certainty alone. There are various connecting factors that make a certain court more appropriate to resolve a certain dispute. This has also been stated by Jenard in his explanatory report. He stated that:

> (…) the rules of jurisdiction codified in Title II determine which State's courts are most appropriate to assume jurisdiction, taking into account all relevant matters (…)[86]

In proceedings in which, for example, one of the parties to the proceedings is a weaker party, it could be that a different court is more appropriate to resolve this dispute (for example the court of the weaker party's domicile) than in a dispute in which parties are equal.[87] A direct example of a ground of jurisdiction that results in the court relating to a weaker party for jurisdiction, is the jurisdictional ground for consumer-related matters.[88]

The principle of proximity[89] also determines which court is more appropriate. Courts that have the practical advantage of first-hand knowledge of the facts,[90] ease of taking evidence and/or knowledge of the applicable law, should have jurisdiction.[91] The special grounds of jurisdiction in Article 7 Brussels I-bis are examples

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[84] Case C-26/91, Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA [1992], ECR I-3967, para 19.

[85] Alternative courts and fragmentation of proceedings have to be avoided.

[86] See Jenard Report, p. 15. This was later reaffirmed by the ECJ in C-26/91, Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA [1992], ECR I-3967, paras 11–12.

[87] The weaker party relates to the procedurally weaker party, but also to the socio-economically weaker party. See also De Boer 2012, pp. 43–45.

[88] For example, see Sects. 5.3, 6.3 and 7.4.

[89] See Pontier and Burg 2004, pp. 162 et seq. See also Lagarde 1986, pp. 9 et seq. and p. 117. See also Magnus et al. 2016, p. 143. See also De Boer 2012, pp. 41–42.

[90] See also De Boer 2012, pp. 45–46.

[91] With respect to these factors and compared to the goals of collective redress, considerations of procedural economy are also taken into account in deciding which court is the most appropriate.

through which a court can base its jurisdiction on the fact that it has a practical advantage.[92]

In the sections where I will analyse whether the various private international law rules have an effect on the goals of collective redress mechanisms, I will also discuss the (possible) discovered effect that can be associated with the goals of the Brussels Regulation.

References

Arons TMC (2012) Cross-border Enforcement of Listed Companies' Duties to Inform. Kluwer, Deventer

De Boer TM (2012) 'Enkele gedachten over de grondslagen van het internationaal bevoegdheidsrecht'. In: Ibili F et al (eds) IPR in de spiegel van Paul Vlas. Kluwer, Deventer

Duivenboorde BB (2013) 'The Future of collective redress in Europe'. Tijdschrift voor Consumentenrecht en Handelspraktijken, 2013/6

Fairgrieve D, Lein E (eds) (2012) 'Collective redress procedures: European debates'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford

Grušić U (2011) 'Jurisdiction in complex contracts under the Brussels I-bis Regulation'. Journal of Private International Law, 2

Halfmeier A (2012) 'Recognition of a WCAM settlement in Germany'. NIPR 2

Hensler D (2009) The Globalization of Class Actions: An Overview. Annals AAPSS

Hensler D (2011) 'How economic globalisation is helping to construct a private transnational legal order'. In: Muller S et al (eds) The law of the future and the future of law. Torkel Opsahl Academic EPublisher, Oslo

Hodges C (2008) The Reform of Class and Representative Actions in European Legal Systems. Hart Publishing, Oxford

Hodges C (2014) 'Collective redress: A Breakthrough or a Damp Squib?' Journal of Consumer Policy, Volume 37, Issue 1

Hodges C et al (2012) Consumer ADR in Europe. Hart Publishing, Oxford

Karlsgodt PG (2012) World class actions. Oxford University Press, New York

Kramer XE (2011) 'Cross-border enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure'. Journal of Procedural Law 2

Kramer XE (2014) 'Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries'. Pacific McGeorge Global Business & Development Law Journal 2

Lagarde P (1986) 'Le principe de proximité dans le droit international privé contemporain'. Recueil de Cours 196

Layton A (2012) 'Collective redress: policy objectives and practical problems'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford

Magnus U et al (eds) (2016) 'Brussels I Regulation'. Sellier, Munich

(Footnote 91 continued)

See for example Case C-539/03, Roche Nederland v. Primus [2006], ECR I-6569 para 36 and with respect to Article 8(1) Brussels I-bis, Case C-462/06 Glaxosmithkline and Laboratoires Glaxosmithklinepara v. Jean-Pierre Rouard, para 27.

[92] In Article 7 Brussels I-bis the connecting factors are, for example, the place of performance of an obligation or the place where the harmful event occurred.

Michaels R (2013) 'European class actions and applicable law'. In: Nuyts A et al (eds) Cross-border class actions - The European way. Sellier European Law Publishers, Munich
Muir Watt H (2012) 'The trouble with cross-border collective redress: issues and difficulties'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford
Nuyts A (2013) Consolidation of collective claims under Brussels I. In: Nuyts A et al (eds) Cross-border class actions - the European way. Sellier European Law Publishers, Munich
Nuyts A et al (2013a) Cross-border class actions, the European way. Sellier European Law Publishers, Munich
Nuyts A et al (eds) (2013b) 'Market Regulation, Judicial Cooperation and Collective redress'. In: Nuyts A et al (eds) Cross-border Class Actions, the European Way. Sellier European Law Publishers, Munich
Pontier JA, Burg E (2004) EU principles on jurisdiction and recognition and enforcement of judgments in civil and commercial matters according to the case law of the European Court of Justice. TMC Asser Press, The Hague
Stadler A (2012) 'Conflicts of laws in multinational collective actions - a judicial nightmare?' In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford
Stadler A (2013) 'The Commission's Recommendation on common principles of collective redress and private international law issues'. NIPR 4
Tzankova IN (2007) Toegang tot het recht bij massaschade. Thesis Tilburg
Tzankova IN et al (2009) 'Effectieve en efficiënte afwikkeling van massaschade: terug naar de kern van het collectieve actierecht'. In: 't Hart FMA et al (eds) Collectieve acties in de financiële sector. NIBE-SVV, Amsterdam
Tzankova IN et al (2011) 'A critical note on two EU principles: A proceduralist view on the Draft CFR, 2011'. In: Micklitz HW, Niglia L, Waterhill S (eds) The foundations of European private law. Hart Publishing, Oxford
Tzankova IN (2012) 'Funding of mass disputes: lessons from the Netherlands'. Journal of Law, Economics & Policy, 3
Tzankova IN et al (2012) 'Class actions and class settlements going global: the Netherlands'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford
Tillema I (2014) 'De representatieve vordering: dekt de Europese vlag de Nederlandse lading'. NTBR 24
Van der Heijden MJC (2013) 'De Shell-Nigeria-zaak: de eerste Nederlandse foreign direct liability-zaak voor de civiele rechter'. Tijdschrift voor vennootschaps- en rechtspersonenrecht 3
Van Lith H (2011) The Dutch Collective Settlements Acts and Private International Law. Maklu, Antwerp
Yeazell SC (1977) 'Group litigation and social context: toward a history of class action'. Columbia Law Review
Yeazell SC (1987) From Medieval Group Litigation to the Modern Class Action. Yale University Press, New Haven/London

Part I
Collective Redress Mechanisms in the EU

Chapter 2
German KapMuG Procedure

Abstract One of the types of mechanisms to be used to revolve a mass dispute, is the model case procedure. The German KapMuG procedure is an important example of such type of procedure. In this chapter, the KapMuG procedure is clarified: who can commence such procedure, what can parties achieve and how can they achieve this (what are the procedural steps).

Keywords KapMuG · Deutsche Telekom · Individual procedures · Beigeladenen · Oberlandesgericht

Introduction to Part I. (Collective redress mechanisms in the EU)

In the following chapters the three prototypes of collective redress mechanism will be set out by giving an overview of three important examples of these mechanisms. Firstly the German KapMuG model case procedure will be covered, secondly the Dutch collective action and thirdly the Dutch collective settlement. In order to put the mechanisms in perspective, the legislative history of the mechanism will first be briefly described. This will be followed by a description of the use and requirements of the specific collective redress mechanism. In what ways can the mechanism be used and by whom? The chapters conclude by describing the recent developments affecting the specific collective redress mechanisms.

2.1 Introduction

As collective litigation has a long history in Germany, the KapMuG test case procedure is not the first or only collective redress mechanism in the country. The commonest form of collective litigation in Germany is the association or interest group complaint, which originates from 1896. The 1896 Act on the Repression of

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Unfair Competition[1] enabled associations whose purpose is to promote commercial interests, to bring a claim for an injunction in the case of misleading advertising.[2,3] Later, in 1965, the possibility to bring a claim for injunction in the Unfair Competition Act (UWG) was extended to certain consumer associations (Verbrauchersverbände)[4]; this right was been extended yet again, in 2004, to cover all acts of competition.[5]

With the increasing influence of the EU, the rules regulating the protection of consumers' interests and the right to seek injunctive relief gradually changed through EU legislation. The EU Directive on Injunctions for the Protection of Consumers' Interests[6] was implemented in German law through the Act on Injunctive Relief[7] (UKlaG), which came into force in 2002. This new act also contains the right to seek injunctive relief against the use of unfair standard contract terms.[8] In the UKlaG the right to seek injunctive relief encompasses violations of all provisions protecting consumer interests.[9]

A collective claim for injunctive relief may be initiated by various eligible bodies.[10] These bodies can be divided into *qualified entities*, in accordance with the list of qualified entities held by the Federal Office of Administration[11] and by the European Commission.[12] Another possible body is an association with legal personality for the promotion of commercial interests. This association must have a considerable number of businesses marketing goods or commercial services of the same or a similar type. Moreover, these organisations must also have enough staff and organisational and financial resources to perform the interest promotion functions laid down in their statues.[13] In addition to the important remedies of the UWG and the UKlaG, there are several smaller legal instruments for interest groups: for

[1] Dated 27 May 1896 (Official Journal, p. 145ff).

[2] Article 13 sub 2 and Article 3 German Unfair Competition Act. See also Schaumburg 2006, p. 24.

[3] This act was replaced in 1909 by the Act Against Unfair Competition, Gesetz gegen den unlauteren Wettbewerb (UWG). Dates 7 June 1909 (Official Journal, p. 499).

[4] Baetge 2007, p. 4.

[5] See § 8 UWG of 3 July 2004 (Official Journal, Part I, p. 1414). See also Baetge 2007, p. 5.

[6] Directive 98/27/EC of the European Parliament and of the Council of May 19, 1998, Official Journal L 166, p. 51.

[7] Law Authorizing Suits for Injunctive Relief in Consumer Protection and other Matters (Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen). Dated 26 November 2001 in the version promulgated on Aug. 27, 2002, BGBl. I, p. 3422.

[8] These were formerly included in § 13 of the AGB-Gesetz.

[9] Baetge 2007, p. 5.

[10] See Section 3(1)(2) UKlaG.

[11] See Section 4 UKlaG.

[12] See Article 4 Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interest.

[13] See Section 3(1) UKlaG and Schaumburg 2006, pp. 143–146.

example, in the German Competition Act[14] and the Telecommunications Act,[15] as well as legislation relating to equal treatment of disabled persons[16] and environmental protection.[17] None of these, however, offer the possibility for individual plaintiffs to collectively claim damages. This can only be done through a joinder construction of the various plaintiffs.

As was demonstrated most clearly in the Deutsche Telekom case,[18] there was indeed a need for a proper collective redress mechanism that could facilitate the eventual compensation of victims in a mass dispute, especially in securities mass disputes, as the previously mentioned legislation did not relate to this area. The KapMuG collective redress mechanism, which was created to resolve the Telekom case, is seen as one of the first real mass damage claims in Germany.[19]

2.2 Deutsche Telekom and KapMuG History

In 1999, Deutsche Telekom developed a stock exchange prospectus (Börsenprospekt), which was one of the preconditions for its planned initial public offering (IPO).[20] This IPO occurred in June 2000. Within one year after this public offering, the share price dropped from EUR 67 to as low as EUR 8.42, because Deutsche Telekom had allegedly issued wrong information in the prospectus.[21] Claimants contended that Deutsche Telekom had overstated the value of its real property by EUR 2 billion.[22]

Because the Deutsche Telekom share was also called the people's share, it did not take long before the first of many shareholders filed a claim demanding a refund of the share's initial price.[23] The competent court for such claims is, pursuant to

[14] See § 33(2) of the Law against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen or GWB) dated 26 August 1998 (Official Journal Part I, p. 2521).

[15] See § 44(2) of the Telecommunications Law (Telekommunikationsgesetz or TKG) of 22 June 2004 (Official Journal Part I, p. 1190).

[16] See § 13 of the Law on Equal Treatment of Disabled Persons (Gesetz zur Gleichstellung behinderter Menschen or BGG) of 27 April 2002, (Official Journal, Part I, p. 1467).

[17] See § 61 of the Law on the Protection of the Environment and Landscape (Gesetz über Naturschutz und Landschaftspflege or BNatSchG) of 25 March 2002 (Official Journal, Part I, p. 1193).

[18] For example, see Hess 2005.

[19] Stadler 2009, p. 38.

[20] According to Section 32(3) German Stock Exchange Act (Börsengesetz).

[21] Saam 2008, p. 21.

[22] The Deutsche Telekom mass dispute is a classic example of a securities mass dispute.

[23] Based on Section 44(1) German Stock Exchange Act.

Section 44(1) of the German Stock Exchange Act, the one located at the registered office of the issuer: in this case, Frankfurt am Main.[24] This court was eventually confronted with between 16,000 and 17,000 shareholders, represented by more than 750 attorneys, who filed individual claims. With a single presiding judge being confronted with a flood of claims, it seemed impossible to resolve the Deutsche Telekom mass dispute in an efficient way. After almost three years, not a single oral hearing had taken place. This led to a number of plaintiffs lodging a constitutional appeal with the Federal Constitutional Court (Bundesverfassungsgericht) on the grounds of a denial of justice. To come to some sort of resolution of (or at least a beginning of a solution to) the Deutsche Telekom case, the German legislator came up with the Kapitalanleger Musterverfahrensgesetz (Capital Markets Model Case Act or KapMuG), which came into effect in 2005.[25]

The KapMuG was initially intended to be in force for only five years. In 2010, however, when the KapMuG had not yet been fully reviewed and the legislator had not yet decided on a structural solution for mass disputes, it was extended for 2 years. After the KapMuG had been reviewed,[26] the German legislator decided to modify several points in it. The resulting revised KapMuG came into force on 1 November 2012, and will be in effect for a period of eight years (till 1 November 2020).[27] The KapMuG has been revised in five points:

- Its scope has been extended to include civil law suits where capital market information has been used in the sale and distribution of financial products and/or the provision of investment services.
- Investors are given the option of registering their claim and applying for a model case treatment, before deciding whether to bring a claim.
- The entire process has been accelerated by introducing a deadline for applying for a model case proceeding.
- A settlement between the parties must be accepted by the Higher Regional Court before it can become effective. This settlement option has an opt-out character, which means that once the settlement has been accepted, it binds all parties to the KapMuG proceedings unless they decide to opt out.
- The admissibility of the legal separation of joinder of claims in individual proceedings has been limited, in order to encourage collective legal action of the investors as early as the court of first instance.

In the next section the various steps in a KapMuG procedure will be set out.

[24] See Section 32b German Civil Procedure Code (Zivilprozessordnung).

[25] The KapMuG came into force on 1 November 2005. See Baetge 2007, p. 9.

[26] For the extensive report on the evaluation of the KapMuG see Halfmeier et al. 2010.

[27] Kapitalanleger-Musterverfahrensgesetz of 19 October 2012 (BGBI. I S. 2182).

2.3 How a KapMuG Procedure Is Initiated

The KapMuG procedure can be divided into three phases: the preliminary phase, the main phase and the phase in which the individual procedures will have to be resolved. Below, the KapMuG as it applied at the beginning of 2012 is described. The future developments of the KapMuG and the possible changes to the procedure—in addition to the amendments discussed in Sect. 2.2—will be discussed in Sect. 2.5.

The '*preliminary phase*' consists of the first instance proceedings by the individual plaintiffs/victims in the mass dispute. Model case proceedings can be initiated solely by parties and not by the court on its own motion.[28] In order to start a KapMuG procedure, plaintiffs first have to file separate individual applications to the competent District Court (Landesgericht) in which, for example, a claim for compensation of damages due to false, misleading or omitted information on public capital markets is asserted. A party to this procedure can apply for a KapMuG procedure, in which case this party will have to demonstrate to the District Court that a model case procedure 'may have significance for other similar cases beyond the individual dispute concerned'.[29] The application must contain information on all factual and legal circumstances which serve to justify the establishment objective of a KapMuG procedure[30] and a description of the evidence the applicant intends to use to substantiate or refute factual claims.[31]

After the first application for a KapMuG procedure has been filed, the District Court will announce the request in a claim's register or Klageregister.[32] Within 6 months of this announcement/registration, at least nine[33] other parties have to have filed an application for a KapMuG procedure tool. If this requirement is met, the entire matter will be transferred to the Higher Regional Court (Oberlandesgericht). All points that are presented to the Oberlandesgericht must be 'related to the same subject matter' of the pending cases. After the Oberlandesgericht has confirmed that the matters that formed the basis for the application for a KapMuG procedure, will actually be part of a KapMuG procedure, the court of first instance before which the various initial claims are pending stays all proceedings which are related to the

[28] Stürner 2007, p. 257. The KapMuG can partly be seen as an opt-in system, as it will be accessible only when there is an adequate incentive for individual claimants to file a lawsuit in the first place. See Stadler 2009, p. 42. For an extensive study on the old KapMuG procedure (pre 2012) see Vorwerk et al. 2007; Reuschle et al. 2008.

[29] See Section 1(2) KapMuG. See also Baetge 2007, p. 15.

[30] In a model case, plaintiffs can establish the existence or non-existence of conditions that justify or rule out entitlement, or they can seek the clarification of legal questions, provided the decision in the legal dispute is contingent thereupon.

[31] See Section 1(2) KapMuG.

[32] See Section 3 KapMuG.

[33] See Section 6(1) KapMuG.

same subject matter of the test case and which are pending at the district courts.[34] This includes related cases in which the plaintiff has not applied for the model case.

At this point, the procedure has entered the '*main phase*'. The Oberlandesgericht will have to select one of the plaintiffs that filed an individual suit to become the main plaintiff in the model case. When doing so, the Oberlandesgericht will take into consideration the amount of the individual claim (if the claim is the subject matter of the model case) and whether several plaintiffs have already designated a single model case plaintiff.[35] The remaining plaintiffs in the suspended proceedings are summoned to the model case proceeding.[36] According to Section 14 KapMuG, these interested parties (Beigeladene) may participate in the proceeding and even file petitions, as long as these are not contrary to the statements and actions of the main plaintiff in the model case procedure. The role of the Beigeladene is merely supportive.[37]

In the final stage of the model case proceeding, the Oberlandesgericht will, in accordance with general German procedural rules, render a declaratory ruling on the factual and/or legal issues listed.[38] This model case ruling has a final binding effect in relation to all suspended cases if it has not been appealed.[39] It remains unclear, however, if the model case has res judicata with respect to the Beigeladene or whether the procedure of this party must be seen as a Nebenintervention, which would mean that the judgment would have different effect between the various individual parties that are involved in the KapMuG procedure.[40] In this book, the option which states that the model case will have res judicata over the individual procedures has been taken as the starting point.[41] After the 2012 revision of the KapMuG, it became possible also to have a court-approved settlement between the defendant and the model case plaintiff. Before the revision, all the parties needed to consent to the settlement; under the revised KapMuG, a court-approved settlement is binding on all parties, unless they opt out.[42]

The third and final phase of the KapMuG proceedings consists again of the '*individual cases*'. These individual cases will be resolved by the court on the basis of the final ruling in the model case proceeding.[43] During the third and final stage, the courts trying the matter will decide the individual cases on the basis of the final ruling in the intermediate proceeding.

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[34] See Section 7(1) KapMuG.

[35] See Section 8(2) KapMuG.

[36] As a result, the defendant, the model case plaintiffs and the so-called interested parties (victims of the other pending related cases) will be summoned to the model case procedure.

[37] The supporting party can be seen as a so-called Nebenpartei. See also Hess et al. 2008, p. 388.

[38] Stadler 2009, p. 43.

[39] According to Section 15 KapMuG, the model case can be appealed only on points of law.

[40] See Stadler 2009, p. 43; and Hess et al. 2008, pp. 531–533; and Vorwerk et al. 2007, pp. 240–241.

[41] See also Fees and Halfmeier 2012, p. 14.

[42] See Section 17 KapMuG et seq.

[43] See Section 16 KapMuG.

2.4 What Plaintiffs Can Achieve Through a KapMuG Procedure

In a model case, plaintiffs can establish the existence or non-existence of conditions that justify or rule out entitlement, or they can seek the clarification of legal questions, provided the decision in the legal dispute is contingent thereupon (this is known as the establishment objective of the KapMuG).[44] Whereas the main plaintiff will claim monetary damages, the other plaintiffs receive only a declaratory ruling on the factual and/or legal issues listed. This ruling can be used in the subsequent individual proceedings. The declaratory judgment may only state something about general legal or factual issues and not about individual issues (such as the causal relationship and individual and demonstrable loss). This declaratory judgment will be binding for all plaintiffs. Should, for example, the court rule in favour of the defendant, plaintiffs will be left empty-handed.[45]

If the 'model case plaintiff' agrees to settle his individual dispute, the settlement could also be used to resolve the mass dispute. As mentioned above, this settlement is binding to all parties, unless they opt out of the settlement. Since a mass dispute often contains several thousands of plaintiffs, this implies that these plaintiffs have to agree to the settlement individually (by not opting out of the settlement). The size of the group of plaintiffs makes it unlikely that every plaintiff will agree to a settlement. Because of the sheer numbers of plaintiffs involved in a mass dispute, it is unlikely that a KapMuG mass dispute will be resolved through a settlement.

2.5 Recent Experience with the Act, and Future Developments

Since the enactment of the KapMuG, the case that resulted in the act—the Telekom case—has been pending. The Oberlandesgericht started a KapMuG model case in July 2006.[46] The list of main issues of fact/law to be decided by the court stopped at 33.[47] The oral hearings did not begin until April 2008. An illustration of the sheer number of people involved is that the court had to relocate from the courtroom to a large public hall. In May 2012 the District Court ruled in favour of the defendants, stating that there was no proof of a misleading prospectus. The claimants, however, filed for an appeal and on 21 October 2014, the Bundesgerichtshof ruled in favour

[44] See Section 1(1) KapMuG.

[45] See also Fees and Halfmeier 2012, p. 14.

[46] Court order 11-7-2006, 3/7 OH 1/06.

[47] If all sub items are taken into account the list comes to more than 180. See also Stadler 2009, p. 46.

of the claimants, stating that Deutsche Telekom used a misleading prospectus.[48] As no court has yet decided on the issues of causation and negligence, the model case procedure will be continued before the Oberlandesgericht.

There are also examples of KapMuG cases that were resolved quicker. An example is the Daimler-Chrysler case. Because this case involved only one key issue, the court was able to come to a decision relatively quickly. The court, however, decided in favour of the defendant company, which caused the plaintiffs to appeal. In March 2008 the test case judgment was overturned and the Oberlandesgericht had to deal with the matter again.[49] In total, eight KapMuG cases have been filed with a court. As the KapMuG is a form of trial legislation, it should have expired automatically after 5 years, on 1 November 2010.[50] As already noted, however, it was evaluated, after which the German government decided that it should remain in force for longer. In July 2010, the act was prolonged until 31 October 2012.[51] The revised KapMuG act that came into force on 1 November 2012 will be in effect for eight years (until 1 November 2020).[52]

References

Baetge D (2007) 'Class actions, Group Litigation and other Forms of Collective Litigation'. Globalisation of Class Actions project (2007), Stanford University

Fees E, Halfmeier A (2012) The German Capital Markets Model Case Act (KapMuG) - a European role model for increasing the efficiency of capital markets? http://ssrn.com/abstract=1684528 Last accessed 30 January 2017

Halfmeier A et al (2010) Kollektiver Rechtsschutz im Kapitalmarktrecht. Frankfurt School Verlag GmbH, Frankfurt am Main

Hess B (2005) 'Musterverfahren im Kapitalmarktrecht'. Zeitschrift für Wirtschaftsrecht 26

Hess B et al (2008) Report on the Application of Regulation Brussels I in the Member States

Reuschle F et al (2008) Kölner Kommentar zum Kapmug. Verlag C.H. Beck, Munich

Saam D (2008) 'Collective enforcement of law within the German Legal System and the pending Telekom Case before the Higher Regional Court (Oberlandesgericht) of Frankfurt am Main – the need to reclassify the German Musterverfahren in this context'. Legal Latitudes 2

Schaumburg E (2006) Die Verbandsklage im Verbraucherschutz- und Wettbewerbsrecht. Nomos, Baden-Baden

Stadler A (2009) 'A test case in Germany: 16,000 private investors vs. Deutsche Telekom'. ERA Forum 10

Stürner M (2007) 'Model Case Proceedings in the Capital Markets - Tentative Steps Towards Group Litigation in Germany'. Civil Justice Quarterly 250

Vorwerk V et al (2007) KapMuG. Verlag C.H. Beck, Munich

[48] BGH, Beschluss vom 21. Oktober 2014 - XI ZB 12/12.

[49] Stadler 2009, p. 46.

[50] See the 'sunset clause' in Article 9(2) of the Act Introducing Model Proceedings in Securities Litigation (Gesetz zur Einführung von Kapitalanleger-Musterverfahren) of Aug. 16, 2005, BGBl. I, p. 2437.

[51] BGBl. I Nr. 39. of 29. July 2010, S. 977, 979.

[52] Kapitalanleger-Musterverfahrensgesetz of 19 October 2012 (BGBI. I S. 2182).

Chapter 3
Dutch Collective Action

Abstract One of the types of mechanisms to be used to revolve a mass dispute, is the collective action. The Dutch collective action procedure is an important example of such type of procedure. In this chapter, the collective action procedure is clarified: who can commence such procedure, what can parties achieve and how can they achieve this (what are the procedural steps).

Keywords Interest group · No monetary damages · Declaratory judgment · Proposal to amend the procedure · Opt-in · Two-stage approach

3.1 Introduction

Contrary to Germany collective redress legislation, Dutch collective redress history does not go back as far as the German Verbandsklage of 1896. The Dutch did not start developing specific instruments for collective redress until the 1980s.[1] The first true legal instrument for the resolution of mass disputes was the collective action of 1994, which can be found in Articles 3:305a–c of the Dutch Civil Code (DCC).[2] This instrument covers a public interest and a representative group claim, in which a foundation or association is able to represent a group of claimants that have similar interest by submitting a claim on their behalf. Article 3:305a DCC is the group action which can be used by individual claimants. Articles 3:305b and c DCC are instruments that allow national and local governments and consumer-like authorities to submit a collective action. As only collective litigation from an individual victim's/plaintiff's perspective will be covered in this book, Articles 3:305b and c DCC will not be analysed.

[1] In this period, several options were available for starting a collective procedure in a very specific case, such as misleading advertising. For example, see Parliamentary Documents, TK 1991–1992, 22486, nr. 3, pp. 8 et seq.

[2] Parliamentary Documents TK 1991–1992, 22486, Official Journal 1994, 391. Last modification can be found in Official Journal 2000, 254.

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Although the purpose of the collective action is to improve the efficacy and efficiency of the resolution of a mass dispute, such an action does not allow or facilitate a much used claim in normal two-party disputes: the claim for monetary damages (which will be covered in the following sections). Because of this, parties found it difficult to finalise a mass dispute in which they had suffered damage and were seeking compensation. In 2005 the legislator came up with a solution in the form of the collective settlement.[3] Since the enactment of the Collective Settlement Act in 2005 and the various settlements that have been declared binding, the collective settlement has become the leading procedure in the Netherlands for resolving a mass dispute. The collective action, however, remains one of the most important procedures that is required in order to reach a settlement that can be made binding. As a result, it remains an important procedure in mass disputes.

Although the collective settlement is often used as the procedure to eventually resolve a mass dispute, the collective action has also evolved through the years. In the 2009 evaluation of the Dutch Collective Settlement Act,[4] the Dutch legislator also made some suggestions concerning the collective action. As of 2012, Article 3:305a DCC has been modified to improve the way collective actions are instituted: more specifically, how the interest group that use the collective action are organised.

In the following sections, first some more historical background information will be given on the Dutch collective action. Then the requirements of the "collective" are set out: who can bring a collective action, what are the conditions and what can someone achieve with a collective action. Lastly, recent experiences with the collective action will be described. This section will also elaborate on the recent legislative changes to Article 3:305a DCC in the Netherlands.

3.2 History of Collective Action

As mentioned briefly in the introduction, collective actions became available in the Netherlands in 1994. Before then, collective action mechanisms were only rarely put in the law. Officially, the first semi-collective action dates from 1937. This action gave trade unions and employers' organisations the opportunity to claim compliance and/or nullity of conflicting provisions of a universally binding collective labour agreement.[5] In 1967, a special commission—the Commission for orderly Economic Traffic (commissie-Zijlstra)[6]—discussed the feasibility of interest groups submitting collective claims in other areas. The Social and Economic

[3] Parliamentary Documents TK 2003–2004, 29414, Official Journal 2005, 380.

[4] Parliamentary Documents TK 2008–2009, 31762, no. 1.

[5] For an extensive analysis of the Dutch collective action see Frenk 1994, p. 105.

[6] Parliamentary Documents TK 1991–1992, 22486, nr. 3, p. 2.

Council (SER)[7] also advised investigating ways to make collective actions possible in the area of competition law.[8]

These advisory reports resulted in a shift in legislative policy. The legislator began to look at adding collective action mechanisms when new legislation was being made and when scrutinising laws needed an update. The upshot was a law against misleading advertising, in which a collective action to seek injunctive relief was made possible. New collective actions in other areas followed shortly afterwards. Collective actions were made possible in relation to wrongful conduct with regard to the use of standard contract terms, copyright law, equal treatment and non-discrimination, and animal welfare.[9] The 1985 interdepartmental report on deregulation influences on consumer policy[10] mentioned the policy that collective litigation was made possible only in areas that were already on the legislative agenda. In the course of time, however, it became clear that there was indeed an increasing need for the means to collectively resolve a large dispute through a group action. The legislator noted that the availability of a collective action improved an efficacy and efficiency of the safeguarding of legal rights.[11] In 1988 the development of the current collective action began and in 1994 the actual law, with Article 3:305a DCC as its most important rule, came into effect. The first section of this Article states that:

> A foundation or an association with full legal capacity can commence a legal action that serves to protect the similar interests of other people, as long as the protection of these interests is also stipulated in the articles of association of the group.

3.3 Parties That Can Bring a Collective Action?

Because of the general character of the Dutch collective action, it does not define the set of people/institutions that are entitled to bring a collective action.[12] It can therefore be used by a large variety of victims in a large dispute. In order to bring a collective action, this group of victims will have to organise themselves in a representative association. Existing organisations that comply with the requirements and actually protect the interests of a certain group of people are entitled to use the collective action (for example the Dutch Investors Association (*Vereniging van Effectenbezitters*)). The actual filing of the action will be done through this interest group. According to Article 3:305a(1) DCC, this organisation has to be a

[7] In Dutch: Sociaal-Economische Raad.

[8] Parliamentary Documents TK 1991–1992, 22486, nr. 3, p. 2.

[9] Ibid.

[10] Ibid.

[11] See Parliamentary Documents TK 1991–1992, 22486, nr. 3, p. 3.

[12] The German KapMuG, for example, can be used only in a shareholder or shareholder-related dispute. The collective action is accessible in any kind of civil law dispute.

foundation or an association with full legal capacity.[13] A notarial deed is necessary for both types of legal entities.[14] Although the legislator initially thought that this requirement would inhibit access to justice in the case of an ad hoc mass dispute,[15] he eventually decided that a notary deed would offer more legal certainty and could prevent problems regarding the admissibility of the interest group.[16] Moreover, the legislator thought that the requirement of a notary deed would prevent the formation of too many ad hoc collective action interest groups, which could overload the judicial system. If the use of an interest group to file a collective action in an ad hoc case was inevitable, the notary deed should not prove to be an unbridgeable requirement.[17]

3.4 Criteria for Bringing a Collective Action

According to Article 3:305a(1) DCC the association or foundation can only serve the similar interests of the group that it represents.[18] To make the collective action the efficient and effective remedy the legislator wants, the court should not have to look into the individual situation of each of the victims the interest group claims to represent. To prevent this, a collective action can deal only with those individual interests that are suitable for bundling. The District Court of Haarlem stated that:

> The bundling of interests in a collective action is only possible if it is not necessary to involve the individual victims with the assessment of the claim.[19]

This bundling requirement narrows down the group of individual victims on whose behalf the collective action will be brought before a court. Otherwise, it is conceivable that, for example, when a collective action is brought in which the shareholders of a bank claim for losses because of faulty market information, the suppliers of paper for the bank's printers who have not been paid for several months could also be represented in the collective action. Yet these two claims have no connection, other than the fact that in both cases the bank is the opposing party in the claim.

An interest group wishing to issue a collective action must first submit the description of the similar interests it protects that is contained in the purpose clause

[13] Hereafter, an interest group will mean an interest group that complies with the requirements of Article 3:305a DCC.

[14] Article 2:30(1) DCC.

[15] See Parliamentary Documents TK 1991–1992, 22486, nr. 3, p. 20.

[16] Parliamentary Documents, TK 1993–1994, 22486, nr. 14.

[17] Ibid. See also Cornegoor 2009, pp. 24–28 on the requirements for the interest group in collective actions.

[18] This requirement is comparable to the US commonality test. It is, however, less strict.

[19] District Court of Haarlem, 5 February 2002, *JOR* 2002, 102. See also: HR 23 December 2005, *NJ* 2006, 289.

of its articles of association.[20] In addition, the interest group must actually represent the interests of the group of victims. It is not enough merely to state in the articles of association that an interest group will represent the victims' interests. Subsection 2 of Article 3:305a DCC gives an example of how the interest group can practically represent the victims. This clause obliges an interest group to look into ways of negotiating a solution to the mass dispute. If the interest group does not spend time on negotiations, it can be declared that it has no cause of action.

The 2012 legislative change of the collective action added another requirement to the collective action in Article 3:305a(2) DCC. A legal entity, as is described in Subsection 1 of Article 3:305a DCC, also has no cause of action if the interests of the persons whose interests should be protected by filing the collective action claim are not sufficiently guaranteed.[21]

3.5 The Result of Bringing a Collective Action

A Dutch collective action can serve several remedies. An interest group can seek injunctive relief or ask for a judicial order (an order to perform). An important limitation of the collective action is described in Article 3:305a(3) DCC, which states that a collective action cannot be used to claim monetary damages. The starting point of a claim for monetary damages is that the individual has to describe his/her demonstrable loss. Moreover, the victim has to show what the damage that resulted from the loss was and also to what degree the victim is accountable for that loss (circumstances which can be imputed to the victim himself). These factors are strictly individual.[22] Hence, according to the Dutch legislator, monetary damages can be claimed only by the individual victims themselves. To avoid a judge having to look into each individual situation, which would overload the judicial system, the Dutch legislator added the prohibition of Subsection 3 to Article 3:305a DCC. Another reason for adding this subsection was that if the judge had to look into all these cases, it would not be favourable to issue a collective action instead of an individual action. Moreover, the gap left by the prohibition set out in Subsection 3 can be filled by collectively claiming monetary damages through the use of a power of attorney or by assigning the claim to an interest group.[23]

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[20] See also Article 3:305a(1) DCC.

[21] Parliamentary Documents TK 2011–2012, 33126, nr. 3, pp. 4–6, 12. For more information on the 2012 legislative change to the collective action see Klaassen 2013, p. 635; Tzankova et al. 2012, p. 39; De Jong 2011, 2012.

[22] In a shareholders' dispute, it is likely that the various shareholders did not hold the same number of shares in a company, so therefore the amount of damage differs among them. Moreover, the cause of the demonstrable loss can be influenced: for example, by using an intermediary.

[23] Victims could use these options to give the interest group the power to claim damages for the victims. Although the claims could still be related to the individuals, they could be brought collectively.

If a victim of a mass dispute cannot use the collective action to claim monetary damages, what can a plaintiff claim by using this mechanism? The collective action is mostly used to file for a declaratory judgment. In most cases, the collective action is used to declare that a certain alleged perpetrator has acted wrongfully. After a court has declared that the perpetrator acted wrongfully, the plaintiffs that were party in the collective action will only have to prove their demonstrable loss and factors such as a causal connection between the perpetrator's act and the loss in an individual case, and circumstances which can be imputed to the victim in an individual procedure. This way, they can claim monetary damages more easily than if they had all had to claim these individually. All the other requirements to determine liability arising from a wrongful act have already been taken care of through the collective action. What is important is that the judgment that follows from a collective action only has res judicata in relation to the interest group.[24] Should the individual plaintiffs start an individual action, they can use only the precedent effect that follows from the collective action judgment.[25]

The bringing of an individual claim is the actual opt-in part of the collective action. Victims in a mass dispute may set up an interest group, which can bring a collective action. If, however, a declaratory judgment is given, this judgment will apply to all the victims in the mass dispute, even those not a member or part of the interest group.

When the collective action is to be used in a cross-border mass dispute among inhabitants of Member States of the EU, the organisation has to actually represent the interests of a group of the individual victims from the various Member States (Articles 3:305a(1) and (2) DCC).[26] If the organisation does not comply with this requirement of the collective action, the Dutch court can declare the action inadmissible.[27] Since this requirement does not seem to be a problem in collective actions that involve Dutch victims only,[28] and since this book focuses on the rules on private international law rather than the procedural requirements of the specific mechanisms, the possible consequences of the use of the collective action in a cross-border mass dispute on this requirements will not be discussed further here.

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[24] Parliamentary Documents TK 1991–1992, 22486, nr. 3, p. 26. See also HR 1 July 1983, *NJ* 1984, 360 (Staat/LSV) and HR 14 juni 2002, *NJ* 2003, 689.

[25] Parliamentary Documents TK 1991–1992, 22486, nr. 3, pp. 26–27.

[26] An interest group can actually represent the victims in a collective action by, for example, starting negotiations for a possible settlement or resolution to the mass dispute. See parliamentary documents 1991–1992, 22486, nr. 3, p. 20 and Sect. 3.4 of this book. See also note (25), Groene Serie Privaatrecht - Vermogensrecht, Article 3:305a DCC in which is stated that there must always be an individual victim whose interest the interest group will have to defend (based on its articles of association).

[27] See Article 3:305a(2) DCC.

[28] Meijer 2007, p. 752.

3.6 Recent Experience with Collective Actions

The above-mentioned use of the collective action is of course an improvement compared to the use of a substantial number of individual actions. It is, however, not as great an improvement as legal practice desires. In the Vie d'Or case, plaintiffs attempted to obtain a declaratory judgment in which an alleged perpetrator was proved liable (jointly and severally). This way, the individual plaintiffs would merely have to state the demonstrable loss in separate individual claims. The Supreme Court, however, decided that this practice was too closely connected to the claiming of monetary damages, which is prohibited in Article 3:305a(3) DCC.[29]

In the World Online case,[30] in which investors sustained a financial loss because of deceptive conduct involving the flotation on the stock market, the Supreme Court adopted an abstract check. According to the Supreme Court, the collective action is appropriate for a claim in which the plaintiffs wish to declare that the alleged perpetrator has conducted deceptively. The court stated that in such a case, it is the statements of the perpetrator that are subject in such a claim, not the consequences of these statements on the victims and the subsequent damage they sustained. Although there is an important difference in respect to the circumstances which can be imputed to the victim, the court does not take into account the difference between private and institutional investors.[31] The Supreme Court also went into the causal relationship between the deceptive conduct and the damage sustained. This is where the abstract test played a role, as the court only looked to see if there was a condicio sine qua non relationship. In principle, there is proof of such a relationship. The Court, however, stated that the individual circumstances will eventually decide if there is a cause-and-effect relationship in a particular individual case.

Finally, in an important collective action case[32] the court reaffirmed that representativeness is not a requirement which interest groups must meet in order to be able to bring the collective action. This judgment, however, predates the 2013 legislative change which introduced a requirement similar to the representativeness known in the WCAM procedure. As will be elaborated on in the next section, representativeness is an important requirement in the collective settlement.

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[29] HR 13 October 2006, *RvdW* 2006, 942 (Vie d'Or case). See also Cornegoor 2009, pp. 17–21.

[30] HR 27 November 2009, *LJN:* BH 2162 (World Online case).

[31] Private investors will probably have less detailed knowledge with respect to investments, that may allow them to avoid large-scale loss on their investment. As a consequence, it is more likely they will be confronted with situations which can be imputed to themselves.

[32] HR 26 February 2010, *LJN:* BK5756 (Plazacasa case).

3.7 Future Developments

The modification of the collective action mentioned at the end of the last paragraph originated from a proposal to amend the WCAM procedure.[33] In this proposal an alteration of the collective action procedure was also suggested: the current WCAM provision of Article 7:907(3)e DCC should be added to Article 3:305a DCC. The later Article requires that the interests of the persons on whose behalf the agreement was concluded are adequately safeguarded, as otherwise the collective action will be inadmissible.[34] With this provision the legislator aims at giving more guarantees that the interest group will actually defend the interests of the victims in a mass dispute. Abusive litigation and putting victims at a disadvantage must be prevented. In the end, however, the requirement of Article 7:907(3)e DCC was not applied to the collective action. Instead, a legal entity, as described in Subsection 1 of Article 3:305a DCC, is inadmissible if the interests of the persons whose interests should be protected by filing the collective action claim are not sufficiently guaranteed.

Another alteration made to the collective action is that courts have the power to refer collective actions ex officio to other courts if the parties to the collective action have the power to do so (this power is specified in Article 3:305a(6) DCC). Courts are also able to consolidate actions ex officio if parties are able to consolidate such actions. As a result, courts will have the power to bring several pending collective actions or a collective action and several individual actions before a single court, thereby improving the efficacy and efficiency of the legal protection offered by the collective action.[35]

When the WCAM procedure came into force, one of the important questions that was raised was whether the prohibition of claiming monetary damages (Article 3:305a(3) DCC) should be abolished.[36] During the legislative process of the enactment of the WCAM it was, however, decided that if this prohibition were abolished, a mass dispute would become unmanageable. The new WCAM procedure was to fill the gap formed by Article 3:305a(3) DCC.[37]

The abolition of this prohibition was, however, raised again in November 2011, when the Dutch Parliament accepted a motion to research the feasibility and desirability of abolishing the prohibition.[38] The proposers of the motion contended that claiming monetary damages through a collective would offer efficiency benefits and reduce the administrative burden of the judiciary. The proposers of the motion, however, ignored the fact that if victims became able to use the collective action to claim monetary damages, courts would be forced to look into their individual

[33] This proposal will be discussed in depth in Sect. 4.5.

[34] See Parliamentary Documents II, 2011–2012, 33 126, nr. 3, p. 12.

[35] See Parliamentary Documents II, 2011–2012, 33 126, nr. 2, p. 1. See also Parliamentary Documents II, 2011–2012, 33 126, nr. 3, pp. 13–14.

[36] See Parliamentary Documents II, 2003–2004, 29414, nr. 3, p. 5.

[37] See Parliamentary Documents II, 2003–2004, 29414, nr. 3, pp. 5–6.

[38] See Parliamentary Documents II, 33 000 XIII, nr. 14 (motion of 8 November 2011).

situation. Moreover, the true intention of the motion was unclear, since the proposers suggested changing not only the DCC in order to accommodate the collective claiming of monetary damages (through the abolition of Article 3:305a(3) DCC), but also the WCAM itself. On 26 June 2012, the Minister of Justice responded to the November 2011 motion, stating that the abolition of Article 3:305a (3) DCC would not be enough to make it possible to claim for monetary damages. The Minister of Justice suggested splitting the resolution of a mass dispute into two phases: in the first phase, parties should discuss whether the perpetrator had acted unlawfully. Questions concerning damage or causality could be discussed, but only in the event of it not being necessary to examine the individual situations of the victims whose interest is being represented by the interest group. In the second phase, parties could discuss the possibility of the perpetrator paying monetary damages. The Minister of Justice, however, noted that in this phase the parties would have to use the WCAM procedure. In this way, the Minister of Justice avoided the option of abolishing Article 3:305a(3) DCC. As an alternative to the two-phase structure suggested by the Dutch legislator, it has been proposed to add a certification phase to the collective action.[39] It has also been suggested that the current collective does not completely prohibit the claiming of monetary damages. In order to claim monetary damages, however, the judiciary must actively facilitate such a claim.[40] Current case law, however, shows that the Dutch courts have not yet actively pursued such an endeavour.

Mid 2014, the Ministry of Justice published a draft act, which purported to allow collective action for damages.[41] In short, the proposal—which is based on Article 3:305a DCC (the collective action)—is aimed at giving the court tools to guide parties to achieving a settlement. The collective action for damages is divided in various steps, in which the court firstly will have to determine whether the parties are even allowed to file such a collective action. Pursuant to the proposal, a collective claim for monetary damages for example can only be brought in case either most of the group members are domiciled in the Netherlands, the event has occurred in the Netherlands, or the defendant has its domicile in the Netherlands. Hence, the proposal is also aimed at limiting possible private international law issues. Once the parties' claim is admissible, the court could try to persuade parties to enter into a settlement agreement by for example give its judgment on the liability of the defendant, give a decision on outstanding legal issues, or suggest mediation. The court could also, should the parties have not reached a settlement yet, suggest possibilities to settle. The proposal does not allow for a true collective action for damages in which it would be possible to determine which individual suffered damage and whether he/she should be compensated for it. Issues such as causality and the specific damage suffered by the individual were not included in

[39] See Lunsingh Scheurleer 2013, pp. 33–40. See also Van Dam-Lely et al. 2013, pp. 20 et seq.
[40] Tzankova et al. 2009, pp. 95–125.
[41] For an English summary of the proposal see: http://www.internetconsultatie.nl/motiedijksma/document/1177.

the proposed procedure.[42] At the time of writing, it was unclear to what extent this proposal would be adopted. Hence, the proposal has not been included in the discussion of the rules of private international law in this book.[43]

Another important aspect currently being developed in addition to the legislative modifications of the collective actions is the organisation of the interest group that is allowed to file a collective action and the criteria it must satisfy. Although the Dutch legislator has tried to prevent a proliferation of interests groups, in recent mass disputes in the Netherlands a large number of interest groups have been set up to represent the interest of the victims in mass disputes. A well-known example is the mass dispute concerning the products of the Dutch DSB Bank, in which dozens of interest groups were involved. In general, there has always been debate in the scholarly literature about whether the members of the board of such an interest group should be screened or whether people with certain credentials should be allowed to be on the board of an interest group. Pursuant to this debate, a 'claim code' has been drafted, which stipulates the criteria an interest group must meet.[44]

References

Arons TMC et al (2014a) '20 jaar collectieve actie in het Nederlands BW'. OR 68

Arons TMC et al (2014b) 'Voorontwerp wet afwikkeling massaschade in een collectieve actie. Het sluitstuk van de collectieve actie'. OR 137

Bosters MWF (2014) 'Voorontwerp collectieve schadevergoedingsactie'. AV&S 16

Cornegoor JMKP (2009) 'Collectieve acties en belangenorganisatie in hun verschijningsvormen'. In: De Jong BJ (ed) (2010) 'Een Claimcode voor stichtingen die collectieve acties initiëren'. Ondernemingsrecht 46

De Jong BJ (2010) 'Een Claimcode voor stichtingen die collectieve acties initiëren'. Ondernemingsrecht 46

De Jong BJ (2011) 'Herziening van de WCAM en het collectief actierecht'. Ondernemingsrecht 60

De Jong BJ (2012) 'Voorstel Wet tot wijziging van de Wet collectieve afwikkeling massaschade'. Ondernemingsrecht 22

Frenk N (1994) Kollektieve akties in het privaatrecht. Kluwer, Deventer

Klaassen CJM (2013) 'De rol van de (gewijzigde) WCAM bij de collectieve afwikkeling van massaschade 'en nog wat van die dingen' '. Ars Aequi 2013/9, pp. 627–639

Lemstra JH et al (2010) 'Consultatiedocument 'Zelfregulering claimstichtingen'. Tijdschrift voor Financieel Recht 6

[42] See for example the response of a number of large law firms from the Netherlands, accessible (in Dutch) at http://www.internetconsultatie.nl/motiedijksma/reactie/31216/bestand.

[43] See for more information on the proposal Arons et al. 2014b; Bosters 2014. See for an insight on the status/usefulness of the collective action Arons et al. 2014a and Van der Velden et al. 2014.

[44] See Lemstra et al. 2010, pp. 158 et seq. in which the draft claim code is discussed extensively. The text of the code can be found at http://www.consumentenbond.nl/morello-bestanden/pdf-algemeen-2013/compljuniclaimcodecomm2011.pdf (last accessed 30 January 2017). For an extensive discussion of the claim code see also De Jong 2010, pp. 239–242; Van Doorn 2013, pp. 548–556; Tzankova 2010, p. 137.

Lunsingh Scheurleer DF (2013) ‘Enkele gedachten omtrent wenselijk procesrecht in collectieve acties en schikkingen’, Collectieve acties in het algemeen en de WCAM in het bijzonder. Boom Juridische Uitgevers, The Hague

Meijer RS (2007) ‘Massaschade’. Ars Aequi, 10

Tzankova IN (2010) ‘Kwaliteitsbewaking van belangenbehartiging bij collectieve acties en massaschade: ‘Who will guard the guardians?’ In: Holzer M et al (eds) Geschriften vanwege de Vereniging Corporate Litigation 2009–2010. Kluwer, Deventer

Tzankova IN et al (2009) ‘Effectieve en efficiënte afwikkeling van massaschade: terug naar de kern van het collectieve actie recht’. In: ’t Hart FMA (ed) Collectieve acties in de financiële sector. NIBE-SVV, Amsterdam

Tzankova IN et al (2012) ‘De evaluatie van de WCAM: de kernthema’s uitgelicht’. TCR 2

Van Dam-Lely JH et al (2013) ‘Collectieve acties in het algemeen en de WCAM in het bijzonder’. Tijdschrift voor Consumentrecht 1

Van der Velden BWG et al (2014) ‘Grenzen van collectieve afdoening in zicht’. Tijdschrift Ondernemingsrechtpraktijk 5

Van Doorn CJM (2013) ‘De afwikkeling van massaschade: optimale belangenbehartiging door belangenorganisaties’. WPNR

Chapter 4
Dutch WCAM Procedure

Abstract One of the types of mechanisms to be used to revolve a mass dispute, is the collective settlement (opt-out). The Dutch collective settlement procedure is an important example of such type of procedure. In this chapter, the collective settlement procedure is clarified: who can commence such procedure, what can parties achieve and how can they achieve this (what are the procedural steps).

Keywords Interest group · Settlement agreement · Application to declare the agreement binding · Opt-out

4.1 Collective Settlement History

After 1994, when the collective action had been added to the set of legal instruments that plaintiffs in a mass dispute could use, it did not take the legislator long to come to the conclusion that other measures were necessary in order to resolve mass disputes effectively and efficiently. The DES case played an important role in the creation of the Collective Settlement Act. It involved the DES drug[1] which was prescribed to many women from the 1940s until the 1970s, to prevent miscarriages. During the 1970s, however, it became evident that it produced many undesirable side-effects. Pregnant women and the children born from those pregnancies were at greater risk of certain types of cancer. In some instances, the drug also caused malformations of the children. After the causal relationship between the drug and the serious side-effects was demonstrated, the drug was banned worldwide. This, however, did not compensate the people who had already suffered because of it. Given the large number of victims,[2] it was logical to look into ways to resolve the various cases collectively. However, after several lengthy procedures, the parties came to the conclusion that the law was not sufficiently adequate to resolve the case

[1] Synthetic hormone called diethylstilbestrol (DES). For the influence of the DES case on collective redress in the Netherlands, see Van Regteren Altena 2005, pp. 27–35.
[2] The Dutch DES Centre, which represented most of the Dutch victims, had approximately 17,000 registered victims.

T. Bosters, *Collective Redress and Private International Law in the EU*,
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'in a single stroke'. One of the reasons for this legislative gap was the prohibition of Article 3:305a(3) DCC. The victims could not get their financial compensation through a collective action and hence the only option available to them was to use a construction of powers of attorney or assignments[3] and this did not resolve their case very efficiently or effectively. By the end of 1999, through a combination of procedures and negotiation, parties arranged an out-of-court settlement. In order to finalise the case completely, this settlement had to be made binding for all the victims, even those who were not a party at the settlement. In this way, the case could be finalised once and for all. Because the law did not provide for such an instrument and because it seemed that there was a legislative gap because of the prohibition of Article 3:305a(3) DCC, the legislator came up with a binding mechanism for out-of-court collective settlements (collective settlement). The Dutch Collective Settlement Act came into effect in 2005 and in June 2006 the first collective settlement (DES case) could be made binding for all of the victims involved.[4]

4.2 The Conditions for Arranging a WCAM Settlement

The interest group that can arrange a collective settlement is similar to the group that can bring a collective action. It must also be a foundation or an association with full legal capacity.[5] Moreover, the articles of association of the interest group must include a description of the group of victims the group represents. Apart from the requirement that only specific legal entities are able to use the instrument, there are not many similarities between the collective action and the collective settlement. The most striking difference between the action and the settlement is their legal construction: the collective action is a claim and the collective settlement consists of a request to make an agreement binding. This has an effect on the requirements that must be met in order to be able to deploy these legal instruments. In the case of the settlement, it is logical that negotiations are necessary before any settlement can be arranged, but this is not a prerequisite for the collective action.[6]

The collective action is limited only by the prescribed legal form of the interest group (together with the prescribed articles of association), the duty to negotiate with the perpetrator, the prohibition of monetary damages claims and the restriction to the representation of similar interests, whereas before a collective settlement can be used to resolve a mass dispute, many more conditions must be met. A collective settlement agreement can only compensate for the loss caused by one and the same

[3] For the regular mechanisms that can be used in mass dispute section, see Sect. 1.5.

[4] Amsterdam Court of Appeal 1 June 2006, *LJN* AX 6440.

[5] See Parliamentary Documents II, 2003–2004, 29414, nr. 3, p. 10.

[6] Hence the formal requirement in Article 3:305a(2) DCC.

event.[7] If there are more events that caused the damage, the agreement can only compensate for the loss caused by similar events. Moreover, the actual settlement agreement has to meet certain requirements. The agreement must contain a detailed description of the group of victims. It must also describe, among other things, the number of victims, the amount of damages awarded and the conditions under which the damages awarded will be paid out.[8]

In order to obtain court approval, the compensation amount may not be unreasonable,[9] the performance of the settlement agreement must be sufficiently guaranteed, the interest group must sufficiently represent the class, and the number of class members must be sufficient to warrant certification.[10] And, finally the organisation[11] that pays out the awarded damages may not be a party to the settlement agreement. All in all a vast increase in requirements compared to the collective action. A particularly important addition is the requirement of representativeness. The representativeness may, for example, follow from the fact that the interest group also represents the interests of its group members because of its activities (e.g., by disseminating of information or by lobbying), or because of the number of people that have joined it. Representativeness of an interest group is one of the requirements that many practitioners would like to add to the collective action procedure.[12] By placing the onus on the interest group to prove that it is an adequate organisation for the group of victims it represents, there is little risk of incompetent interest groups. This issue was raised on numerous occasions during the bankruptcy of the Dutch DSB Bank. Before this bank became bankrupt, there were two main interest groups that claimed they were representing large groups of victims of DSB Bank's faulty financial services. They were negotiating with the bank to come to a suitable settlement. To persuade the bank to conclude a settlement, they were also planning to bring several collective actions. Later, however, it turned out that these groups did not properly represent the victims and were even damaging the victims they should have been assisting in an already complicated dispute. By adding the requirement of proper representation to the Collective Settlement Act, the legislator hopes to prevent such issues when dealing with a collective settlement. This goal is also supported by the provision of Article 7:907 (3)e DCC, which requires that the interest group adequately safeguard the interests of the persons on whose behalf the agreement has been concluded.

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[7] The collective action is not specifically aimed at one and the same event, but at protecting the same interests of a group of victims of a mass dispute.

[8] See Article 7:907(2) DCC for all the specific requirements.

[9] Taking into account the amount of damage done, how easily and quickly the damages awarded can be paid out and the possible sources of the demonstrable damage.

[10] Lunsingh Scheurleer et al. 2007, p. 8.

[11] This organisation must be a legal entity.

[12] For example, see the various opinions that were part of the explanatory document accompanying the December 2011 proposal for amending the collective action and the WCAM (See the annexes of Parliamentary Documents II, 2011–2012, 33 126, nr. 3).

4.3 What Can Eventually Be Achieved with a WCAM Settlement

If the interest group and the settlement agreement satisfy the above-mentioned legislative requirements, the parties might be able to obtain court approval for a settlement arranged out of court. This means that the settlement agreement can be made binding for all victims, even those who were not a member of any of the interest groups that arranged the settlement and requested the court approval.[13] To prevent victims who were not part of the negotiation process losing their right to a fair trial, the legislator looked into an opt-out system for a solution. When parties have agreed on the content of the settlement agreement, they can submit an application to the Amsterdam Court of Appeal to request it be made binding. After the application has been submitted, parties will be offered the opportunity to file a statement of defence. This offer will be made public by notifying the known parties by letter and by placing an advertisement in one or more national newspapers. Once the Court of Appeal has approved the settlement agreement, the settlement agreement is binding for all known and unknown parties. With the publication of the court order,[14] the opt-out phase will start. This means that people who do not wish to be bound by the content of the settlement agreement may decide to opt out of the collective settlement, by declaring this in writing to the interest group. The Court must specify a period (of at least three months) in which parties can opt to opt out of the settlement.[15] These parties are informed of this opt-out option through their interest group or through the news items in the newspapers. The entitled parties that have no knowledge of their demonstrable loss can opt to opt out at the moment the loss is made known. The perpetrator that is bound to compensate the loss may specify the period in which an entitled party that has knowledge of the loss can opt out of the settlement agreement.

4.4 WCAM Case Law

The WCAM came into effect in 2005. Since then, seven mass disputes have been resolved by its use. The monetary damages awarded total approximately EUR 1.7 billion.[16] Whereas the first settlement case (DES) for which the WCAM was

[13] In contrast to the collective action, the victims in the mass dispute that is being resolved through the WCAM are not required to file an individual claim (and thus to opt in) for compensation. The agreed compensation that is mentioned in the settlement is binding for the perpetrator and the victims, depending on the victim choosing to opt out or not.

[14] The court order is also sent to all known parties and is also published in several national newspapers.

[15] See Article 7:908 DCC.

[16] DES case (2006), more than 34,000 victims, settlement value approximately EUR 38 million. Dexia case (2007), more than 300,000 victims, settlement value approximately EUR 1 billion. Vie

initially made involved personal injury, the next five settlement cases all involved damage caused by financial services and/or securities. The most recent settlement case involved the bankruptcy of a bank, which—pursuant to an amended of the WCAM in 2013—was resolved through use of the WCAM. In the following subsections the most important WCAM cases will be set out.[17]

4.4.1 Dexia Case

The first major financial services case to be brought under the WCAM was the Dexia case, in which the point of dispute was the sale of high-risk equity lease agreements by Dexia Bank. These agreements or so-called securities lease constructions, consisted of a loan with which the borrower could buy shares. Because share values rose, these arrangements were very popular during the 1990s. However, after the internet bubble burst and the value of shares fell, many of the investors in these lease constructions became unable to repay their loan.[18] After a lengthy negotiation process led by the former chairman of the Dutch and European Central Bank, Wim Duisenberg, the various parties involved reached a settlement in 2005. The parties requested a court order at the Amsterdam Court of Appeal, to effectuate the second binding collective settlement since the WCAM had come in effect. The settlement eventually became binding in early 2007.[19]

The Dexia case proved to be a challenge for the Dutch opt-out system, because several interest groups were negotiating a settlement with Dexia Bank. The circumstances under which the members of these interest groups suffered damage were quite different. One of these interest groups was of a group of victims that claimed that the agreement they had concluded with Dexia was voidable. They stated that the lease agreement could be described as a hire-purchase agreement, for which the spouse of the contracting party should have given approval. As this had not been done, the agreement was voidable and therefore they were entitled to more substantial compensation. As this substantive compensation was not put in the

(Footnote 16 continued)

d'Or case (2009), more than 11,000 victims, settlement value approximately EUR 45 million. Shell case (2009), more than 500,000 victims, settlement value approximately EUR 352.6 million. Vedior case (2009), more than 2000 victims, settlement value approximately EUR 4.25 million. Converium case (2012), more than 12,000 victims, settlement value approximately EUR 58.6 million. The DSB case (2014), which was the first bankruptcy case resolved through use of the WCAM relates to more than 110,000 victims. The settlement value is approximately EUR 200 million.

[17] See also Kramer 2013, pp. 63–90.

[18] The reduced value of the purchased shares made it impossible to pay off the loan with which the shares had been bought.

[19] HR 25 January 2007, *LJN* AZ7033.

settlement, Eegalease—the interest group representing these victims—opted to opt out of the settlement agreement.

This case was a real challenge for the system, since it was the first time that a large group of victims had opted to opt out of a settlement. The opt-out victims started new proceedings, to obtain more substantial compensation. Instead of doing them any harm, this benefited them. Eventually the Dutch Supreme Court decided in favour of the Eegalease victims.[20] The Supreme Court stated that the lease agreement could indeed be described as a hire-purchase agreement for which the spouse of the contracting party should have given approval.

Besides this court decision, the Supreme Court also decided that the banks that offered these lease constructions had a specific duty of due care, which they had failed to fulfil.[21] As a result, the people who had filed this specific case were also entitled to more compensation than the people who were party to the settlement agreement.

4.4.2 Vedior Case

The previously covered DES, Dexia and Vie d'Or[22] cases (described in Sect. 3.6) were all based on a certain product that was offered for purchase. The three cases discussed below all concerned mass disputes relating to the stock market. The first (and smallest) stock market related mass dispute concerned the merger of an employment agency (Vedior).[23] Compared to all the other settlements, this Vedior case is more straightforward than the other four settlements.

Sensitive information about the future merger of two companies leaked out before the official announcement. As a result, the share value fluctuated and many shareholders lost money. Parties agreed on a settlement in less than two years, which is fast compared to other mass disputes. As this case concerned a situation comparable with that of the Shell and Converium cases, and as the latter two cases involved major issues of private international law, the Vedior case will not be analysed in depth.

4.4.3 Shell Case

The Shell case, like the Vedior case, was an archetypal securities mass dispute, brought because shareholders suffered monetary damages after the stock market

[20] HR 28 March 2008, *LJN* BC2837.

[21] HR 5 June 2009, *LJN* BH2815 (Dexia Bank), *LJN* BH2811 (Levob), *LJN* BH2822 (Aegon).

[22] The Vie d'Or case was settled and made binding in 2009. See Amsterdam Court of Appeal 29 April 2009, *LJN* BI2717.

[23] Amsterdam Court of Appeal 15 July 2009, *LJN*: BJ2691.

value of the share fluctuated disproportionately. It was the first case in which a large group of non-Dutch shareholders were party at a WCAM settlement. Because Shell is registered on the London, New York[24] and Amsterdam Stock Exchanges, the domicile of the Shell shareholders is automatically diverse.

In previous cross-border mass disputes in which a Dutch company was the proclaimed perpetrator, victims had to seek salvation in the US class action. The Ahold case is an important example.[25] This securities mass dispute was resolved entirely through the use of the US class action and the settlement that followed. With the enactment of the WCAM, the Shell case would form an important test case for the international role of this new mechanism.[26]

The Shell case revolves around Shell's announcement in January 2004 that it would reclassify its proven oil and gas reserves reported over the period 1997–2002. In March 2004 a second announcement followed, which, together with the first announcement, led to Shell's proven oil reserves being revised down to approximately 3.9 billion barrels. The re-estimation of Shell's oil reserves led to a steep drop in the stock market value of its shares. In addition to the various supervisory authorities (the American SEC, the American Department of Justice and the UK's FSA) that imposed penalties on Shell for this wrongful conduct, many shareholders also initiated class actions to be compensated for the demonstrable loss that was caused by the drop in market value of their shares. In a short time, 14 class actions were filed against Shell,[27] which were eventually consolidated in the summer of 2004 before the Court of New Jersey. Many non-US shareholders were also victims of the drop in share value. This group of people was also a member of the consolidated class action. Separately from this class action, several non-US institutional investors (pension funds) also filed individual claims.

In December 2004, Shell moved to dismiss the claims asserted by these non-US purchasers pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.[28] In determining whether there is Federal Court subject matter jurisdiction over foreign transactions in a securities fraud case, US courts consider whether conduct outside the USA has had a substantial adverse effect on domestic investors or on the US markets ('effects test') and a court analyses whether conduct within the USA has played some part in the perpetration of securities fraud on investors outside this country (the 'conduct test').[29] The motion to dismiss was denied because some sites for which reserves were overstated were in the USA. Moreover, some auditing had taken place in the US, and investor relations meetings had been held in the US. To avoid a global class action in the USA, Shell offered to

[24] As American Depository receipts (ADRs).

[25] For the final approval order, see: http://www.aholdsettlement.com/us/final.pdf.

[26] The actual private international law issues that were discussed in the judgment will be set out in Chap. 7.

[27] Croiset van Uchelen et al. 2009, p. 254.

[28] See Royal Dutch/Shell Transport Sec. Litig., 280 F. Supp. 2d 509, 539 (D. N. J. 2005).

[29] See Royal Dutch/Shell, 380 F. Supp. 2d at 540. See also Reding et al. 2009, p. 2.

settle the non-USA claims. Because Shell and its main investors are based in the Netherlands, the WCAM offered in theory the best solution for resolving the mass dispute for all other parties. This settlement, however, was contingent on the US District Court in New Jersey declining foreign jurisdiction, and the Amsterdam Court of Appeal approving the deal.[30]

Later, on 18 April 2007, Shell resubmitted the motion to dismiss for lack of subject matter jurisdiction.[31] Shell also moved to sever and dismiss the non-US victims' claims, on the basis of the doctrines of comity[32] and forum non conveniens.[33] Later, after a Special Master had been appointed to give recommendations to the court, this motion was accepted and WCAM was used to resolve the non-USA part of the mass dispute.[34] The settlement that was made binding by the Amsterdam Court of Appeal included plaintiffs from 17 European countries as well as from Canada and Australia.[35]

4.4.4 Converium Case

The Converium case revolved around the Swiss reinsurance company Converium Holding AG (currently known as SCOR Holding AG).[36] In late 2001, Zürich Financial Services Ltd.[37] sold its shares through an IPO. The shares were listed on the SWX Swiss Exchange in Switzerland and on the New York Stock Exchange.[38] Between 7 January 2002 and 2 September 2004, Converium issued several announcements which led people to believe that Converium had deliberately underestimated the insurance risks when floating its reinsurance unit. The existing reserve deficiency forced Converium to announce that it would take a charge to earnings of between USD 400 and USD 500 million to increase its reserve. This,

[30] Ibid, p. 2.

[31] See re Royal Dutch/Shell Transport Sec. Litig., 04-374, 2007 WL 3406599 at *2 (D. N. J. Nov. 13 2007).

[32] Comity refers to the notion that courts should not act in a way that demeans the jurisdiction, laws, or judicial decisions of another jurisdiction.

[33] Forum non conveniens refers to the possibility that a certain forum is not the best forum available to resolve a certain dispute. In such cases a court can refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties.

[34] More details on the US part of the Shell case and the role of the US class actions on the resolution of mass disputes will be covered in the next chapter.

[35] See for an extensive description of the Shell case Van Abeelen 2012.

[36] The following text has been taken from the blog post 'Jurisdiction of the Amsterdam Court of Appeal in the Converium Settlement Case' written by M.W.F. Bosters. See http://conflictoflaws.net/2010/jurisdiction-of-the-amsterdam-court-of-appeal-in-the-converium-settlement-case/ (last accessed 30 January 2017).

[37] Of which Converium was a full subsidiary.

[38] As American Depositary Shares (ADSs).

combined with the downgrading of the company's credit rating by Standard & Poor's in response to the reserve increase, caused the value of the company's shares to plummet.

In October 2004, the first of several securities class action complaints was filed against Converium, ZFS, and several of Converium's officers and directors. Eventually, the filed class actions were consolidated before the United States District Court for the Southern District of New York. This court, however, excluded from the class action all non-US persons who had purchased Converium shares on any non-USA exchange; this left these persons empty-handed.[39] This decision was a precursor of the later Morrison v. National Australia Bank class action.[40] In that case, the US Supreme Court abolished the previous conduct and effect tests in favour of a bright line rule that focuses not on punishing misleading conduct, but only on punishing misleading conduct that is related to (i) the marketing or buying of securities on a US stock exchange, or (ii) other securities sold or purchased in the USA. As a result US securities litigation does not have extra-territorial effect, and therefore non-US plaintiffs are excluded from f-cubed securities class actions.

Because in the Netherlands the Shell case was being resolved satisfactorily for all parties, Converium and ZFS agreed to seek a settlement for its non-US investors through the Dutch collective settlement system. Converium, ZFS, the special Converium Securities Compensation Foundation (which was founded to represent the group of individual purchasers that were excluded from the US class), and the Dutch Investors Association agreed on a settlement on 8 July 2010. These parties subsequently filed an application with the Amsterdam Court of Appeal to declare the settlement binding. Because there were only approximately 200 known Dutch individual purchasers (out of a total of 12,000), who formed the most important link to use the Dutch system, the court first wished to decide whether this link was sufficient to justify assuming jurisdiction over the case. On 12 November 2010 the Amsterdam Court of Appeal ruled in a preliminary judgment that it had jurisdiction over all of the non-US plaintiffs.[41] On 17 January 2012, the Amsterdam court reaffirmed its preliminary judgment on its jurisdiction and made the settlement binding.[42]

[39] See opinion and order of 6 March 2008, United States District Court for the Southern District of New York, 04 Civ. 7897 (DLC).

[40] US Supreme Court, 24 June 2010, 561 U. S. (2010) [Morrison v. National Australia Bank]. For an analysis of the Morrison case and the impact on cross-border collective redress, see Silberman 2012, pp. 363–378.

[41] The considerations of the Amsterdam Court of Appeal will be set out in Sect. 7.6.1. See for an extensive analysis on the decision Kok et al. 2011.

[42] Amsterdam Court of Appeal 17 January 2012, LJN: BV1026. See also Kok et al. 2012; Van Yperen 2012.

4.5 Current and Future Developments

In 2008 the legislator embarked on an evaluation of the WCAM. Although the Act was seen as a success, there were some aspects that could be improved. In some cases, parties (usually the perpetrator) had been unwilling to negotiate and to come to a settlement.[43] Given that a settlement can only be made binding if it is reasonable, in these cases the WCAM could not provide a suitable solution to resolve the mass dispute. To stimulate the willingness of parties to negotiate a settlement agreement and to increase the quality of such a settlement, parties should be able beforehand to submit questions to the Dutch Supreme Court, in order to clarify certain crucial issues. If the Supreme Court decides that a perpetrator has acted wrongfully before the start of an actual procedure, that perpetrator would have a better incentive to start settlement negotiations. This was also an important recommendation of the Hammerstein Commission.[44]

One of the amendments proposed for the Dutch collective redress legislation by the Hammerstein Commission was to enable preliminary questions to be submitted to the Supreme Court. When making this amendment, the legislator looked at comparable national and international procedures, primarily the preliminary questions that national courts may ask the European Court of Justice (ex. Article 234 EC Treaty).[45]

Another proposal for changing Dutch collective redress legislation was aimed specifically at the WCAM itself. All the above-mentioned amendments and proposals will be discussed in the following subsections.

4.5.1 Amendments to the WCAM

As stated in Sect. 3.7, the collective action and the WCAM procedure were modified in 2013, pursuant to the earlier evaluation of Dutch collective redress mechanisms.[46] The amendments were aimed at improving several points in the WCAM procedure.

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[43] Parliamentary Documents TK 2008–2009, 31762, no. 1.

[44] This commission that looked into the role of the Supreme Court to set norms. See Parliamentary Documents TK 2007/08, 29 279, no. 69. The mechanism of preliminary questions was also recommended in a report that looked into the fundamental review of Dutch Civil Procedural Law. See Asser et al. 2006. The latest proposal is set out in TK 2010–2011, 32612, nr. 3 (explanatory memorandum).

[45] The legislator also drew inspiration from Articles 6 and 7 of the Treaty regarding the establishment and the statutes of the Benelux Court of Justice, and the Belgian preliminary questions relating to competition law (Articles 72–74 Belgian Act on the Protection of Economic Competition).

[46] For an extensive analysis of the various modifications to the WCAM see Klaassen 2013; and Tzankova et al. 2012.

As will be discussed in the following chapters, the way the interested parties/victims are notified is of great importance to the ability to offer finality in a mass dispute. This is especially important when the mass dispute is a cross-border mass dispute. The WCAM procedure does not contain rules specifically about notifying non-Dutch interested parties of the existence of a settlement and of the possibility of opting out of the settlement. As a result of Van Lith's study[47] of the aspects of private international law, the legislator came up with several proposals for provisions that would improve the notification procedure.[48] Another proposal for improving the WCAM law was to make the WCAM procedure accessible in bankruptcy proceedings. At present, if a company that has gone bankrupt is confronted with a mass claim, each separate claimant must file a claim with the bankruptcy trustee. The subsequent separate proceedings are time-consuming and costly. By making the WCAM procedure applicable in bankruptcy proceedings too, the mass dispute could be solved more quickly. In order to achieve this, the Dutch bankruptcy procedure was altered, to make the WCAM procedure available.[49] The first case in which the WCAM is used in relation to a bankruptcy case was resolved on 4 November 2014 (the DSB case).[50] The addition of the WCAM procedure to bankruptcy proceedings will not have an effect on the use of this collective redress mechanism in a private international law setting.

4.5.2 Preliminary Questions Supreme Court

A court is able to ask preliminary questions at the request of one of the parties or of its own motion.[51] These questions can be asked when a collective action has been brought before the court or when legal questions that have to be answered in an individual procedure are of interest for many other identical cases that have been founded on the same cause. This does not mean that every legal question can be asked through this procedure. Inappropriate preliminary questions include those that would entail the Supreme Court having to look into the individual situation of one of the parties (e.g., circumstances which can be imputed to the victim). However, even then it might be interesting to ask a preliminary question, because in the past the Dutch Supreme Court has been prepared to give more general principles that can be helpful in resolving a certain mass dispute.[52]

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[47] Van Lith 2011.

[48] The legislator, for example, proposes to make better use of the internet or to have a prescribed pre-trial review to decide how, among others, foreign parties will be notified. For the full range of proposed amendments, see Parliamentary Documents II, 2011–2012, 33 126, nr. 3, p. 3.

[49] See Parliamentary Documents II, 2011–2012, 33 126, nr. 3, pp. 7 et seq.

[50] Amsterdam Court of Appeal, 4 November 2014, ECLI:NL:GHAMS:2014:4560.

[51] The law regarding these preliminary questions came into force on 1 July 2012 and was published in the 'Staatsblad' 2013, 65, Articles 392–394 DCCP.

[52] See HR 5 June 2009, *LJN* BH2822, BH 2815, and BH 2811. See also Frenk et al. 2009, p. 1154.

After a court has asked a preliminary question, the related procedure is suspended until the procedure in the Supreme Court has been ended. The parties involved have influence over the question that a court can ask the Supreme Court. When asking a question, the court has to mention the opinions of the parties. Moreover, parties are allowed to be heard before the actual question has been asked. In addition, the plaintiffs are entitled to give their opinion about the question(s).

It is, however, also possible for the court to refuse to ask a preliminary question. Plaintiffs cannot seek remedy against such a decision. This will only occur in situations in which a court does not think a preliminary question would expedite the resolution of the case. A conceivable justification for such a refusal might be that there are grounds upon which the Supreme Court could refuse to give an answer. The Supreme Court can refuse to answer a preliminary question if the preliminary question is too factual or if the answer required is not sufficiently relevant to the case.[53] When the Supreme Court does want to answer the preliminary question, parties are allowed to be heard.

After the court that asked the preliminary question has received an answer, the initial procedure resumes. The parties involved are given the opportunity to give their opinion on the answers from the Supreme Court, or on the absence of an answer. Providing that the facts on which the Supreme Court based its answers to the preliminary questions have not been deemed to be indisputable, a court is insofar not bound by the answer of the Supreme Court. If the matters of fact, however, do not change, the court is bound by the answers.

The legislator expects that the preliminary questions will eventually expedite a collective settlement procedure. Looking at the Dexia case, if plaintiffs could have asked a preliminary question about the hire-purchase agreement and the role of the contractor's spouse they might not have been forced to opt out of the settlement agreement. This might have meant that the entire case could have been finalised through the WCAM, and that further collective actions would not have been necessary.

It is unclear whether the WCAM will be modified in the near future. The European Commission has been working on plans for collective redress mechanisms in the European Union. In 2013, they issued a set of recommendations, which will be discussed in Sect. 15.2. Among these recommendations are various common principles which, according to the European Commission, should be processed in all collective redress mechanisms in the EU. It is, however, unclear whether these principles are binding or not. Hence the effect of these principles on the WCAM is unclear.

[53] See Frenk et al. 2009, pp. 142–143.

References

Asser WDH et al (2006) Uitgebalanceerd. Boom, The Hague
Croiset van Uchelen ARJ et al (2009) 'Shell-shocked?' Tijdschrift voor de ondernemingsrecht-praktijk 7
Frenk N et al (2009) 'Het voortontwerp prejudiciële vragen aan de Hoge Raad'. RM Themis 4
Klaassen CJM (2013) 'De rol van de (gewijzigde) WCAM bij de collectieve afwikkeling van massaschade 'en nog wat van die dingen' '. Ars Aequi 2013/9, pp. 627–639
Kok AJ et al (2011) 'Converium: een stap vooruit bij collectieve afwikkeling van internationale massaschade in Nederland?' Tijdschrift voor de ondernemingsrechtpraktijk 1
Kok AJ et al (2012) 'Converium; de eindbeschikking'. Tijdschrift voor de ondernemingsrecht-praktijk 2
Kramer XE (2013) 'Enforcing Mass Settlements in the European Judicial Areas: EU Policy and the Strange Case of Dutch Collective Settlements (WCAM)'. In: Hodges C, Stadler A (eds) Resolving Mass Disputes: ADR and Settlement of Mass Claims. Edward Elgar, Cheltenham/Northampton MA
Lunsingh Scheurleer DF et al (2007) 'The Netherlands'. Globalisation of class actions project, Stanford University
Reding J et al (2009) 'Approval of Class Action Settlement by the Amsterdam Court of Appeal Closes Chapter on One 'F-Cubed' Securities Litigation, But the Future of Such Actions Remains Uncertain'. PaulHastings StayCurrent
Silberman L (2012) 'Morrison v National Australia Bank: Implications for Global Securities Class Actions'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford
Tzankova IN et al (2012) 'De evaluatie van de WCAM: de kernthema's uitgelicht'. Tijdschrift voor Civiele Rechtspleging 2
Van Abeelen DMJ (2012) 'Het sluitstuk van de afwikkeling van massaschade: waar blijven de Himalayabeklimmers?' Tijdschrift voor vennootschaps- en rechtspersonenrecht 4
Van Lith H (2011) The Dutch Collective Settlements Act. Maklu, Apeldoorn
Van Regteren Altena PN (2005) 'De collectieve afwikkeling van de DES-zaak in Nederland'. In: Van Mierlo AIM et al (eds) Het wetsvoorstel collectieve afwikkeling massaschade. Boom Juridische uitgevers, The Hague
Van Yperen CAJ (2012) Converium deel II: zesde verbindendverklaring van een collectieve schadeovereenkomst met toepassing van de Wcam'. Vennootschap & Onderneming 3

Part II
Jurisdiction in Cross-Border Mass Disputes

Chapter 5
Jurisdiction and the KapMuG

Abstract Various connecting factors can be used in order to confer jurisdiction to a certain court (e.g. the court parties choose in a choice of forum agreement, the domicile of the defendant, the Erfolgsort/Handlungsort, the place of performance of an obligation). In order to determine the compentent court in a KapMuG procedure, these connecting factors must be put in perspective with the particularities of the KapMuG procedure (i.e. one party's claim is used as an example for all other claims). This chapter sets out whether and how jurisdiction can be conferred to a certain court with respect to a KapMuG procedure. In addition, it is analysed whether the way jurisdiction can be conferred to a certain court is in line with the goals of both collective redress and the Brussels I-bis Regulation.

Keywords KapMuG · Jurisdiction · Choice of forum clause · Domicile of the defendant · Submission · Handlungsort · Erfolgsort · Place of performance

Introduction to Part II. (Jurisdiction in cross-border mass disputes)

In this part of this book, firstly the applicability of the grounds of jurisdiction on the three types of collective redress mechanisms will be set out. A court's jurisdiction in an EU-based mass dispute must be based on the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('Brussels Regulation' or 'Brussels I-bis').[1] This traité double, which also contains the EU rules for the recognition and enforcement of judgments and settlements, has a hierarchal set of rules on which a court can base its jurisdiction on.[2] The following system can be distilled from case law and the Regulation itself.

[1] A reference to either the Brussels Regulation or Brussels I-bis refers to the Council Regulation (EC) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. A reference to Brussels I refers to the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[2] See for example Briggs 2009, which sets out the hierarchy that was used in this book.

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- The exclusive grounds of jurisdiction in Article 24 Brussels I, for example, have precedence over all of the other grounds of jurisdiction. As the grounds of Article 24 Brussels I-bis only go into certain specific situations which are not related to the type of mass disputes covered in this book,[3] I will not set out or analyse this ground of jurisdiction.
- The second most precedent rule in the Brussels Regulation that forms a ground of jurisdiction is the submission rule of Article 26 Brussels I-bis.[4] When a defendant enters an appearance before a court, this court will have jurisdiction. Since this rule precedes every other jurisdictional rule, it will be covered first in the following chapters.
- The next most precedent set of rules of the Brussels Regulation are the protective grounds of jurisdiction. These grounds deal with the jurisdiction of courts in insurance,[5] consumer[6] and employment[7] situations. As the individuals involved in such a situation are believed to have a weaker financial and possible procedural position, it was deemed necessary to have specific grounds of jurisdiction to assure that this weaker position will not become a disadvantage in a court procedure. Since the focus of this book is limited to cases in which the damage suffered is caused by dealings on the stock market and faulty financial products (such a product is not an insurance contract), only the protective ground of jurisdiction in consumer-related matters will be set out in this book.
- Parties are able to deviate from these protective grounds of jurisdiction when they agree to bring a claim at another court.[8] Such an agreement will precede the protective rules for jurisdiction. Since, however, such a specific choice of forum agreement also has to comply with the requirements of the standard choice of forum agreement, I will set out both types of rules together.
- If the submission rule is not applicable and the protective ground of jurisdiction and the two types of choice of forum agreements are not available, only the general[9] and special grounds of jurisdiction will remain. Because this book

[3] The exclusive jurisdictional rules of Article 24 Brussels I-bis, for example, relate to proceedings concerning the validity of the constitution or the validity of entries in public registers.

[4] In C-111/09, Česká podnikatelská pojišťovna as, Vienna Insurance Group v. Bilas [2010], paras 19–33 the ECJ decided that Article 26 Brussels I-bis must be interpreted as meaning that the court seised, where the rules in Section 3 of Chapter II of that regulation were not complied with, must declare itself to have jurisdiction where the defendant enters an appearance and does not contest that court's jurisdiction. Entering an appearance in that way amounts to a tacit prorogation of jurisdiction. Although Section 3, Chapter II relates to insurance matters, this judgment applied applies for all the other protective grounds of jurisdiction (see Section 28) because the judgment sees the provisions in Section 3, Chapter II as provision to protect weaker parties. As consumers are also seen as weaker parties, Article 26 Brussels I-bis also precedes the rules relating to consumer-related matters.

[5] Articles 10–16 Brussels I-bis.

[6] Articles 17–19 Brussels I-bis.

[7] Articles 20–23 Brussels I-bis.

[8] Articles 13, 17, 21 Brussels I-bis.

[9] Article 4 Brussels I-bis.

focuses on certain specific mass disputes (related to the stock market and financial products), only the special ground of jurisdiction that can be used in matters relating to a contract and matters relating to tort will be analysed.[10] Moreover, in relation to the Dutch WCAM procedure, the possibility to have jurisdiction over several defendants in a procedure (Article 8(1) Brussels I-bis) will also be covered.[11]

Based on this system the applicability of the various grounds of jurisdiction in mass disputes that are to be resolved through the three types of collective redress mechanisms will be analysed. After the application of the various grounds of jurisdiction has been set out, the effects of the use of these grounds of jurisdiction on the goals of collective redress and the goals of the Brussels Regulation will be analysed. The starting point will be that nearly all of the victims in a mass dispute will resolve this dispute by using the specific collective redress mechanism that is being analysed. This is not only because in practice almost all victims will use the collective redress mechanism,[12] but also to prevent it becoming impossible to ascertain the effect of private international law rules on the goals of collective redress. Two of the goals of collective redress are to improve the efficiency and effectiveness of legal protection. I will not cover the possibility that individual victims will start a regular separate individual procedure, because having several parallel proceedings in addition to the collective redress procedure would mean that the use of a collective redress mechanisms has not markedly improved the effective and efficient legal protection. As a result, it would be difficult to determine whether the reason these two specific goals of collective redress have not been met is because of a choice made by a group of victims (not to have their dispute resolved through use of the specific collective redress mechanism) or because of the use of a certain private international law rule.

In the following chapters, I set out the application of these jurisdictional rules on the mass disputes described above, assuming that they will be resolved through respectively the German KapMuG, the Dutch collective action and the Dutch WCAM collective settlement procedure. Finally, in addition to the grounds of jurisdiction, I will discuss the application of the lis pendens rule in cross-border mass disputes.

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[10] Article 7(3) is related to criminal proceedings. Article 7(4) relates to cutlural property. Article 7 (5) is related to branches of offices or agencies. In this book situations in which damage occurred that is caused by either a company registered on the stock market or by faulty bank products that are offered by full subsidiaries will be covered. Branch offices or agencies will not play a role. Article 7 (6) is about settlors, trustees or beneficiaries of a trust. This too does not relate to the two example situations I use. The same applies for Article 7(7), which is related to the salvage of cargo or freight.

[11] For the section that relates specifically to the Converium case, see Sect. 7.6.1.

[12] Since the use of a collective redress mechanism in a single Member State has the benefit of a large group of victims that can persuade the defending company to resolve the dispute for the benefit of the victims as well. A large group of victims would make it feasible for parties to combine their legal defence. In addition, the larger the group of victims that uses a collective redress mechanism, the bigger the chance that defending companies can be offered finality of the dispute.

5.1 Introduction

Although the KapMuG procedure has not been used in a cross-border mass dispute, in this book the specific procedure is used as an example of the model case collective redress mechanism because the KapMuG specifically relates to securities mass disputes.[13] In this chapter, the application of the grounds of jurisdiction in the Brussels Regulation in a hypothetical mass dispute for which the KapMuG is used as the collective redress mechanism will be set out.[14] After looking to see on which grounds a court can base its jurisdiction, the effect the application of these rules will have on the goals of collective redress mechanisms will be set out. It will be examined whether it is possible to use the KapMuG procedure in a cross-border dispute in accordance with the goals of collective redress and as effectively as in a mass dispute applying solely to Germany. In addition, the effect of such a use on the goals of the Brussels Regulation will be discussed. By looking at the effects the cross-border use of the KapMuG has on the goals of the KapMuG and the Brussels Regulation, it is possible to draw conclusions on whether this specific type of collective redress mechanism is suitable to use in a cross-border context and whether the rules in the Brussels Regulation allow this use.

When the KapMuG is used in a cross-border mass dispute, plaintiffs from the various Member States first have to file their claims individually with a German court before a KapMuG procedure can start. As explained in Sect. 2.3, a KapMuG procedure is essentially an individual procedure to be used as a model to answer certain legal or factual questions that—after the model case procedure has been finalised—apply to all the other pending individual cases. The judgment that follows from this model case procedure will affect the other pending procedures, even though these are not formally part of the model case procedure. There is no case law on the use of the KapMuG by non-German victims of a mass dispute, but so that the KapMuG can be used as an example of a model case procedure, in this book the assumption is used that if non-German victims do file a claim with a competent German court, the model case judgment will also apply to them.

Because the KapMuG procedure can be seen as a bundle of various individual procedures and because the grounds of jurisdiction will probably apply, as they can be applied in normal procedures, Chap. 6 will also outline the fundamentals of the grounds of jurisdiction that will also be analysed in Chaps. 6 and 7. The various requirements of the grounds of jurisdiction will therefore not be discussed in detail in Chaps. 6 and 7.

[13] Although the KapMuG is a law that applies only to cases in Germany, it is here used as an example of the model case type of collective redress mechanism, with the aim of producing general data and conclusions which could be be applicable to other model case collective redress mechanisms.

[14] The specific hierarchy of the grounds of jurisdiction is indicated in the introduction to Part III of this book. Based on this hierarchy, the various grounds of jurisdiction will be analysed.

5.2 Submission

The first possible basis for jurisdiction that I will examine is the submission rule (Article 26 Brussels I-bis). This provision states that a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction or where another court has exclusive jurisdiction by virtue of Article 24 Brussels I-bis. Since the submission precedes the other grounds of jurisdiction that are mentioned in the Brussels Regulation, it can be used in any mass dispute by any party to confer jurisdiction to a certain court. As a result, this rule can be used in both securities mass disputes and also in the hypothetical contractual financial product mass disputes.[15]

Submission, i.e. tacit prorogation, must not be mistaken for a choice of forum agreement. Pursuant to the submission rule, parties can also choose a certain court. The various requirements to use this ground for jurisdiction, however, differ. The ECJ determined that the submission rule ranks above the choice of forum agreement, making it possible for parties to deviate from a choice of forum agreement. Choice of forum agreements are modifiable by the parties in the same way parties can modify regular contracts or choice of forum agreements. If parties agree on a certain forum, they can grant international jurisdiction to a different court through submission.[16] In this way, submission can be used to confer international jurisdiction to courts that have been specially adapted to rule on specific international controversies.[17] The submission rule not only precedes over the choice of forum agreement, but it also prevails over the protective grounds of jurisdiction.[18] Hence, if only a court from a Member State other than Germany were able to base its jurisdiction on one of the grounds of jurisdiction, it would always be possible to confer jurisdiction to the German court pursuant to the submission rule.

Article 26 Brussels I-bis contains several requirements. The provision's main requirements include that a *defendant* must *enter an appearance*. This first requirement seems to imply in principle that only a defendant can act in order to make use of the submission rule and confer jurisdiction. This is only partially true. The plaintiff(s) must choose a court first, before the defendant can enter an appearance and thus confirm the jurisdiction of this court.[19] Although Article 26

[15] The two types of hypothetical cases that will be used in this book are described in Sect. 1.2.

[16] Elefanten Schuh GmbH v. Pierre Jacqmain, (Case 150/80) [1981] ECR 1571, 1700; Hannelore Spitzley v. Sommer Exploitation SA, (Case 48/84) [1985], ECR 787, 800. See also Magnus et al. 2016, pp. 679–680.

[17] Magnus et al. 2016, pp. 671–672.

[18] C-111/09, Česká podnikatelská pojišťovna as, Vienna Insurance Group v. Bilas [2010], paras 19–33. Brussels I-bis, however, states that in matters that are described in the protective grounds of jurisdiction in which the protected party is about to confer jurisdiction pursuant to Article 26(1) Brussels I-bis, the court shall ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not enternig an appearance: see Article 26(2) Brussels I-bis.

[19] Magnus et al. 2016, pp. 108 and 673.

Brussels I-bis precedes almost any other ground of jurisdiction, it is also seen as a last resort ground of jurisdiction. If there were a ground of jurisdiction in the Brussels Regulation that a plaintiff could use to confer jurisdiction to a court, he would not have to base the court's jurisdiction on Article 26 Brussels I. This would mean that the court which has jurisdiction because the defendant entered an appearance can only be a court that could not base its jurisdiction on one of the other provisions in the Brussels Regulation.[20] Should the court not have any ground on which it can base its jurisdiction and should the defendant not enter an appearance, the court cannot assume jurisdiction under the submission rule (Article 26(1) Brussels I).

In the *hypothetical 'securities' type of mass dispute*, shareholders wish to sue a registered company by using the German KapMuG. To accomplish this, they first have to file individual claims with a German court. Hence, the German court should have jurisdiction in all of these individual claims. Should the company, for example, have its statutory seat in Germany, the jurisdictional question would not pose a problem (for the application of the general provision in the Brussels Regulation, see Sect. 5.5 of this chapter). However, what if there is no link with German jurisdiction? Let us consider a hypothetical case of a Spanish public company that is registered on a stock exchange in the UK and the shareholders are domiciled in the Netherlands and in Spain. Neither the parties nor the harmful event will have a linking connection with a German court. Should the plaintiffs nevertheless wish to use the KapMuG procedure to resolve this mass dispute, the submission rule could serve as a ground of jurisdiction. If all the shareholders were to bring an individual action in Germany first and the company were subsequently to enter an appearance, the German court would be able to assume jurisdiction in all of these individual actions.

In the *contractual financial product mass dispute*, in Sect. 5.3 of this book it will be argued that Section 4, Chapter II of the Brussels Regulation will apply in this type of mass dispute in relation to the consumers.[21] In principle, the rules in this section precede any other ground of jurisdiction. Only the courts that can base their jurisdiction on the grounds in Section 4/II are able to assume jurisdiction. However, should a defendant enter an appearance in another court, this other court is allowed to base its jurisdiction on Article 26 Brussels I-bis. This means that if a bank enters an appearance at a German court, yet neither the bank nor the group of consumers are domiciled in Germany, the German court would still have jurisdiction because of Article 26 Brussels I-bis.

This leaves the question of what is meant by 'entering an appearance'. Although the ECJ has not given an autonomous definition, legal scholars have defined entering an appearance as 'the legal presence of the defendant in the process, which would make the defendant a party in the proceedings'.[22] How and when a defendant

[20] Magnus et al. 2016, pp. 675–676.

[21] As will be stated later, Article 7(1) Brussels I-bis will apply to the non-consumers.

[22] Magnus et al. 2016, pp. 672–673. See also Rauscher 2006, p. 460.

becomes a party in the proceedings depends on the local procedural law.[23] German procedural law, for example, states that a person enters an appearance by answering the complaint.[24]

The use of the submission rule as a basis for the German court's jurisdiction would mean that both the registered company (in the securities type of mass dispute) and the bank (in the contractual mass dispute) will have to enter an appearance at a German court, which cannot base its jurisdiction on one of the formal grounds of jurisdiction of the Brussels Regulation. More specifically, the registered company in the one hypothetical example and the bank in the other have to enter an appearance in all of the individual proceedings that institute the KapMuG procedure. As a result, the defending company will have to follow many procedures to enter an appearance before the KapMuG procedure can commence.

As a result, the defending company will have the ability to influence the course of the KapMuG procedure. In cases where the submission rule is the only rule on which the court can base its jurisdiction, it is the defendant that decides whether or not the court will have jurisdiction. The bank, for example, could refuse to enter an appearance in most of the KapMuG procedure (the court would have to declare of its own motion that it has no jurisdiction ex Article 26 Brussels I-bis), or it could contest the jurisdiction of the courts in the individual procedure. Hence, the courts would have no jurisdiction, which could be a ground for not starting the KapMuG procedure.

In summary, the submission rule can be used to confer jurisdiction to a German court so that plaintiffs can use the KapMuG to resolve the mass dispute. It is questionable, however, whether the defendant will concur with the court before which the action is brought and enter an appearance. The defending party must be convinced that the KapMuG is the preferred redress mechanism for resolving the mass dispute.

5.3 Jurisdiction in Consumer-Related Matters

5.3.1 Application of Chapter II, Section 4 Brussels I-Bis

The rules concerning consumer-related matters, which can be found in Chapter II, Section 4 Brussels I-bis (hereafter: Section II/4)), relate to contracts that have been concluded between a person (the consumer) and a professional party.[25] Such a

[23] Briggs 2009, p. 131. The so-called lex fori regit processum rule applies. This has been confirmed by the ECJ in C-119/84, Capelloni et Aquilini v. Pelkmans [1985], ECR 3147, paras 20–21.

[24] See Magnus et al. 2016, pp. 672–673 and Kuypers 2008, pp. 127–128. For what is meant in German law by entering an appearance, see Rauscher 2006, pp. 460–463. See also Rauscher et al. 2008, pp. 312–313.

[25] See C-180/06 Ilsinger v. Schlank & Schick GmbH [2009] ECR I-0000, 14 May 2009, para 50 in which is decided that the person with whom a consumer concludes a contract cannot be a regular

matter can be classified as a consumer contract only when it meets the definition of a contract in Article 7(1) Brussels I-bis.[26] A contract in the meaning of Article 7(1) Brussels I-bis is given an autonomous and independent definition.[27] The most important boundary that is set for this definition of a contract is the one between contract and tort.[28] A legal relationship is contractual when parties have of their own free will chosen to commit themselves to cooperate with another party. In a tort case, an involuntarily creditor does not have any choice, strictly speaking.[29] If an obligation at stake is not freely assumed by the debtor, it cannot be characterised as contractual.[30]

When a natural person individually holds shares of a certain registered company, he will in principle have a contractual relationship with the bank he is using to purchase the shares. Such an agreement can also be seen as a consumer-related matter ex Section II/4.[31] In this book, however, the cases covered are only those in which the shareholder/consumer might wish to claim damages from the issuing company only and not from a third party such as a bank.[32] Although a natural person that holds shares in a company will also have a legal relationship with the issuing company itself, this relationship is regulated by company law and not the law of contracts. Since there is no contract between a shareholder and the issuing company, nor is there a consumer contract, the contractual-related grounds of jurisdiction in the case of mass disputes will be set only out in relation to financial

(Footnote 25 continued)

consumer as well. The contract can be concluded only between a consumer with a professional party and must fall within the latter's commercial or professional activities.

[26] See Case C-96/00 Gabriel [2002], ECR I-6367, paras 35–36; Case C-27/02 Engler [2005], ECR I-481, paras 31–3. See also Tang 2011, p. 107.

[27] Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging, (Case 34/82) [1983] ECR 987, 1002, and Réunion européenne SA v. Spliethoff's Bevrachtingskantoor BV and Master of the vessel 'Alblasgracht 002', (Case C-51/97) [1998] ECR I-6511, I-6541. See also Briggs 2009, pp. 214–217.

[28] A contract-based claim can never been seen as a tort-based claim. See Magnus et al. 2016, pp. 164–165. Also see Česká spořitelna/Feichter (Case C-419/11) [2013] ECLI:EU:C:2013:165 in which the ECJ ruled—in short—that an obligation that is used to base a claim on is either a contractual obligation or a tortious obligation. To have a type of obligation that is neither contractual nor tortious is undesirable. See also Marc Brogsitter/Fabrication de Montres Normandes (Case C-548/12) [2014] ECLI:EU:C:2014:148, in which the ECJ ruled that in case a claim can—pursuant to national laws—be seen as tortious, but the damage causing act can be presumed to be the result of a non-performance of an agreement, a court cannot base its jurisdiction on Article 7(2) Brussels I-bis.

[29] Magnus et al. 2016, p. 165.

[30] See Réunion européenne v. Spliethoff's Bevrachtingskantoor and Frahuil SA v. Assitalia SpA, (Case C27-02) [2005] ECR I 1543, I-1555 and see also Tacconi v. Wagner (Case C344/00) [2002] ECR I-7357.

[31] See Van Houtte 2009, pp. 205–207 and Kuypers 2008, p. 452. See also Opinion A-G Darmon in C-89/91, Shearson v. TVB [1993], ECR I-139.

[32] A bank as underwriter in an IPO or as a broker can be a party in a mass dispute. Such cases will, however, not be covered in this book.

products.[33] As a consequence, only the hypothetical financial product case will be covered in relation to consumer- related jurisdictional grounds.

In the hypothetical example relating to a contractual mass dispute in which a group of individuals suffered damage due to a faulty financial product, it is clear that there is a contractual relationship between the victims and the bank. For the purpose of this book, it is assumed that the individual victims concluded the contract for a purpose which can be regarded as being outside their trade or profession and the bank can be seen as a professional party that offered the underlying product/service for which the contract was concluded. Hence it is justifiable to say that the hypothetical case can fall under the rules for jurisdiction in consumer-related matters.

There are, however, several points that have to be looked at in detail. The consumer contract, which is covered by Section II/4 of the Brussels Regulation, can be seen as a lex specialis in relation to Article 7(1) Brussels I-bis.[34] It follows from the actual wording of Article 17 Brussels I-bis that Section II/4 is applicable only insofar as the action relates generally to a contract concluded by a consumer for a purpose outside his trade or profession. It also follows from case law that the consumer agreement has to fit one of the three types of agreements that are laid down in Article 17(1) Brussels I-bis.[35] The financial product used as an example in this book constitutes more of a service, and does not relate to the sale of goods. As a result, the consumer agreement that relates to the financial product cannot fall under Article 17(1)a and b, as both a and b relate to the sale of goods. Since Article 17(1)c also covers contracts that concern the provision of services, the contract that is used in this hypothetical case must fall under Article 17(1)c Brussels I-bis.[36]

The grounds of jurisdiction on consumer-related matters apply to contractual mass disputes that involve consumers. Natural persons who have an agreement with a bank and can be seen as consumers and parties to a financial product must resort to the provisions of Section II/4 of the Brussels Regulation to base a court's jurisdiction on.[37] The general provision (Article 4 Brussels I-bis) and the special ground of jurisdiction in contractual matters (Article 7(1) Brussels I-bis) do not apply to mass disputes concerning consumers and financial products. This also means that in the financial product mass dispute, the group of plaintiffs will have to be split into two groups: consumers and non-consumers. In the following

[33] The sale of shares and bonds does not fall inside the scope of Article 17 Brussels I. See also Magnus et al. 2016, pp. 478–479. With respect to claims against the issuing bank, please see also C-375/13, Kolassa v. Barclays Bank Plc [2015], ECLI:EU:C:2015:37, in which the ECJ ruled that prospectus liability (which could be a material ground to base a securities group action on) cannot be charaterised as a contractual claim.

[34] Case C-27/02, Petra Engler v. Janus Versand GmbH [2005], ECR I-481. See also Danov 2011, p. 55.

[35] Case C-89/91 Shearson Lehman Button [1993] ECR I-139, paras 19, 20, 22 and 24. See also Case C-96/00, Gabriel [2002], ECR I-6384, paras 36–39.

[36] Magnus et al. 2016, pp. 480–481. See also Briggs 2009, p. 148.

[37] Danov 2011, p. 55.

subsections I will set out the jurisdictional ground for consumers. The jurisdictional grounds for the group of non-consumers will be set out in Sects. 5.5 and 5.6.[38]

Although Article 19 Brussels I-bis (choice of forum agreement to depart from Article 18 Brussels I-bis, the rule that sets out which court has jurisdiction in consumer-related matters) precedes the jurisdictional ground of Article 18 Brussels I-bis, I will nevertheless first set out Article 18 Brussels l, in order to clearly cover which rules a party can depart from by using Article 19 Brussels I-bis. The choice of forum agreement in consumer-related matters will be covered in Sect. 8.4.1.

5.3.2 *Jurisdiction in KapMuG Procedure Relating to Financial Products*

As concluded above, consumers that have entered into an agreement with a bank in relation to a financial product have to base a court's jurisdiction on the ground of Section II/4. In KapMuG procedures, the victims/consumers will first have to file their claims individually, after which a single procedure out of the set of individual procedures will be used as a model case. This means that these parties are able to use the KapMuG as redress mechanism only if a German court has jurisdiction in these individual procedures.

The court that will decide in the model case procedure must also be able to assume jurisdiction in relation to the third parties. The third parties to the model case procedure do have a specified role in the model case procedure. They are seen as interested parties and have certain rights which they can use to support one of the parties in the model case procedure.[39] Although the KapMuG law states that these interested parties have certain rights,[40] it is also clearly stated that the interested parties should not be named in orders or in the heading of the model case ruling.[41] The reason for this is that it prevents unnecessary extensive judgments.[42] It does not aim at excluding the interested parties from the power of the judgment. On the contrary, these interested parties should be informed of the judgment between the model case parties so that the effect of this judgment will also count for the interested parties. As a result, the court that will resolve the model case procedure must, in my opinion, also have jurisdiction in relation to the third parties. If a German court can assume jurisdiction in the individual cases, the German court that will resolve the specific model case will also be able to assume jurisdiction.

[38] As mentioned, they will have to base a court's jurisdiction on the general and special provisions in the Brussels Regulation.

[39] § 14 KapMuG.

[40] Paragraph 12 KapMuG.

[41] See para 9(1) and 14 KapMuG.

[42] Vorwerk et al. 2007, p. 147.

With respect to consumer-related matters, this means that jurisdiction can be assumed by the courts that are referred to in Article 18(1) Brussels I-bis, according to which both the court of consumers' domicile and the court of the domicile of the other party to the contract can have jurisdiction. Should this mass dispute comprise consumers/victims that are domiciled in the Netherlands, France, the UK and Germany, and should the bank/other party to the consumer contract have its domicile in Germany, the German court could assume jurisdiction in relation to all of the consumers because of the bank's domicile in Germany. If the bank has its domicile in Germany, a German court can assume jurisdiction in the individual procedures the consumers will have to start. Only in cases in which the bank is not domiciled in Germany, but for example in the Netherlands, would a German court not be able to assume jurisdiction on Section II/4 in relation to all of the consumers. In this case the German court would be able to assume jurisdiction only for the consumers domiciled in Germany. This would make it impossible for a German court to resolve a cross-border mass dispute solely through the use of the KapMuG procedure, since the court would not have jurisdiction over all of the consumers/plaintiffs.[43] Moreover, the non-consumers will have to base the jurisdiction of the court with which they will file their claim on other grounds. This could mean the non-consumers having to go to a different court than the consumers. This would eventually lead to parallel litigation, as will be set out in Chap. 8.

Concluding, the German court can base its jurisdiction on Section II/4 with regard to all of the consumer victims in a cross-border mass dispute if the defendant is domiciled in Germany. The alternative is that the courts of the various plaintiffs' domiciles would have jurisdiction, which would make it impossible to resolve the entire mass dispute by the German court through the KapMuG. In such an event, the only way for consumers to confer jurisdiction to the German court pursuant to one of the rules in Section II/4 is to agree on the German court's jurisdiction through a choice of forum agreement (Article 19 Brussels I-bis). This possibility will be discussed in the next subsection.

5.4 Choice of Forum Agreement

As has been explained in the previous sections, the choice of forum agreement precedes any ground of jurisdiction additional to the previously set out submission rule (and the exclusive grounds of jurisdiction that will not be set out in this book). Choice of forum agreements are important grounds of jurisdiction, as many financial institutions and companies try to agree that a certain court will be the exclusive court to have jurisdiction in certain legal relationships.

[43] Although there are several courts that can have jurisdiction, it is up to the consumer to decide which to go to. Should, however, the other party of the contract decide to bring proceedings against a consumer, only the court of the Member State where the consumer is domiciled would have jurisdiction.

There are two types of choice of forum agreements that are regulated: choice of forum agreements in consumer-related matters (which are regulated in Article 19 Brussels I-bis) and choice of forum agreements in non-consumer-related matters (which are regulated in Article 25 Brussels I). Although Article 19 Brussels I-bis does not contain any formal requirements for a choice of forum agreement, such a choice of forum agreement must also meet the formal requirements of Article 25 Brussels I-bis.[44] In the following subsection, firstly the choice of forum agreement in consumer-related matters is covered in relation to a securities mass dispute and a financial service mass dispute. Then the choice of forum agreement in non-consumer-related matters is analysed.

5.4.1 *Choice of Forum Agreement in Consumer-Related Matters*

In the hypothetical contractual mass dispute[45] case, a choice of forum agreement ex Article 19 Brussels I-bis can be used in relation to consumers to confer jurisdiction to a certain court, which—in the case of a KapMuG procedure—is the German court.[46] Before the various requirements of Articles 19 and 25 Brussels I-bis are set out, it is important to realise that—as is stated above—many agreements already contain a choice of forum agreement. Such a choice of forum agreement might not confer jurisdiction to the German court, which is the court that must be able to assume jurisdiction in order for a mass dispute to be resolved through use of the KapMuG.

A choice of forum agreement firstly has to comply with the formal requirements of Article 25 Brussels I-bis (the general choice of forum agreement).[47] As will be explained in the following subsections, pursuant to Article 25 Brussels I-bis a choice of forum agreement must (i) either be in writing, (ii) or be in a form which accords with practices which the parties have established between themselves, or (iii) in international trade or commerce, be in a form which accords with a usage of which the parties—in a nutshell—should have been aware and which is

[44] See Schlosser report para 161a.

[45] Since it is assumed that there is no contractual relationship between the shareholder and the company whose shares are held, the grounds of jurisdiction in relation to contracts are not set out in relation to the shareholder mass dispute. Hence, the consumer-related jurisdictional rules in Section II/4 are not set out either and therefore the use of Article 19 Brussels I-bis will only be covered with in relation to the financial product mass dispute.

[46] These jurisdictional rules and the type of choice of forum agreement that are set out in this subsection relate solely to the consumers in a mass dispute. The other parties (companies) are not bound by the rules in consumer-related matters and can confer jurisdiction only through the general and special rules on jurisdiction and through the submission rule and the general choice of forum agreement (Article 25 Brussels I-bis).

[47] Schlosser Report, [161a]. See also Briggs 2009, p. 153.

widely known.[48] The main goal of the formal requirements of the choice of forum agreement is to assure that consensus between the parties is actually established.[49]

A choice of forum agreement in writing means that the agreement actually has to be in writing or evidenced in writing. This choice of forum agreement can have several written forms. In consumer-related matters a choice of forum agreement is often part of the main agreement which—in this example—is entered into between the consumer and the bank. It can of course also be a stand-alone agreement. In such an event, the choice of forum agreement would comply with the requirements of Article 25 Brussels I. Any other form of choice of forum agreements in consumer-related matters is unlikely to comply with the requirements of Article 25 Brussels I.

The second possible form of a choice of forum agreement in that the agreement has to be in a form which accords with practices which the parties have established between themselves, also requires that there is already a continuing *business* relationship between the two parties and that it would be contrary to good faith to deny the existence of a jurisdiction agreement.[50] Although most consumers have a relationship with a bank (perhaps only a bank account), it is necessary for this relationship to be related to business and to be recurring.[51] For the relationship with business to apply, the user of the choice of forum agreement has to actually be engaged in business.[52] As business activities cannot fall under Section II/4,[53] this version of the choice of forum clause cannot be used. Moreover, most consumers only spend a very short time doing business with a bank, i.e. signing a contract (bank account, mortgage or perhaps an occasional loan). Hence the relationship between a consumer and a bank can be described as incidental, which also makes it impossible to make use of this second type of choice of forum agreements.

The third option possibility cannot apply in consumer-related matters either, because it applies in international trade or commerce, and consumers are, by definition, not parties in international trade or commerce.[54] This means that the only choice of forum agreement in consumer-related matters can be writing or evidenced in writing.

If a choice of forum agreement has been entered into in a consumer-related matters, the choice of forum agreement between the consumer and the professional can only allocate jurisdiction to a court in three exhaustive situations, which are described in Articles 19(1), (2) and (3) Brussels I-bis. These situations can be

[48] The various requirements of Article 25 Brussels I-bis are set out in Sect. 5.4.2.

[49] C-387/98, Coreck Maritime v. Handelsveem [2000], ECR I-9337, para 13.

[50] C-25/75, Segoura v. Bonakdarian [1976], ECR I-1851, para 11. See also C-71/83, Tilly Russ v. Nova [1984], ECR I-2417, para 18.

[51] Kuypers 2008, p. 334.

[52] Kuypers 2008, p. 335.

[53] This section applies only to consumers.

[54] Kuypers 2008, p. 350.

divided into a choice of forum agreement that is entered into before the dispute arises (Articles 19(2) and (3) Brussels I-bis) and an agreement that is entered into after the dispute arises (Article 19(1) Brussels I-bis).

5.4.1.1 Choice of Forum Agreement Before the Dispute Arises

A choice of forum agreement in consumer-related matters should be entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State (Article 19(3) Brussels I-bis). This type of choice of forum agreement should confer jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State. Article 19(3) Brussels I-bis will be used only in the event of one of the parties moving to another Member State in the near future. Hence this particular choice of forum agreement cannot be used to confer jurisdiction to the German court in the cross-border mass dispute described above. Because this rule cannot offer a ground of jurisdiction in the hypothetical case examined here, this provision will not be covered in this book.

In the Article 19(2) Brussels I-bis situation, in which consumers and the bank can allocate jurisdiction to a court through an agreement, the agreement has to allow the consumers to bring proceedings in courts other than those indicated in Section II/4. This type of choice of forum agreement can be used only when both the consumers and the bank are not domiciled in Germany. Moreover, only consumers may confer jurisdiction to the court that is agreed upon in the choice of forum clause. The bank is not allowed to deviate from the courts that have jurisdiction pursuant to Article 18 Brussels I-bis and hence cannot avail themselves of his choice of forum clause.[55]

Article 19(2) Brussels could thus partly provide a solution when conferring jurisdiction to a German court in consumer-related matters, and make it possible to use a KapMuG procedure to resolve a cross-border mass dispute. Partly, as in this type of choice of forum agreement, the agreement has to be entered into before the dispute arises. Most banks already use a set of general terms and conditions which contains a choice of forum clause and it is unlikely that in its terms and conditions a bank will allocate jurisdiction to a court other than the court of its preference,[56] let alone to a court that is the choice of a group of consumers. Since banks themselves cannot use Article 19(2) Brussels I-bis to allocate jurisdiction to the court they favour most, it seems highly unlikely that the type of agreement

[55] See Magnus et al. 2016, pp. 522–523.

[56] It should be seen as a lawyer's duty to advise his client to go to the most favourable court. See Geimer 2005, p. 373 (§ 1096). Given evidence and practicality, this would probably be the court of the bank's domicile. In addition, it must be taken into account that a bank would not confer jurisdiction in relation to mass disputes to a certain court only through its terms and condition. That court would have jurisdiction in all disputes that arise. This would also make it undesirable for a bank to confer jurisdiction to a court other than the court of its domicile.

mentioned in this Article will be agreed upon through the bank's general terms and conditions.[57]

It must thus be concluded that non-German bank/financial institutions are unlikely to have a choice of forum agreement that confers jurisdiction to a German court. German banks/financial institutions are, however, likely to have such a choice of forum agreement. If consumers wish to bring a KapMuG procedure before the German court, such a choice of forum agreement would not be required, since the German court could assume its jurisdiction on the basis of Article 18 Brussels I-bis. Thus, if the German court cannot assume jurisdiction in consumer-related matters, the parties to the mass dispute could try to agree on a choice of forum agreement after the dispute has arisen.

5.4.1.2 Choice of Forum Agreement After the Dispute Has Arisen

Pursuant to Article 19(1) Brussels I-bis, a court can assume jurisdiction when an agreement thereto is entered into after the dispute has arisen. The first question arising from this is what is meant by 'after the dispute has arisen'. According to Jenard, this means 'as soon as parties disagree on a specific point and legal proceedings are imminent or contemplated'.[58]

As a result, this type of choice of forum agreement is comparable to the submission rule of Article 26 Brussels I-bis, as parties agree to go to a certain court when legal proceedings are imminent or contemplated.[59] When consumers and the bank disagree on the use of a financial product and legal proceedings are imminent or contemplated, both parties should agree on a choice of forum. This is possible as long as proceedings have not yet started.

When the mass dispute has already arisen, the initiator of the KapMuG procedure has to persuade the rest of the consumers that the German KapMuG is the most suitable collective redress mechanism. Hence, the use of a choice of forum agreement depends on the persuasive powers of the party wishing to use the KapMuG in a cross-border mass dispute, and on the KapMuG as a collective redress mechanism itself; if the KapMuG is not seen as the most favourable mechanism for resolving a mass dispute, it is unlikely that parties will agree on Germany as a suitable forum.

This choice of forum agreement should be reached after the dispute has arisen. Since proceedings are imminent in this phase, the bank will think twice about agreeing on a certain court to resolve the pending dispute. Since a collective redress mechanism can be used to put pressure on the defendant to come to a certain level of compensation, it seems unlikely that the bank will agree to enter a choice of forum agreement with all of the consumers. The only incentive the consumers could

[57] See also Kuypers 2008, p. 484.

[58] Jenard Report, p. C 59/33 under 'Article 12'.

[59] See Magnus et al. 2016, p. 529.

use is the prospect of resolving the mass dispute for a large group of plaintiffs in a single procedure. Since the KapMuG can offer such guarantee only on a limited basis, I believe it is unlikely that a non-German bank will agree to such a choice of forum. On the other hand, should the bank not be willing to agree on a choice of forum, it would be forced to start proceedings in numerous other relatively unknown jurisdictions, depending on the domiciles of the group of victims. In this case, the standard rules in consumer-related matters (and of course the standard grounds of jurisdiction in relation to the non-consumers) would apply, and the bank will be confronted with several proceedings in different jurisdictions.

The willingness of the bank to agree on a choice of forum brings me to another point: that the bank has influence over the allocation of jurisdiction through this agreement. Should the bank not agree on the proposed jurisdiction of a German court, it would be able to force consumers to start proceedings in different Member States. This could undermine the power the consumers would have if they started a single collective procedure. A bank would probably choose another court to resolve the case only if that court is able to use a more favourable collective redress mechanism.

Summarising, in relation to a contractual mass dispute it is expected that the bank/financial institution and the consumers are already bound by a choice of forum agreement, and this raises the question of whether this agreement confers jurisdiction to the German court. Secondly, it is unlikely a bank/financial institution will agree to confer jurisdiction to another court and thirdly, this would also require coordinating to achieve all the consumers agreeing to confer jurisdiction to the German court. In addition, the non-consumers would also have to be involved in conferring jurisdiction to the German court, otherwise the risk of parallel proceedings could cause inconsistent judgments.[60] As a result, a choice of forum agreement could be used in conferring jurisdiction to the German court in consumer-related matters. There are, however, several impracticalities.

5.4.2 Choice of Forum Agreement in Non-Consumer-Related Matters

In the previous subsection the possibility of departing from the jurisdictional rules of Chapter II, Section 4 by using a choice of forum agreement was described. However, it is possible that not only the consumers but also non-consumers cannot confer jurisdiction to a German court through the general and special grounds of jurisdiction.[61] In the next subsection the use of the general choice of forum agreement for non-consumers ex Article 25 Brussels I-bis is set out. Since a general

[60] See Chap. 11.

[61] For these grounds, see Sects. 5.5, 5.6 and 5.7.

choice of forum agreement can also be used in tortious disputes,[62] the possibilities of such a choice of forum in the securities mass dispute will also be set out. Since the underlying relationship between the non-consumer and the bank differs from that between the shareholder and the registered company, these subjects will be set out separately.

5.4.2.1 Choice of Forum Agreement and the Underlying Financial Product

A choice of forum agreement can be entered into when the underlying relationship between two parties is established. In this book, such a relationship is established when a party enters an agreement that arranges the contractual relationship for the financial product and when a party holds shares in a certain company.

Where consumers only have the possibility of using a choice of forum agreement in a separate agreement, non-consumers can use a choice of forum clause in their general terms and conditions. This implies that non-consumers might be able to confer jurisdiction to a German court through a choice of forum clause in their general terms and conditions. Non-consumers could also, just like consumers, try to agree on a choice of forum agreement in a separate contract which only contains the choice of a certain court. In a mass dispute related to a financial product, the use of a forum clause in a company's general terms and conditions is the only practical way a choice of forum agreement can be used, other than the use of a separate agreement. For example, it is unpractical and unrealistic to have a verbal choice of forum agreement that is evidenced in writing when dealing with a bank and agreeing on the use of a financial product. The professional nature of entering into a contract with a bank implies that most parts of the dealings with the bank are done in writing.

The use of a choice of forum clause in general terms and conditions is generally accepted.[63] Since these general terms are in writing, they satisfy the requirements that are set for the choice of forum agreement (Article 25(1)a Brussels I-bis). The only problem, however, is that the party that is going to use the financial product is not the only party that uses general terms and conditions and is probably not the only party that uses a choice of forum clause. Hence the question arises of which choice of forum clause will prevail: the clause of the bank or the clause of the non-consumer? The necessary *battle of forms* can be resolved using three methods; the *first shot theory* (in which the terms of the offering party prevail), the *last shot theory* (in which the terms of the accepting party prevail, and the *knockout theory* (in which neither of the choice of forum clauses prevails and parties are forced to

[62] Since consumer-related matters have to be contractual ex Article 17 Brussels I-bis, the choice of forum agreement in Section II/4 cannot be related to tortious matters. An Article 25 Brussels I-bis choice of forum agreement can, however, also be entered into when a tortious dispute has arisen; in that phase of the dispute, parties can agree to go to a certain court to resolve the dispute.

[63] Kuypers 2008, p. 7.

confer jurisdiction through the normal rules of private international law).[64] Since no theory prevails and it is not entirely clear if the *battle of forms* should be interpreted autonomously or according the lex causae, it remains unclear which court should have jurisdiction when two parties use conflicting choice of forum clauses. Some are inclined to believe that the *battle of forms* is to be interpreted autonomously and that the *knockout theory* is the most appropriate theory to use.[65] This means that in the case of a *battle of forms* a choice of forum agreement in the benefit of the non-consumer is not concluded, since the bank is the offering party. However, since the ECJ has decided that none of the theories is preferred exclusively,[66] in the end the opinion of the offering party principally decides; when the bank does not agree to confer jurisdiction to a German court according to the accepting party's choice of forum clause, the bank could decide to withdraw the offer of the specific financial product. This would result in the non-consumer being forced to accept the bank's choice of forum clause.

As well as the problems with conflicting terms and conditions, it remains unlikely that when they are entering a choice of forum agreement before a dispute arises, non-consumers that do not have their domicile in Germany would prefer a German court above the court of their domicile.[67] Should these non-consumers prefer the KapMuG over another collective redress mechanism, it remains unlikely that all of these non-consumers will implement a choice of forum clause in their terms and conditions to confer jurisdiction to a German court. Firstly, there is the question of future disputes and the need for these non-consumers to conclude a choice of forum agreement for disputes that have not even arisen. Secondly, this would mean that a German court would, in principle, also have jurisdiction in non-mass disputes, since such an agreement will focus on a legal relationship and not a certain procedure. Thirdly, in order for all these non-consumers to use the KapMuG and go to a German court would require stringent coordination. In a phase when there is no dispute, it seems unlikely that parties would be willing to confer jurisdiction to a relatively unknown court. Since parties cannot predict that a mass dispute will occur and since it is cheaper to start proceedings in one's country of domicile, it seems unlikely that non-consumers will use such a choice of forum clause.

Besides agreeing on the use of these general terms and conditions it is also possible for these non-consumers to agree on a certain forum in a separate agreement. This, however, would have the same impracticalities as with the comparable separate choice of forum agreement in consumer- related matters (see Sect. 5.4.1.1). It therefore seems unlikely that non-consumers would use a separate choice of

[64] Kuypers 2008, pp. 268–269.

[65] Case C-106/95, MSG/Les Gravières [1997] ECR. I-911, paras 15–17. See also Kuypers 2008, p. 271.

[66] Case C-313/85, Iveco/Van Hool [1986], ECR 3337, para 12.

[67] Pursuant to the Brussels I-bis Regulation, a choice of forum agreement can also confer jurisdiction to a court of a Member State in case none of the parties to the choice of forum agreement are domiciled in a Member State.

forum agreement. Should parties not use such an agreement at all, the choice of forum clause most probably used by the bank will apply and the court of the bank's preference will have jurisdiction in the mass dispute.

5.4.2.2 Choice of Forum and the Holding of Shares

A choice of forum agreement can also be used in securities matters. As is mentioned earlier, a shareholder does not have a contractual relationship with the registered company.[68] The only contractual relationship that plays a role in a share purchase is the relationship with the bank. Because the shareholder would want to sue the registered company in a mass dispute, a choice of forum agreement in the relationship between the shareholders and the registered company might offer a ground of jurisdiction in this type of dispute.

Taking into account that there is no contractual relationship between a shareholder and the registered company, the general terms and conditions of both the registered company and a shareholder cannot be of influence in this mass dispute. The parties in this dispute could decide to enter a separate choice of forum agreement before court proceedings are actually started. It is, however, again the question if the defending party is willing to go to a court which is not in the registered company's domicile even before the dispute has arisen.[69]

There is, however, another option available. A choice of forum clause could also be added to a company's articles of association. Such a choice of forum clause is intended for deciding which court has jurisdiction in conflicts with subsidiaries or with shareholders.[70] Since such a choice of forum agreement is in writing, it will comply with the requirements of Article 25 Brussels I.[71] This choice of forum agreement also applies to those shareholders that held shares before the choice of forum clause was added to the articles of association. The moment that such a choice of forum clause is added to the articles of association is therefore not of importance.[72] It is, however, necessary to define a specific set of disputes in which this choice of forum clause will be valid. If every dispute falls under this choice of forum clause, the clause will be deemed to be too wide.[73] Should the choice of forum clause be of a more general nature, then it will apply only to disputes related to company law (not, for example, disputes concerning the delivery of goods).[74]

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[68] Since in this book, only matters are set out in which damage occurred that is caused by shares that are traded on the secondary market.

[69] For the considerations, see the previous subsections.

[70] See Kuypers 2008, 415.

[71] See Kuypers 2008a, p. 979.

[72] See Kuypers 2008, p. 217.

[73] A choice of forum agreement can relate only to a particular legal relationship. See Article 25(1) Brussels I-bis. See also case C-214/89, Powell Duffryn/Petereit [1992], ECR I-1745. and Kuypers 2008, p. 415.

[74] See Kuypers 2008, p. 415.

Concluding, a choice of forum clause in a company's articles of association can be used to confer jurisdiction to a court in a securities dispute. Again, should a company decide to use such a clause, it should weigh it against the fact that in this case the German court would also have jurisdiction in securities disputes (and perhaps other company-related disputes),[75] while the clause is intended to be used only in mass disputes. Although—depending on the applicable company law—shareholders have the power to suggest adding such a clause, this raises the question of whether shareholders will use their powers in a shareholders' meeting when no dispute has arisen.

5.4.3 Conclusion

Summarising, when looking at the possibilities of a choice of forum agreement in the financial product case, the plaintiffs will have to be divided into a group of consumers and a group of non-consumers. This means that a choice of forum agreement in the consumer-related matters will have to comply not only with the requirements of Article 25 Brussels I-bis, but also with Article 19 Brussels I. Consumers can try to enter a choice of forum agreement before or after the dispute has arisen. Taking into account that a bank is likely to have already inserted a choice of forum agreement in the contract underlying the financial product, chances are slim that the bank will agree (either before or after a dispute has arisen) with any court other than the court of the company's domicile. Agreeing with another court would seem to be possible only when the consumers can persuade the bank to confer jurisdiction to the German court because of benefits of the KapMuG procedure for the bank itself. The non-consumers are likely to have a choice of forum agreement in their terms and conditions. As a result, it is possible that two choice of forum agreements play a role in deciding which court has jurisdiction. In the event of choice of forum agreements in the parties' terms and conditions, a battle of forms could resolve which clause will prevail: the non-consumers' clause or the bank's. Because due to the distinction between consumers and non-consumers the parties in a contractual mass dispute can have different choice of forum agreements, parties should have to coordinate that the consumers and non-consumers ultimately confer jurisdiction to the same court, in order to resolve the mass dispute before a single court and through use of the KapMuG.

In the securities dispute, which is tortious, the shareholders—here the distinction between consumer and non-consumer does not apply—can try to enter a choice of forum agreement with the registered company. They are, however, confronted with the same impracticalities as in the contractual mass dispute: it is unlikely the registered company will agree to confer jurisdiction to a court unless this court has

[75] If the clause is formulated in more general terms by which other company-related disputes will also fall under the clause.

certain benefits for the company itself. In addition, it could be possible that the registered company's articles of association contain a choice of forum agreement which confers jurisdiction to a certain court. Again, it is unlikely that a non-German company will confer jurisdiction to the German court in order to resolve mass disputes through use of the KapMuG, as companies are likely to confer jurisdiction to the court of their own domicile.

Hence, in theory a choice of forum agreement can be used to confer jurisdiction to the German court in order to resolve mass disputes through use of the KapMuG, but in practice it seems unrealistic that non-German companies will confer jurisdiction to a German court.

5.5 General Provision

In case the victims in a mass dispute wish to have the dispute resolved through use of the KapMuG, but the German court cannot assume jurisdiction because the defendant does not enter an appearance (submission rule), or if the parties have not conferred jurisdiction to a the German court through a choice of forum agreement, the remaining grounds on which the German court can assume jurisdiction regarding the non-consumers[76] are the general provision and the special rules regarding jurisdiction.[77] The rationale for a collective redress mechanism is to resolve a mass dispute by filing a claim collectively (consumers and non-consumers together). Since the consumers in a mass dispute are bound by the rules of Section 4, Chapter II, it could be problematic for consumers and non-consumers to jointly file a claim in a cross-border KapMuG procedure.

The general provision of Article 4 Brussels I-bis states that a plaintiff can sue a person before the court of this person's domicile.[78] The focus is thus on the domicile of the bank and the domicile of the registered company.[79] If the bank or

[76] Regarding the consumers, jurisdiction is taken care of by the rules of Section 4, Chapter II. Non-consumers have the option of starting proceedings at the courts mentioned in either Article 4 Brussels I-bis or Article 7 Brussels I-bis.

[77] These rules will be set out in the next subsections. The special jurisdictional rules for contractual matters will be covered in Sect. 5.6 and the rules for tortious matters will be covered in Sect. 5.7.

[78] Nationality of this person (hereafter: defendant) is of no importance. For example, it could be possible that an Englishman brings an action against a Frenchman domiciled in Germany. In this case Article 4 Brussels I-bis could serve as a ground for the German court to assume jurisdiction.

[79] Unlike the definition of the notion 'domicile' with natural persons, the regulation gives a more autonomous definition regarding the domicile of companies and other legal entities. These legal persons are domiciled in the place where the entity has its statutory seat, central administration or the principal place of business. Since the United Kingdom and Ireland do not use the notion 'statutory seat', the regulation gives a special rule regarding the use of this notion (Article 63(2) Brussels I-bis).The definition of the domicile of a trust is regulated separately in Article 63(3) Brussels I-bis, which states the domicile has to be determined in accordance with the rules of private international law of the forum.

registered company has its domicile in Germany and the victims wish to use the KapMuG as redress mechanism, the German court can base its jurisdiction for the non-consumers on Article 4 Brussels I-bis. Since the German court can also assume jurisdiction in relation to the consumers pursuant to Section II/4, the entire group of victims could start a procedure before the German court. Should the defendant, however, be domiciled outside Germany, then it would become impossible for the non-consumers to base a court's jurisdiction on Article 4 Brussels I-bis. The consumers would have the same problem, since Section 4, Chapter II allows the courts of the domiciles of both the consumers and the defendants to have jurisdiction.

The general provision of Article 4 Brussels I-bis provides a clear jurisdictional ground in mass disputes. Since this provision focuses on the defendant, more specifically his domicile, a court can base its jurisdiction either on this provision for all the plaintiffs (with the exception of consumers) or for none of them. If a court cannot base its jurisdiction on Article 4 Brussels I-bis, one of the special jurisdictional grounds should offer a solution. Moreover, it is possible for the consumers to join the KapMuG procedure, since the consumer-related grounds of jurisdiction also allow consumers to start proceedings at the court of the defendant's domicile.

5.6 Jurisdiction in Contractual Matters

When there is no appeal to the submission rule, no choice of forum agreement and the defendant is not domiciled in Germany, non-consumers[80] must have recourse to the special rules for jurisdiction (Article 7 Brussels I-bis), specifically the rules concerning contractual matters and tortious matters. For contractual matters, the same applies as for consumer-related matters; the securities mass dispute that is used as an example focuses on claiming damages from the registered company, not from the bank with which the shareholder has a contract. Hence, this subsection covers only the mass dispute that is caused by the faulty financial product.

In order to see whether a German court can base its jurisdiction in a KapMuG procedure on Article 7(1) Brussels I-bis, several things are of importance. Firstly, Article 7(1) applies only to legal relationships that fall under the ECJ's definition of a contract.[81] The financial product which is used as an example of a cause of a mass dispute can be seen as a contract-based product which falls under Article 7(1) Brussels I-bis. Second, where the general provision of Article 4 Brussels I-bis relates jurisdiction to the place of the defendant's domicile, Article 7(1)a relates jurisdiction to the place of performance of the obligation in question. Article 7(1)b gives a description for the place of performance in the case of the sale of goods and the provision of services. In all the other cases, Article 7(1)a applies (as stated in Article 7(1)c). In practice, sub b is applied most, as few other types of contracts are

[80] Since consumers are bound by the rules in Section 4, Chapter II.

[81] For a definition of a contract ex Article 7(1), see Sect. 5.3.

used. Thirdly, it is important to take into account that Article 7(1) Brussels I-bis deals with the place of performance of an *obligation* in a contract. It is, however, possible to have more than one obligation in dispute. When there is a multiplicity of obligations in a certain contract it is necessary to come up with a centre of gravity in order to reduce the number of jurisdictional connections.[82] The principal obligation has to be identified before the place of performance of this obligation can be determined.

Before looking into the two possible interpretations of the 'place of performance', the possibility that parties might have agreed on the place of performance through a contract must be explored. In this case, the agreed place of performance would be the starting point in determining which court will have jurisdiction according to Article 7(1) Brussels I-bis.[83] In this particular mass dispute, the place of performance should be in Germany (since the German court should have jurisdiction according to Article 7(1) Brussels I-bis in order to resolve the mass dispute through the KapMuG). If parties agree on a place of performance, it is not necessary to comply with the formal requirements for the choice of forum agreement (Article 25 Brussels I-bis).[84] Should, however, the only intention of the agreed place of performance be to provide a forum for litigation, it will be necessary to comply with Article 25 Brussels I-bis.[85] This raises the question of on which ground a single place of performance for all the individual financial product agreements should be agreed upon in this mass dispute context.

Strictly speaking, there is not necessarily one obligation for which a place of performance should be agreed, as it could very well be that various obligations are the subject of a claim. Although an agreed place of performance of the place where to perform the obligation to pay the bank is used regularly,[86] in our hypothetical case this is not the obligation which is in dispute.[87] A place of performance for this obligation should therefore not be agreed upon.

It is also possible to use such a fixed place of performance for the obligation of the bank to pay the user of the financial product. The place of performance of a certain obligation in an agreement should be stipulated in the agreement itself.

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[82] See Briggs 2009, p. 234.

[83] Article 7(1)b Brussels I-bis namely states that '(…) for the purpose of this provision and *unless otherwise agreed* (…)'. See also Kuypers 2008, p. 20.

[84] Case C-56/79 Zelger v. Salinitri [1980], ECR 89. See also Briggs 2009, pp. 198–199 and 246. See also Kuypers 2008, pp. 20–28. See also Strikwerda 2010, pp. 62–63.

[85] Case C-106/95, MSG v. Les Gravières Rhénanes Sarl [1997], ECR I-911. See also Briggs 2009, p. 246. Since such an agreement would be seen as a regular choice of court agreement, I will refer to Sect. 5.4.

[86] See Kuypers 2008, p. 23.

[87] The mass dispute will, in this hypothetical case, originate from the faulty bank product. This mean that the users of the bank product will not get the promised indicated return of their investment. As a result the obligation to pay this sum of money will be the specific obligation that causes the damage, since the indicated sum cannot be paid.

A user/non-consumer cannot come up with a place of performance for an obligation by naming a certain bank account in a certain place.[88] Hence the parties of a financial product should agree on an actual place of performance. However, whether a specific place of performance will be agreed upon depends on the duration of the financial product. If the duration is long, then it is possible that the user of this product would prefer not to agree on a place of performance, because of uncertainty about a certain place still being the best place to perform the obligation in the future (for example, the user would not know if he would still have the same bank account and if the place of payment would still be the same). Moreover, in order to confer jurisdiction to a German court it would also mean that all the non-consumers would have to agree on the same place of performance when they enter into the agreement that underlies the financial product. Since these users will not have the same domicile, such a coordinated use and completion of the agreement is unlikely.

Summarising, should a place of performance that is agreed upon be used in this mass dispute context, it must not be used only to confer jurisdiction to a German court (otherwise Article 25 Brussels I-bis would apply). This requires a ground which justifies the use of a place of performance of the obligation in Germany. If both the perpetrator and the individual users are not domiciled in Germany, it seems unlikely that there is a ground that legitimises the use of an agreed place of performance. Additionally, it seems unlikely that the users themselves would want to agree on a place of performance which is outside of their domicile. An agreed place of performance thus only seems realistic when it is intended to use this method to confer jurisdiction to a German court. In this case, however, the rules concerning the choice of forum agreement would apply.

5.6.1 Various Places of Performance

Should parties not have agreed on a place of performance of the financial product, the general rule of Article 7(1)a Brussels I-bis and the specific rules of Article 7(1)b Brussels I-bis apply, where the specific rules precede the general rule. The first specific interpretation of the place of performance is determined by the place where the goods (in the case of sale) are delivered or should have been delivered. What is meant by the sale of goods is the contractual exchange of these goods.[89] The term 'goods' is not interpreted very differently from the interpretation used in most national laws. Generally, the definition in the United Nations Convention on the

[88] It is not allowed to come up with a place of payment. The debtor cannot decide or change the place of payment without the creditor's consent.

[89] As Article 7(1) applies only to contract-related issues, property law falls outside the scope of this provision and does not even have indirect influence via questions of classification. See Magnus et al. 2016, pp. 189–190.

International Sale of Goods is used.[90] However, the financial product that is used as an example of the financial product cannot be put under the sale of goods, because a financial product provides a service.

Hence, the second interpretation of the place of performance can be used to determine the place of performance. In this case, the place of performance is determined by the place where the services are provided or should have been provided. In this context, *services* should be given a broad meaning:[91] a service encompasses an activity (act of production) rendered in the interest of another person. A financial product falls under the type of service that is described in Article 7(1)b Brussels I-bis, in which case the place of performance of this obligation is the place in a Member State where, under the contract, the services were provided or should have been provided.[92] Depending on the situation and the complexity of the financial product, a multiplicity of obligations could be in dispute, resulting in more than one place of performance. In such a situation, in order to ascertain which court can have jurisdiction in this specific dispute it is again necessary to identify the centre of gravity.

In a mass dispute, however, many victims have concluded an agreement for the participation in the financial product. In order to use Article 7(1) Brussels I-bis in a mass dispute that is caused by a faulty financial product, the services that follow from the financial product should all be provided in the same Member State, in this case Germany. Should the services be provided in other Member States as well, other courts will have jurisdiction, on the basis of Article 7(1) Brussels I-bis. As a financial product provides services to many people who have their domicile in different Member States, there are several courts that can assume jurisdiction on Article 7(1) Brussels I-bis when claiming damages through a KapMuG procedure. As a result, Article 7(1) Brussels I-bis cannot be used to confer jurisdiction to a single court to resolve a mass dispute through the KapMuG procedure.

5.7 Jurisdiction in Tortious Matters

The Brussels Regulation makes a distinction between a contractual matter and a tortious matter. In the Kalfelis case the ECJ stated that: 'tort, quasi-tort and delict cover all actions which seek to establish liability of a defendant and which are not related to a contract within the meaning of Article 5(1) Brussels I [Article 7(1)

[90] Although the term 'goods' is not defined in the Convention, it encompasess tangible property capable of delivery. The term thus excludes real estate and purely intangible rights, but includes, e.g., raw materials, commodities, finished goods, machinery, etc.

[91] Magnus et al. 2016, p. 202.

[92] The provision of services should be given a broad meaning. The notion 'services' encompasses every activity rendered in the interest of a person. See Magnus et al. 2016, p. 201. A bank product therefore can also be classified as the provision of services. See Magnus et al. 2016, p. 204.

Brussels I-bis]'.[93] If a matter is related to the autonomously defined contract, it cannot be tortious.[94] Whereas our hypothetical securities dispute cannot be seen as a contractual matter, the hypothetical financial product case cannot be seen as tortious.[95] Hence, this subsection will deal only with the jurisdiction based on Article 7(2) Brussels I-bis in the securities case.

If a KapMuG procedure were to be used to resolve a cross-border mass dispute, the same would apply for Article 7(2) as for Article 7(1) Brussels I-bis; individuals would first have to file separate claims. Courts first have to assume jurisdiction in relation to these individual procedures. Afterwards, a single case will be picked as a model. The following judgment of this model case will be used to answer similar questions that play a role in the remaining individual cases. The German court should thus be able to assume jurisdiction for all the individual plaintiffs before it can play a role in resolving the mass dispute. For a court to assume jurisdiction on Article 7(2) Brussels I-bis, it has to look at the place where the harmful even occurred or may occur. The courts at this place can assume jurisdiction under Article 7(2) Brussels I-bis. In the following subsections I will discuss the place where the harmful event occurred or may occur in a securities mass dispute. I will also examine the possibilities for the German court to assume jurisdiction in a cross-border mass dispute.

5.7.1 Place Where the Harmful Event Occurred or May Occur

Should the plaintiffs/shareholders wish to resolve the mass dispute through use of the KapMuG procedure and base the German court's jurisdiction on Article 7(2) Brussels I-bis, they should argue that Germany is the place where the harmful event occurred or may occur. In the Bier v. Mines de Potasse case,[96] the ECJ elaborated on the requirement of the 'place where the harmful event occurred or may occur'. In this case, the ECJ decided that the expression 'place where the harmful event occurred or may occur' must be understood as being intended to cover both the place where the damage occurred (the so-called Erfolgsort[97]) as well as the place of

[93] Kalfelis v. Bankhaus Schröder Münchmeyer Henst & Cie., (Case 189/87) [1988] ECR 5565, para 17.

[94] See also Briggs 2009, pp. 253 and 265.

[95] Since the product is based on an agreement that is freely entered into. See also Briggs 2009, p. 262.

[96] Bier v. Mines de Potasse (Case 21/76) [1976] ECR 1735.

[97] Indirect financial damage or adverse consequences of an event which has already caused damage do not establish jurisdiction. See Magnus et al. 2016, pp. 305–306 and Marinari v. Lloyd's Bank (Case C-364/93) [1995] ECR I-2719.

the event giving rise to it (the so-called Handlungsort).[98] It is up to the plaintiff to decide if the defendant will be sued in either the court for the place where the damage occurred or in the court for the place of the event which gives rise to and is at the origin of that damage. The ECJ reasoned that, taking into account the close connection between the component parts of every sort of liability, it would appear to be inappropriate to opt for either the Erfolgsort or Handlungsort connecting factors, as both could be particularly helpful from the point of view of the evidence and of the conduct of the proceedings. In Zuid-Chemie v. Phillipo's the ECJ stated that the words 'place where the harmful event occurred' designate the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended.[99]

How does this affect the jurisdiction of courts in cross-border mass disputes in the hypothetical case described in Sect. 1.1? In that case a hypothetical Dutch company registered on the London Stock Exchange caused the value of its shares to fall, which resulted in Dutch, French and Belgian shareholders alleging the company had given a misleading statement or had withheld important information. What is the place that gave rise to the damage? The ECJ has indicated that this place is to be understood in the sense of enquiring where that event originated. In other words, the focus is on the event at the start.[100] In the Shevill case,[101] the printing of the newspaper and the defamatory content was the event giving rise to the damage, not the distribution or sale of the newspapers. When a registered company publishes information that is either misleading or that proves that the company has withheld information, it is the publication of this information that gave rise to the eventual damage that is caused when the share value of the company drops. Such information can be made public at more than one place. It is, however, likely that a registered company will make such statements at the company's headquarters. Depending on the statutory seat of the company, this could be the company's domicile, but not necessarily.[102]

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[98] Ibid, para 24.

[99] Case C-189/08 Zuid Chemie v. Phillipo's [2009], ECR I-06917.

[100] Briggs 2009, p. 279. See also Östergötlands Fastigheter AB v. Frank Koot and Evergreen Investments B.V. (Case C-147/12) [2013], ECLI:EU:C:2013:490, in which the ECJ ruled that the fact that a claim has been transferred to a third party does not affect determining which court can have jurisdiction under Article 5(3) Brussels I (now Article 7(2) Brussels I-bis). Hence, the place where the harmful event occurred or may occur will not change due to the fact that the plaintiff has transferred its claim to "the new plaintiff".

[101] Shevill v. Presse Alliance, (Case C-68/93) [1995] ECR I-415.

[102] Alternatively, one could also argue that the damage is not caused by the misleading statement, but by the misleading prospectus. This prospectus could have contained misleading information which was corrected by the statement of the public company. In such an event, the institution that drafted the prospectus (often a bank) could have caused the prospectus to be misleading (See for example C-375/13, Kolassa v. Barclays Bank Plc [2015], ECLI:EU:C:2015:37). As a result, the Handlungsort would have taken place at the domicile of the institution that drafted the prospectus. Possible places where the harmful event occurred could be the place where the prospectus was published or the domicile of the stock exchange where the specific shares are offered/traded. In

If the announcement that gave rise to the drop in share value was made by the company in Germany, then the German court could assume jurisdiction, under Article 7(2) Brussels I-bis. In a mass dispute context, the German court could have jurisdiction over all of the shareholders/victims. This would make it possible to use the KapMuG procedure to resolve the mass dispute. But if the company has its headquarters or office in another Member State and made the announcement public in this other State, then the court of that Member State could assume jurisdiction. Depending on the place where the registered company made the announcement, the use of the Handlungsort interpretation of Article 7(2) Brussels I-bis could be very useful for conferring jurisdiction to a court in a mass dispute.

To ascertain what the place where the harmful event occurred is, it is necessary to determine what the normal use of a share is for the purpose for which it is intended. Since a shareholder does not explicitly *use* his share, the rule that follows from Zuid-Chemie v. Phillipo's[103] is difficult to apply in a financial services matter. In the Réunion Européenne SA case[104] the ECJ pointed out that the place where the damage occurred should meet the requirement of foreseeability and certainty, and it should display a particularly close connecting factor with the dispute in the main proceedings.[105] In this specific case the damage was done to a consignee's cargo of pears, which was carried by sea by a carrier who had did not provide the adequate refrigeration. The cargo was delivered rotten. The place where the damage occurred in this case was where the carrier was to deliver the goods and not the place where the actual rot set in or the place where the consignee discovered the damage that had occurred.[106] This place was the most foreseeable. In a case where a drop in share value caused damage, the most foreseeable place where the damage occurred should be the domicile of the specific investor/shareholder. The ECJ ruled in the Kolassa case that—under the specific circumstances in that matter—the damage occurred in the place where the specific investor or shareholder has suffered it. Pursuant to the judgment in the Kolassa case, the court of the investor's/shareholder's domicile would have jurisdiction, in particular when the loss occurred

(Footnote 102 continued)

such an event, however, it must be taken into account that a lot of companies are listed on several stock exchanges. As a result, there could also be several places where a prospectus is published. In such an event, it is likely that there are more than one places where the harmful event occurred.

Notwithstanding the discussion which could rise with respect to the possibilities to determine the place where the harmful event occurred, the notion that the Handlungsort is located at the domicile of the registered company is taken as a basis in this book.

[103] Case C-189/08 Zuid Chemie v. Phillipo's [2009], ECR I-06917.

[104] Case C-51/97 Réunion européenne SA v. Spliethoff's Bevrachtingskantoor BV [1998] ECR I-6511.

[105] Case C-51/97 Réunion européenne SA v. Spliethoff's Bevrachtingskantoor BV [1998] ECR I-6511, para 36.

[106] Briggs 2009, p. 271.

itself directly in the investor's/shareholder's bank account held with a bank established within the area of jurisdiction of those courts.[107]

The ECJ judgment leaves room for discussion which court would have jurisdiction, in case the related bank account of the investor/shareholder would not have been located at the investor's/shareholder's domicile. Given the fact that the Kolassa judgment was based on very case specific circumstances, the 2016 judgment of the ECJ in relation to the Universal Matter is also of importance to take into account when determining the place where the damages occurred.[108] In this specific matter, the ECJ determined that under the specific circumstances of that matter, the 'place where the harmful event occurred' may not be construed as being, failing any other connecting factors, the place in a Member State where the damage occurred, when that damage consists exclusively of financial damage which materialises directly in the applicant's bank account and is the direct result of an unlawful act committed in another Member State.

Given the fact that the ECJ leaves room for discussion and case law is very case specific, in this book it is assumed that the investors/shareholders will hold shares in the relevant company themselves on their bank account, which is located in their domicile.[109] Given the case law of the ECJ it should, however, be noted, that the place where the damage occurred and the court that may assume jurisdiction based on Article 7(2) Brussels I-bis is very case specific, making it possible for other courts to also assume jurisdiction.

If the domicile of every investor/shareholder can be seen as the place where the damage occurred, then combined with the place where the company made the announcement, shareholders will have a choice of two courts which can have jurisdiction in this mass dispute. In the event that the place where the damage occurred and the place where the harmful event gave rise to the damage are, however, geographically apart, the courts of the Member States where the damage occurred will only have jurisdiction in relation to cases in which the damage occurred in that court's domicile.[110] This means that the courts of the investors'/shareholders' domiciles will have jurisdiction only for the cases which relate to those investors/shareholders. If the announcement causing the damage was made in Germany, the German court would have jurisdiction over shareholders that hold their shares at both the Amsterdam and London stock exchanges.

Depending on the place where the announcement causing the damage was made and the domicile of the various investors/shareholders, there could be several courts

[107] C-375/13, Kolassa v. Barclays Bank Plc [2015], ECLI:EU:C:2015:37, paras 54–55.

[108] C-12/15, Universal Music v. Schilling et al. [2016], ECLI:EU:C:2016:449.

[109] Based on the ECJ judgment in the case Kolassa v. Barclays Bank Plc, the court of the domicile of the shareholders—where also the bank with which they have the relevant bank account is domiciled—would have jurisdiction.

[110] Shevill v. Presse Alliance, (Case C-68/93) [1995] ECR I-415.

that can assume jurisdiction based on Article 7(2) Brussels I-bis. Of these courts, only the court of the place where the damage-causing announcement was made can assume jurisdiction for the entire mass dispute.

5.8 Effect of Grounds of Jurisdiction on the Goals of Collective Redress

The previous subsection covered not only the question of whether a ground can be used to assume jurisdiction when the defendant is domiciled in Germany, but also situations in which the defendant is domiciled in another Member State and, for example, the place of performance of the underlying obligation was in Germany. In the present subsection, the effect the application of these jurisdictional grounds has on the goals of collective redress mechanisms will be analysed. Collective redress mechanisms are made for a certain purpose. Is it still possible to achieve these goals, while utilising certain grounds of jurisdiction?

5.8.1 Effective Legal Protection

Whether the use of the KapMuG still offers effective legal protection depends on the jurisdictional ground that is used as a basis for a court's jurisdiction. As was mentioned in the previous subsections, not all grounds of jurisdiction can be used in a mass dispute that is to be resolved through use of the KapMuG. Moreover, when a ground can be used, this does not automatically mean that the KapMuG can offer effective legal protection. There may be several practical obstacles.

If the German court's jurisdiction in a KapMuG procedure is based on the submission rule because the defendant enters an appearance in relation to all of the individual victims, the collective redress mechanism could provide effective legal protection. If the defending party enters an appearance in the individual procedures that precede the KapMuG model case procedure, the courts would be able to assume jurisdiction and the following KapMuG procedure could resolve the mass dispute. As I stated earlier, the submission rule does give the defending party great power, because it is the defendant that will decide (by entering an appearance or not) whether or not a court will have jurisdiction. Should the defendant wish to use another redress mechanism, he would simply not have to enter an appearance in the individual German procedures that precede the KapMuG model procedure. The consequence is that the plaintiffs have to persuade the defendant to enter an appearance. Since stakes in a mass dispute are high, it is unlikely that the defending party will enter an appearance by mistake. Hence, should the plaintiffs fail to persuade the defendant to enter an appearance, the German court cannot have jurisdiction, and as a consequence the KapMuG procedure cannot be used as a

redress mechanism. As a result, the effective legal protection that the KapMuG is aimed to provide cannot be offered.

The defendant also has great influence on resolving a cross-border mass dispute when the parties involved have agreed on a choice of forum agreement. It is often the defending company that will insist on agreeing on the court of its preference at the moment the legal relationship is established. If parties have agreed upon a choice of forum agreement before a dispute arises, it is again the defendant that will hold the key in conferring jurisdiction to the German court. If the chosen court is not the German court, the plaintiffs/victims require the defendant's consent in order to confer jurisdiction to the German court. If the defendant does not cooperate in conferring jurisdiction, the cross-border mass dispute cannot be resolved through use of the KapMuG and thus the effective legal protection the KapMuG is intended to provide cannot be offered.

With regard to a mass dispute caused by a faulty financial product, a distinction has to be made between consumers and non-consumers. For consumers, the rules in Section 4, Chapter II are used as a basis for jurisdiction. Since the non-consumers are restricted to base a court's jurisdiction on the general provision or on one of the special grounds of jurisdiction, there is a chance that their court of jurisdiction will be different from that of the non-consumers. Such a separation in the group of victims in a mass dispute will affect the power a large group of victims has in a mass dispute. The larger the group of victims, the more pressure this group can exert on the defendant/company causing damage. The sheer number of a group of plaintiffs can force a perpetrator to cooperate in legal proceedings or even in a possible settlement agreement.[111] As a result, the less pressure a group of victims can exert, the less effective is a collective redress mechanism.

When the defendant is domiciled in Germany, the consumer-related jurisdictional rules do support the goal of offering effective legal protection. In that situation the German court can have jurisdiction over all of the non-German plaintiffs. Should the defendant be domiciled in another Member State, the German court will only be able to assume jurisdiction over the plaintiffs that are domiciled in Germany. This would lead to more fragmentation of the group of plaintiffs, which would reduce the effective legal protection for which the KapMuG is to be used.

Should parties (consumers and non-consumers) not opt to use a choice of forum agreement, and should the defendant be domiciled in Germany, the general provision of Article 4 Brussels I-bis could—in combination with the KapMuG—provide effective legal protection. The general provision can confer jurisdiction with regard to non-consumers to a German court. Since a court can assume jurisdiction with regard to consumers on the consumer-related ground of jurisdiction, it would have jurisdiction over all of the plaintiffs.[112] As a result, since the general provision can confer jurisdiction to the court that can assume jurisdiction in relation

[111] See for such a 'strooischade' case, Tzankova 2005.

[112] Since Section 4, Chapter II can also be used to confer jurisdiction to the German court if the defendant be domiciled in Germany.

to consumers, the provision can offer the effective legal protection that the KapMuG is intended to offer. Should the defendant, however, be domiciled in a Member State other than Germany, the German court should base its jurisdiction vis-à-vis the non-consumers on one of the special grounds of jurisdiction.

In contractual matters, the focus is on the place of performance of the obligation in question. Which court can assume jurisdiction in relation to non-consumers depends on the financial product and the obligation to which the mass dispute relates. Looking at the ground of jurisdiction on which courts can base their jurisdiction in consumer-related matters, however, it is unlikely that a single court can have jurisdiction in relation to consumers as well as to non-consumers. In consumer-related matters the court of the consumer's or the defendant's domicile will have jurisdiction. Since consumers and non-consumers cannot bundle their powers when a court has to base its jurisdiction on Article 7(1) Brussels I-bis, the redress mechanism will lose effectiveness. Moreover, if the obligation in question is performed in the individual non-consumer's domicile (for example, the obligation of the financial product to pay every individual participant), than there would be several courts that could assume jurisdiction on Article 7(1) Brussels I-bis, due to the multiplicity of the places of performance. This would make it impossible for the non-consumers to bundle their powers when using Article 7(1) Brussels I-bis, with all the consequences to the effectiveness of the KapMuG procedure.

In the securities mass dispute, jurisdiction for both consumers and non-consumers will have to be based on Article 7(2) Brussels I-bis. This ground of jurisdiction is focused on the place where the harmful event occurred (or, in the case of a possible negative declaratory judgment, the place where the harmful event may occur). Should the shareholders wish to resolve the mass dispute through the KapMuG (and therefore the German court), either the place where the damage occurred (the so-called Erfolgsort) or the place of the event giving rise to it (the so-called Handlungsort) should be in Germany. This means that when using the Handlungsort, the company's headquarters (which in some cases is also the company's domicile) should be in Germany. Should the Erfolgsort be the place that is used, then it would mean that all shareholders should have their domicile in Germany. Only in such an event would a German court be able to assume jurisdiction in relation to all shareholders. Such a situation is, however, unlikely to happen. In the case of a cross-border mass dispute, the German court would have jurisdiction in relation to all of the shareholders if the Handlungsort is in Germany. If the Handlungsort is in another country, for example the Netherlands, and the shareholders are domiciled in France, the Netherlands and Germany, then the German court‘s jurisdiction in relation to the German shareholders could be based solely on the Erfolgsort.

Regarding jurisdiction in the Handlungsort, the KapMuG could offer effective legal protection in a cross-border mass dispute, since it will have jurisdiction in relation to all of the shareholders. Jurisdiction based on the Erfolgsort will not provide the most effective legal protection, since not all shareholders can join the action.

In summary, in relation to a cross-border mass dispute that is to be resolved through use of the KapMuG, effective legal protection is only provided for when the defending company has its domicile in Germany. In that event, it is likely that the choice of forum agreement that the defending company will insist on agreeing before a dispute arises will confer jurisdiction to the court of the company's domicile, Germany. Otherwise, the German court can assume jurisdiction pursuant to Article 4 Brussels I-bis in relation to all shareholders in the securities mass dispute and in relation to the non-consumers in the contractual mass dispute. The German court can assume jurisdiction in relation to the consumers pursuant to Article 18 Brussels I-bis. In that event, the mass dispute can be resolved in relation to all of the victims, thus providing effective legal protection.

5.8.2 Efficient Legal Protection

There are some disadvantages to cross-border procedure that are, however, inherent to proceedings outside a party's own domicile. One is that parties have to translate their legal documents into the language of the country where the proceedings take place: in the example of the KapMuG, the translation would be into German. Another disadvantage is that the legal documents will be served in another country. And because a large number of plaintiffs are forced to bring an action in the country of the single defendant, the costs of venturing into such proceedings are likely to be high. Because these disadvantages and the extra costs parties will incur are inherent to proceedings outside a party's domicile, I will not take these factors into account when analysing whether the KapMuG can still offer efficient legal protection.

As indicated in Sect. 1.6.2, a procedure offers efficient legal protection if the costs and the necessary time are kept as low as possible. As was also indicated, in principle, empirical research is necessary in order to ascertain whether grounds of jurisdiction have an effect on the time and costs involved in the use of a collective redress mechanism. Since there is little if any experience with cross-border mass disputes, it is difficult to come by with empirical data. Therefore this book focuses on the requirements of a procedure and the foreseeable costs and amount of time that is necessary to resolve a mass dispute through use of collective redress mechanisms and certain jurisdictional grounds.

Looking at the first ground of jurisdiction (the submission rule), the plaintiffs will have to persuade the defendant to enter an appearance. This has to be done if both the defendant and the plaintiff are not domiciled in Germany and consequently the court cannot base its jurisdiction on any of the other grounds. The defendant has to enter an appearance in all of the individual procedures that precede the model case procedure. Although this is inefficient, this costly and time-consuming process of entering an appearance in all of the individual procedures is inherent to the KapMuG procedure. Hence, due to the costs and the time the individual procedures will cost, it cannot be concluded that the use of the submission rule would reduce the efficiency of the legal protection that the KapMuG must offer.

In a matter in which the jurisdictional rules in consumer-related matters are used as ground for jurisdiction, the use of these grounds of jurisdiction will lead to the plaintiffs in contractual mass disputes being separated into groups, since in consumer-related matters a court is bound by the rules of Section 4, Chapter II and will have to base its jurisdiction on Articles 4 and 7(1) Brussels I-bis in relation to non-consumers. Since the starting point is to combine as many plaintiffs as possible in order to resolve the mass dispute for all the victims, the parties that are not able to join the KapMuG procedure might be forced to start individual procedures in another Member State and thus not use the benefits of the KapMuG. Such individual procedures are likely to bring more costs and cost more time than joining a KapMuG procedure.

In cases where the defending company has used a choice of forum agreement in order to confer jurisdiction to the court of its preference, the legal protection the KapMuG is intended to provide is not very efficient. If the agreed forum is not a German court, parties are required to try and agree to confer jurisdiction to the German court. As with the submission rule, this requires negotiations between parties, as in the hypothetical case we are considering, the bank will probably not want to deviate from this clause. This means that in any situation in which a plaintiff would want to agree to another forum, it will cost time and require some effort to convince a bank to agree to this (even if it were possible). The same applies to a choice of forum in the hypothetical case of a securities mass dispute.

If no choice of forum agreement has been agreed upon and a court has to base its jurisdiction on standard grounds of jurisdiction, the most efficient and straightforward ground of jurisdiction can be seen as the general provision. If this provision is used, then all the plaintiffs can fall under the court's jurisdiction. The only aspect that makes the use of this general provision inefficient is that parties are confronted with the costs of translating of all the legal documents, and with travel expenses and the time involved.

The special ground of jurisdiction that is related to contractual matters applies only to non-consumers in the hypothetical financial product case. As concluded in the previous subsection, this ground of jurisdiction reduces the effective legal protection the KapMuG generally offers. To some extent, this ground also reduces the efficient legal protection the KapMuG is intended to offer. The ground confers jurisdiction to several courts in a mass dispute. Hence, the costs of a procedure cannot be bundled and any savings in time the parties might gain by starting proceedings collectively will be lost. Should this ground of jurisdiction be used, efficient legal protection cannot be offered.

In the securities mass dispute, the special ground of jurisdiction in tortious matters can confer jurisdiction to either the corporate headquarters (Handlungsort) or the domicile of the shareholders (Erfolgsort). Only in case of the Handlungsort would it be possible for the German court to use the KapMuG and offer efficient legal protection.

5.8.3 *Administrative Burden of the Judiciary*

The third goal of collective redress mechanisms is to reduce the administrative burden of the judiciary. By combining plaintiffs' claims and dealing proceedings collectively, courts are not confronted with several separate claims. Although the KapMuG procedure requires parties to file individual claims first, one may wonder whether the KapMuG complies with this goal itself. However, because a model case is used to provide answers to legal questions that play a role in all the individual cases and because the courts in the individual procedures are not required to go into these questions, the KapMuG procedure does reduce the administrative burden of the judiciary, albeit only slightly. The requirement of the KapMuG to start an individual procedure first will consequently not be of influence on the effect private international law rules have on the use of a collective redress mechanism.

The grounds of jurisdiction on which multiple courts can assume jurisdiction will cause a larger administrative burden than the grounds that make it possible for a single court to assume jurisdiction in relation to all of the parties in a mass dispute. This is because the point of collective redress mechanisms is to reduce the number of separate procedures or, more specifically, to reduce the number of individual legal proceedings which have to be resolved integrally. Since the model case in a KapMuG procedure prevents all of the pending individual procedures having to be resolved integrally, reduction of the administrative burden of the judiciary in a private international law context entails reducing the number of procedures for which a single court can have jurisdiction.

Looking at the submission rule, if a defendant enters an appearance in all of the individual procedures that precede the model case of a KapMuG procedure, the German court would have jurisdiction in relation to all the disputes. As a result, the model case will be used in relation to all of the pending individual procedures which would reduce the administrative burden of the German judiciary. However, because the submission rule is somewhat impractical, since it requires the defendant to enter an appearance in separate procedures first, the defendant has the power to not enter an appearance in a number of individual cases. Although it seems unlikely that if the defendant chooses to enter an appearance in a large number of individual cases, he would refrain from entering an appearance in all of the individual procedures, there is a chance that the administrative burden will be only slightly reduced.

As stated in the previous subsections, the grounds of jurisdiction in consumer-related matters can confer jurisdiction only in relation to all of the parties to the German court if the defendant has is domiciled in Germany. This ground, however, also allows the consumers to confer jurisdiction to the courts of their own domicile. As a result, there is always a chance that a group of consumers will decide to bring a claim at another Member State's court.

It is impractical, but theoretically possible, to use a choice of forum agreement to confer jurisdiction to a single court. As stated before, such an agreement should be entered into after or before the dispute arises (depending on whether the plaintiffs

are consumers or non-consumers). The resulting impracticalities make it unrealistic to expect that the plaintiffs will use a choice of forum agreement. However, should the defendant be domiciled in Germany, it is likely that the bank in the mass dispute relating to a financial product already has a choice of forum clause in its general terms and conditions that confers jurisdiction to the court of the bank's domicile. As a result, the choice of forum agreement can be used by the German court to assume jurisdiction for all users of the financial product.

The general provision to be used for non-consumers in contractual matters, confers jurisdiction to the court of the defendant's domicile. This jurisdiction will relate to all parties in the proceedings. Should the defendant be domiciled in Germany, the German court would be able to assume jurisdiction in both the consumer-related matters and in the non-consumer-related matters. In combination with the rules relating to Section II/4, Article 4 Brussels I-bis reduces the administrative burden of the judiciary the most.

The special ground of jurisdiction relating to a contractual obligation (Article 7(1) Brussels I-bis) links jurisdiction to the place of performance of the obligation in question. Only when the place of performance of the obligation is in Germany would it be possible for the German court to assume jurisdiction in relation to all of the parties in the mass dispute. However, when an obligation in a financial product agreement is in dispute, it is likely that the place of performance of the obligation will be in the domicile of the users of the financial product. If Article 7(1) Brussels I-bis is used as a basis for jurisdiction of a court, since consumers are obliged to use the grounds of jurisdiction of Section II/4 there would be several courts that can assume jurisdiction for non-consumers, and these courts would differ from the court that will have jurisdiction in the consumer-related matter.

If the mass dispute has a tortious ground, the German court can base its jurisdiction on Article 7(2) Brussels I-bis. This provision looks at the place where the damage occurred or where the event giving rise to the damage occurred. Taking a securities dispute as a hypothetical example of a cross-border mass dispute, if the announcement that caused the drop in share value be given in Germany, then the Handlungsort would be in Germany as well and thus the German court can have jurisdiction in relation to the non-consumers. Although there are registered companies that have their statutory seat in a country other than the country in which their corporate headquarters are located, it is common for both a company's statutory seat and the company's headquarters to be in the same country. This would mean that the domicile of a company would probably be in the same Member State as the State where the company made the announcement. If a court were to base its jurisdiction on Article 7(2) Brussels I-bis and the Handlungsort, it is likely that the specific court would be able to assume jurisdiction in relation to all the parties in a mass dispute. However, when the Erfolgsort is used in relation to Article 7(2) Brussels I-bis, the courts of the place of the stock market where the shares are traded will have jurisdiction. Since many multinationals are registered on several stock markets, this would mean that several courts could assume jurisdiction in a mass dispute.

Summarising, the administrative burden of the German judiciary will be reduced only if either the perpetrator is domiciled in Germany, or if the Handlungsort is in Germany. In these cases the German court can assume jurisdiction in relation to all the parties of a mass dispute. Although the submission rule and the choice of forum agreement seems impractical in a mass dispute, in theory these grounds can be used to confer jurisdiction to the German court, in which case they would reduce the administrative burden of the judiciary.

References

Briggs A (2009) Civil Jurisdiction and Judgments. Informa Law, London
Danov M (2011) Jurisdiction and judgments in relation to EU competition law claims. Hart Publishing, Oxford
Geimer R (2005) Internationales Zivilprozeβrecht. Verlag Dr. Otto Schmidt, Cologne
Kuypers PHLM (2008) Forumkeuze in het Nederlandse internationaal privaatrecht. Kluwer, Deventer
Kuypers PHLM (2008a) Forumkeuze in het Nederlandse internationaal Privaatrecht. Thesis Leiden University
Magnus U et al (2016) 'Brussels I Regulation'. Sellier, Munich
Rauscher T (2006) Europaïsches Zivilprozeßrecht Kommentar I. Munich
Rauscher T et al (2008) Münchener Kommentar zur Zivilprozessordnung. Verlag C.H. Beck, Munich
Strikwerda L (2010) De overeenkomst in het IPR. Maklu, Apeldoorn
Tang S (2011) 'Consumer collective redress'. Journal of Private International Law 1
Tzankova IN (2005) Strooischade: een verkennend onderzoek naar een nieuw rechtsfenomeen. SDU, The Hague
Van Houtte H (2009) The law of cross-border securities transactions. Sweet & Maxwell, London
Vorwerk V et al (2007) KapMuG Kommentar. Verlag C.H. Beck, Munich

Chapter 6
Jurisdiction and the Dutch Collective Action

Abstract Various connecting factors can be used in order to confer jurisdiction to a certain court (e.g. the court parties choose in a choice of forum agreement, the domicile of the defendant, the Erfolgsort/Handlungsort, the place of performance of an obligation). In order to determine the competent court in a collective action procedure, these connecting factors must be put in perspective with the particularities of the collective action procedure (i.e. an interest group is a party to the procedure, rather than the actual plaintiff parties). This chapter sets out whether and how jurisdiction can be conferred to a certain court with respect to a collective action procedure. In addition, it is analysed whether the way jurisdiction can be conferred to a certain court is in line with the goals of both collective redress and the Brussels I-bis Regulation.

Keywords Collective action · Interest group · Jurisdiction · Choice of forum clause · Domicile of the defendant · Submission · Handlungsort · Erfolgsort · Place of performance

6.1 Introduction

The way the grounds of jurisdiction in the Brussels Regulation can be applied in a KapMuG procedure cannot be applied to a mass dispute which is to be resolved through the use of the Dutch collective action (hereafter: 'collective action'). Whereas the individual plaintiffs in a KapMuG procedure must first file separate individual actions, an interest group (either a foundation or an association)[1] can commence a collective action only if, pursuant to Article 3:305a(1) DCC, the organisation has exclusive access to the use of this mechanism. It is this specified interest group, not the individual victims that will be the party to the action. It is possible that such an organisation already exists and will file a collective action before the individual plaintiffs wish to start an action. Alternatively, the individual plaintiffs will have to set up such an organisation.

[1] See Sect. 3.3.

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As described in Chap. 3, a collective action consists of two phases. In the first phase, the interest group files the actual collective action. As the group action cannot claim monetary damages for the individual plaintiffs, after the first phase has been finalised these plaintiffs must file an individual action to claim monetary damages. Moreover, the collective action judgment has res judicata only with respect to the interest group. Hence, the individual plaintiffs must wait until the collective action has been resolved, before they may start their action. In these procedures, the individual plaintiffs can use the collective action judgment, through its system of precedent effect, to resolve their individual action more quickly. This individual procedure is the second phase of a collective action.

With regard to the individual procedures, the normal grounds of jurisdiction apply; as such actions do not have a specific collective redress element, they are like any other ordinary claim.[2] This does not apply to the actual collective action: it must be started by an interest group. Because the interest group is the only claiming party in a collective action and the individual plaintiffs do not have an explicit role, the Dutch court does not have to assume jurisdiction with regard to these individual plaintiffs. In addition, the interest group will not be the party that actually suffered damage or, in our hypothetical case, entered into an agreement with a bank to buy a certain financial product. As a result, the application and the effect of the grounds of jurisdiction in a 'collective action' procedure will differ from those in a KapMuG procedure.

There are three different scenarios for which it is required to analyse whether the Dutch court can assume jurisdiction:

i. the perpetrator is domiciled outside of the Netherlands (e.g. in Germany), but a large part of the individual victims are domiciled in the Netherlands;
ii. the perpetrator is domiciled in the Netherlands, but a large part of the individual victims are domiciled outside of the Netherlands (e.g. in France);
iii. the perpetrator is domiciled outside the Netherlands (e.g. in Germany) and a large part of the individual victims are domiciled outside the Netherlands (e.g. in France).

In the following subsections these grounds will be set out in the same hierarchal way as with the KapMuG chapter.

[2] Hence, this chapter will not set out the application of the grounds of jurisdiction in the individual cases. For an overview of the application of the grounds of jurisdiction in individual matters, please see the application of these grounds in relation to the KapMuG in Chap. 5.

6.2 Submission Rule

The submission rule, which was covered in detail in Sect. 5.2, can be used the same way in the three scenarios and in both our hypothetical mass disputes (the financial product one and the securities one). This rule can be used in situations in which neither the defendant nor the interest group has a link with the Dutch court and the court's jurisdiction cannot be based on one of the other grounds of jurisdiction.[3] In order for the Dutch court to base its jurisdiction in a mass dispute in which an interest group has started a collective action on the submission rule, the bank or registered company has to enter an appearance in the collective action procedure. This means, however, that the interest group first has to start a collective action and that the organisation will have to comply with the requirements for a collective action. As has been set out in Chap. 3, in practice, the requirements of the collective action would not be a problem if the collective action is used to resolve a cross-border mass dispute. Should the defendant enter an appearance in the collective action, it would still be necessary for the individual victims to start separate proceedings against this defendant. The individual victims could either try to claim these damages either in individual proceedings in the Netherlands, or in proceedings in another Member State.[4]

Although the submission rule can, in theory, be used, it cannot be assumed that the bank or registered company is willing to go to a (possibly unknown) Dutch court and enter an appearance in a procedure in which the plaintiff is not an actual victim, but an unknown[5] interest group. It is up to the interest group and the individual plaintiffs to persuade the defendant to enter an appearance in both the collective action and in the individual procedures. The submission rule can be used as a ground of jurisdiction only when none of the other grounds can be used by the Dutch court as a basis for its jurisdiction. This would automatically mean that if the defendant does not enter an appearance, the court will have no jurisdiction (Article 26(1) Brussels I-bis). In that instance, proceedings will have to be started in another Member State. As will be set out in the next sections, the position of the interest group might result in such a situation, in which the Dutch court cannot base its jurisdiction on any of the other grounds of jurisdiction because the mass dispute has a cross-border element. This being so, the submission rule is an important ground of jurisdiction on which the Dutch court could base its jurisdiction.

[3] In such a situation, the defendant and a large part of the individual victims, for example, are not domiciled in the Netherlands. Or the place of performance of the infringed obligation is not in the Netherlands.

[4] For the options for actually making use of the collective action judgment in other Member States, see Chap. 11.

[5] The organisation is unknown in that it does not have a direct link with the defendant through a contract or, for example, through holding a share.

6.3 Jurisdiction in Consumer-Related Matters

As is described in Sect. 5.3, only the financial product mass dispute can be seen as a consumer-related matter ex Chapter II, Section 4 of the Brussels Regulation. Although there is a contractual relationship in the securities mass dispute, this contract is concluded between the shareholders and the bank, not between the shareholders and the registered company itself. I will therefore set out the grounds of jurisdiction in consumer-related matters only in relation to the hypothetical financial product mass dispute.[6]

Article 17 Brussels I-bis defines a consumer-related matter as a matter relating to a contract concluded by a person (the consumer) 'for a purpose which can be regarded as being outside his trade or profession'. The procedure in which consumers that concluded the contract underlying the financial product themselves file a claim can be seen as a consumer-related matter. The ECJ, however, has stated that:

> (…) the special system established by Article 13 [*Brussels Convention, now Article 17 Brussels I*-bis][7] (…) should not be extended to persons for whom that protection is not justified.[8]

The interest group protects the interests of the consumers that suffered damage because of the faulty financial product. This could implicitly mean that this organisation can be seen as the weaker party that does require special protection. However, the ECJ has stated that:

> It follows from the wording and the function of those provisions *[articles 13 and 14 Brussels Convention, now articles 15 and 16 Brussels I*-bis*]*[9] that they affect only a private final consumer (…) who is bound by one of the contracts listed in Article 13 [Brussels Convention, now Article 17 Brussels I-bis][10] and who is a *party to the action* (…).
>
> (…) As the Advocate General pointed out in paragraph 26 of his opinion, the Convention protects the consumer only in so far as he personally is the plaintiff or defendant in proceedings.[11]

Because consumers are not party to the actual collective action, the grounds of jurisdiction in consumer-related matters cannot apply to collective action procedures. Moreover, in the VKI v. Henkel case, the ECJ ruled that a consumer representative is not allowed to confer jurisdiction to a court through the grounds of

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[6] The non-consumers will have to base a court's jurisdiction on either the general provision of Article 4 Brussels I-bis, or on the special grounds of jurisdiction in contractual matters (Article 7(1) Brussels I-bis).

[7] Added by author.

[8] Case C-89/91, Shearson Lehman Hutton v. TVB [1993], ECR I-139, paras 18–19.

[9] Added by author.

[10] Ibid.

[11] Case C-89/91, Shearson Lehman Hutton v. TVB [1993], ECR I-139, paras 22–23 (emphasis added by author).

Section II/4 either.[12] In this matter, the consumer protection organisation VKI sought injunctive relief to prevent Mr Henkel from using contested terms in contracts. In reference to the Shearson case, the ECJ ruled that VKI could never be seen as a consumer.[13] More importantly, the ECJ ruled that VKI could in no way be linked to any contractual relationship and that it could never itself be a party to the contract on which the claim is based. Neither is the consumer organisation to which the consumer has assigned his claim a party to the contract. As a result, it is not possible to create a link between the consumer contract and the interest group by assigning a contractual claim to this organisation.[14]

In short, the consumer-related grounds of jurisdiction cannot be used by an interest group in a collective action.

The grounds of jurisdiction in consumer-related matters could, however, be applicable in the individual proceedings that will follow the collective action in case the mass disputes relates to a consumer matter. As will be explained in the next sections and as will follow from the use of the Section II/4 in relation to the KapMuG procedures, if there is no choice of forum agreement and the defendant is unwilling to enter an appearance before the Dutch court, pursuant to Section II/4, the various consumers will have to start these individual proceedings before the court of either their or the defendant's domicile. As is mentioned in Sect. 5.3, this could result in various courts having jurisdiction. In relation to the collective action, it could also mean that the court that will have to decide on the collective action cannot decide on the individual consumer-related matters that will follow the collective action judgment.

6.4 Choice of Forum Agreement

The next possible ground on which the Dutch court could base its jurisdiction is the choice of forum agreement. As the rules on consumer-related matters do not apply in relation to a collective action, below I will focus only on the applicability of the standard choice of forum agreement ex Article 25 Brussels I-bis. The use of a choice of forum agreement in a collective action has to be approached differently than the use of such an agreement in a cross-border KapMuG procedure. As stated in the previous sections, it is not an individual victim or the group of individual victims that is suing the bank or the registered company, but an interest group. This interest group, however, is not acting on behalf of the individual victims; it does not have a power of attorney.

[12] Case C-167/00 Verein für Konsumenteninformation v. Karl Heinz Henkel [2002], ECR I-8111, para 38. See also Tang 2011, pp. 109–110.

[13] See Case C-167/00 Verein für Konsumenteninformation v. Karl Heinz Henkel [2002], ECR I-8111, para 33.

[14] See also Briggs 2009, p. 143.

A choice of forum agreement is, as is stated in Article 25 Brussels I-bis, an agreement that confers jurisdiction to a certain court in order to settle a dispute in connection with a particular legal relationship. In our hypothetical case, that legal relationship would be the contract that formalises the financial product between the individual victim and the bank or the legal relationship between the shareholder and the registered company. A choice of forum agreement is often part of an agreement (for example the agreement to a financial product).[15] In such an event, the choice of forum agreement is part of the agreement that is concluded between the individual plaintiffs and the defendant in the dispute. The problem with a choice of forum agreement and a collective action is that the interest group is not a party to a choice of forum agreement that is concluded between the defendant and the individual victims of a mass dispute.

Should the provision in Article 25 Brussels I-bis be used in a collective action procedure, the question at stake is how the interest group can be linked to a choice of forum agreement that is concluded between the defendant and victim (or vice versa if the victims have concluded a separate choice of forum agreement) or if it is possible for the interest group to enter a choice of forum agreement with the defending company itself.

6.4.1 Mass Dispute Relating to a Financial Product

The first option that will be analysed is the possibility for the interest group to use or be bound by a choice of forum agreement that is entered into between a large part of the group of victims and the defendant in order to confer jurisdiction to a certain court in the collective action. As has been explained above, it is likely the agreement between the victims and the defendant contains a choice of forum clause. If this clause confers jurisdiction to a different court than the Dutch court and the interest group is bound to the agreement, it would be difficult to use a collective action to resolve a mass dispute.

I will explore the first option by analysing case law is analysed in which a third party was also bound by a choice of forum agreement between two other parties. The second option that I will explore is the option in which the interest group enters into a choice of forum agreement with the defendant itself. This option would exclude any role of the individual victims.

[15] As mentioned in Sect. 5.4.1, it is likely that the bank has a choice of forum clause in its general terms and conditions. In a shareholder mass dispute, a choice of forum agreement is likely to be concluded separately.

6.4.1.1 Third Parties and Choice of Forum Agreements

Regarding the effect of a choice of forum agreement on a third party, there are several ECJ judgments in which the court ruled on the nature of the effect a choice of forum agreement can have on third parties.[16] These judgments can be divided into two categories. The first category covers situations in which a party (third or other) has succeeded to the rights and obligations of one of the original parties (in this case one of the individual victims) under the relevant national law.[17] In the other situation the third party did not succeed to the rights and obligations of one of the original parties, because it involved a tripartite agreement.[18]

Regarding the first option, the interest group in a collective action is not aimed at succeeding to the rights and obligations of the victims in a mass dispute. A collective action procedure only partly resolves a mass dispute, since individual victims are required to start separate actions to receive monetary damages. In order to be able to file their individual claim, the individual victims cannot transfer their rights and obligations in a collective action to an interest group.[19] Hence I will not cover this first possible interpretation in depth.

In cases in which the third party (in tour hypothetical collective action, this is the interest group) does not succeed to the rights and obligations of the individual victims, in certain events it is possible to derive certain rights from a choice of forum agreement which is entered into by the victims and the defendant. In the Gerling case, an agreement was entered into by an insurer with a policy holder. Although the beneficiaries were not party to the insurance agreement, they were seen as parties of the choice of forum agreement that was part of the insurance agreement. Hence, the choice of forum agreement that the insurer and the policy holder concluded did also apply to the beneficiaries.[20] The ECJ concluded that:

> where a contract of insurance, entered into between an insurer and a policyholder and stipulated by the latter to be for his benefit and to enure for the benefit of third parties to such a contract, contains a clause conferring jurisdiction relating to proceedings which might be brought by such third parties, the latter, even if they have not expressly signed the said clause, may rely upon it provided that, as between the insurer and the policy-holder, the condition as to writing laid down by Article 17 of the Convention [Article 25 Brussels

[16] See Kuypers 2008, pp. 205–206.

[17] This situation is set out in C-71/83, Tilly Russ v. Nova [1984], ECR I-2417, C-387/98, Coreck Maritime v. Handelsveem [2000], ECR I-9337, case C-C-159/97, Castelletti v. Trumpy [1999], ECR I-1597.

[18] This situation is set out in case C-201/82 Gerling v. Tesoro dello Stato [1983], ECR 2503.

[19] Should the individual parties decide to let the interest group succeed in their rights and obligations, it would not be possible for the individual victims to use a collective action. They would simply assign their right to compensation to the interest group. This option will, however, not be covered in this book.

[20] See also Briggs 2009, p. 185.

> I-bis][21] has been satisfied and provided that the consent of the insurer in that respect has been clearly manifested.[22]

As the Gerling case specifically relates to the position of both the insurer and the insured, the first question is whether this specific case can also apply in non-insurance cases. A third party in an insurance case has its a specific legal relationship with the insurer (e.g. because of the specific rights he receives based on subrogation). As a result, it is unlikely that the way a third party can use a choice of forum agreement in insurance-related matters can also be applied in matters not related to insurance.[23] In other words, the question is whether an interest group in a collective action can be seen as the type of beneficiary that is mentioned in the Gerling case.

To clarify the options available to third parties to use a choice of forum agreement between two other parties, the ECJ has recently ruled in the case between Axa and Refcomp that:

> Article 23 of the Regulation must be interpreted as meaning that a jurisdiction clause agreed in the contract concluded between the manufacturer of goods and the buyer thereof cannot be relied on against a sub-buyer who, in the course of a succession of contracts transferring ownership concluded between parties established in different Member States, purchased the goods and wishes to bring an action for damages against the manufacturer, unless it is established that third party has actually consented to that clause under the conditions laid down in that Article.[24]

Based on the Axa case, it must be concluded that an interest group may not rely upon a choice of forum agreement between the actual victims and the defendant, unless the interest group has actually consented to that choice of forum agreement under the conditions laid down in Article 25 Brussels I-bis. As a result, the interest group is not by definition bound by a choice of forum agreement between the actual victims and the defendant. Whether a choice of forum agreement will play a role in a collective action would thus depend on whether the forum that is agreed upon is a Dutch court, in which case the interest group could accept the choice of forum agreement and start proceedings in the Netherlands—or not. In the event that the interest group does not accept such a choice of forum agreement, the jurisdiction of the Dutch court would have to be based on one of the other grounds of jurisdiction.

Should a choice of forum agreement between the victims and the defending company confer jurisdiction to the Dutch court and should the interest group base the Dutch court's jurisdiction on this choice of forum agreement, the question arises of whether this jurisdiction would also apply to the victims that have not entered into a choice of forum agreement with the defendant. Given that a choice of forum agreement would probably have been part of either general terms or conditions or of the defending company's articles of association, it is, however, unlikely that there

[21] Added by author.

[22] Case C-201/82 Gerling v. Tesoro dello Stato [1983], ECR 2517.

[23] Kuypers 2008, pp. 315 et seq.

[24] Case C 543/10, Refcomp v. Axa [2013], para 41.

are victims that are not bound by this choice of forum agreement. Should there be victims that have not entered into a choice of forum agreement with the defendant, then the logical conclusion would be that the interest group should base its jurisdiction in relation to these victims on one of the other grounds of jurisdiction. If the interest group is not able to confer jurisdiction in relation to several victims to the Dutch court, the precedent effect that follows from the collective action judgment would have no effect in relation to the victims who could not fall under the Dutch court's jurisdiction. This, however, would depend on whether the collective action judgment is recognisable and/or enforceable and to what extent. These questions will be set out in Chap. 11. The interest group could, however, also agree with the defendant to confer jurisdiction to the Dutch court in a separate agreement.

6.4.1.2 Separate Choice of Forum Agreement

Based on the above, a choice of forum agreement can also play a role in the collective action procedure if a choice of forum agreement has been concluded by the interest group and the defendant(s) themselves. Since it is the interest group itself that is party in the collective action procedure, this is theoretically possible.

The interest group has been founded to resolve a dispute that has already arisen between the individual victims and the defendant. It is the underlying relationship of these disputes that causes such an organisation to be founded in the first place. In my view, it is therefore possible to conclude a choice of forum agreement between an interest group and a defendant in a collective action, since the legal relationships of the individual victims whose interest are being represented is the connecting legal relationship between this organisation and the defendant.

6.4.2 Securities Mass Dispute

A choice of forum agreement could also play a role in securities mass disputes that are to be resolved through a collective action. As in the KapMuG procedure, the choice of forum clause that is part of the registered company's articles of association can confer jurisdiction to a certain court. This agreement should, as required by Article 25 Brussels I-bis, aim at a certain legal relationship. This would be the relationship between the registered company and its shareholders. Should the company not be domiciled in the Netherlands, it is however, unlikely that the company will use a choice of forum clause in its articles to confer jurisdiction to this Dutch court. It will most probably opt for the court of the country of its domicile.[25] In the event that the shareholders have entered into a choice of forum agreement

[25] Not only because of familiarity with the procedural law of this country, but also because of advantages in respect to evidence and the costs of legal proceedings.

with the registered company, the interest group would have to accept the forum agreement in order to be bound by it.[26]

6.5 General Provision

Should a Dutch court not be able to assume jurisdiction on either the submission rule or a choice of forum agreement, then only the general provision and the special grounds of jurisdiction remain. As mentioned in Sect. 5.5, the general provision of Article 4 Brussels I-bis provides a straightforward ground for a court to assume jurisdiction. The requirements of Article 4 Brussels I-bis concern the domicile of the defendant. A court that bases its jurisdiction on Article 4 Brussels I-bis because the defendant's domicile is in the same Member State as the court is, has jurisdiction in relation to all the plaintiffs. When a defendant is domiciled in the Netherlands, an interest group can sue the defendant before the Dutch court, since it is the official party to the proceedings. Although the individual plaintiffs are not required to join the collective action, even they could go to a Dutch court if the defendant is domiciled in the Netherlands. Hence, this ground does not affect the use of the collective action and could definitely be used.[27]

If the individual victims wish to receive compensation, then pursuant to Article 4 Brussels I-bis the individual actions that will have to follow the collective action judgment can be filed with the Dutch court too. This could avert possible problems with the recognition and/or enforcement of the collective action judgment in Member States other than the Netherlands.

6.6 Jurisdiction in Contractual Matters

As shown in the previous sections, the position of parties in the Dutch collective action is quite different from the position of the parties in a KapMuG procedure. Whereas in the German KapMuG procedure the actual plaintiff has suffered damage, the claim that is brought in a collective action is brought by an interest group. This organisation merely represents[28] the individual victims and—unlike the party that is used as a model in the KapMuG procedure—has not actually suffered damage. Moreover, individual victims that have a separate case pending in addition

[26] See also Case C 543/10, Refcomp v. Axa [2013], para 31.

[27] See also Danov 2010, p. 364.

[28] As already mentioned, this representation is merely based on the organisation's statutory goal. The claim the individual victims/plaintiffs have is not assigned or ceded to the organisation.

to the pending (KapMuG) model case procedure are allowed to participate in the KapMuG procedure. The individual victims the interest group represents do not have such an explicit role in the collective action. Since the parties that have actually suffered damage do not have a role in the proceedings, in a collective action the essential requirement of Article 7(1) Brussels I-bis is not the place of the performance of a contract but the presence or absence of a contract.

In the aforementioned VKI/Henkel case, in which a consumer protection organisation ordered an injunction in the public interest against the use of terms and conditions that were considered contrary to the Unfair Contract Terms Directive,[29] the ECJ decided that such an organisation is itself never a party to such a contract.[30] Although the claim in this case was a preventive action, the organisation itself would never be linked by any contractual relationship with the defendant; it would be the consumers the organisation represents that would have such a link.[31] There must be a direct contractual link between the actual litigating parties (claimant and defendant), in order for a court to assume jurisdiction on Article 7(1) Brussels I-bis.[32] Because the organisation was claiming an injunction, which is a preventive action, the court could base its jurisdiction on Article 7(2) Brussels I-bis instead.[33] In another case, the ECJ ruled that even in cases where the third party has acquired its right to sue through the existence of a contract, a court cannot base its jurisdiction on Article 7(1) Brussels I-bis, as this third party would not have the required contractual link with the perpetrator/defendant.[34]

Based on the above-mentioned ECJ decisions, an interest group in a collective action cannot confer jurisdiction to a court pursuant to Article 7(1) Brussels I-bis on the basis of the contractual relationship the underlying individual victims have with the defendant. The consequence is that Article 7(1) Brussels I-bis cannot be used to confer jurisdiction in a collective action.

As a result, a preliminary conclusion in relation to the contractual type of mass dispute is that jurisdiction can be conferred to the Dutch court only by resorting to the submission rule, or to a choice of forum agreement, or to Article 4 Brussels I-bis, because in a collective action neither the rules on consumer-related matters nor the ground of jurisdiction in Article 7(1) Brussels I-bis apply.

[29] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

[30] Case C-167/00 Verein für Konsumenteninformation v. Karl Heinz Henkel [2002], ECR I-8111.

[31] Ibid, para 39.

[32] Tang 2011, p. 110.

[33] Although the Brussels I-bis Regulation is not applicable ratione temporis to the main proceedings, for consistency's sake the ECJ used the wording of the Regulation. See VKI v. Henkel para 49.

[34] Case C-51/97 Réunion européenne SA v. Spliethoff's Bevrachtingskantoor BV [1998] ECR I-6511, paras 19–20.

6.7 Jurisdiction in Tortious Matters

As was seen in the previous section, the consumer organisation in the case of VKI v. Henkel could confer jurisdiction to a court pursuant to Article 7(2) Brussels I-bis instead of Article 7(1) Brussels I-bis, whereas the underlying dispute concerned a contract. The question then arises whether an interest group can confer jurisdiction pursuant to Article 7(2) Brussels I-bis in both a contractual and a tort mass dispute.

Article 7(2) Brussels I-bis conveys jurisdiction in matters of tort, delict or quasi-delict to the court in the place where the harmful event occurred or may occur.[35] Here too, as with the concept of a contract in Article 7(1), the ECJ employs an autonomous definition of the concept of tort. In the Kalfelis case the ECJ stated that: 'tort, quasi-tort and delict cover all actions which seek to establish liability of a defendant and which are not related to a contract within the meaning of Article 7(1) Brussels I-bis'.[36] Accordingly, contract and tort are construed as strict alternatives and there is no overlap between the two grounds of jurisdiction.[37]

So the first step when deciding whether Article 7(2) applies is to see whether the matter concerned is contractual or not. However, not every claim which cannot be classified as contractual is automatically tortious. Some authors believe that certain obligations are not covered by Articles 7(1) and (2) (e.g., cases involving unjustified enrichment and management of the affairs of another).[38] Tort, however, remains a broad concept,[39] also covering the undermining of legal stability by, for instance, unfair contract terms.[40] Taking the VKI v. Henkel case and the fact that the representative body is not a party to the contract underlying the financial product means that the dispute must be defined as tortious in nature, instead of contractual. Regarding our hypothetical securities dispute, since this is a strictly tortious matter, jurisdiction can be conferred to the competent court pursuant to Article 7(2) Brussels I-bis.

Both in the contractual and tortious types of mass dispute, however, it is questionable whether a court can assume jurisdiction the same way as in VKI v. Henkel in a collective action situation that is brought to seek a declaratory judgment. Since it is not permitted to use the Dutch collective action to claim monetary damages and declaratory relief in which a company's liability is set,[41] the important question that has to be answered is whether a collective action can ever fall under the tort, delict, and quasi-delict terms of Article 7(2) Brussels I-bis.

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[35] Since jurisdiction in tortious matters is not regulated separately, this section will deal with the jurisdictional grounds for both consumers and non-consumers.

[36] Kalfelis v. Bankhaus Schröder Münchmeyer Henst & Cie., (Case 189/87) [1988] ECR 5565.

[37] Magnus et al. 2016, pp. 268–269.

[38] Veenstra 2003, p. 141.

[39] Bier v. Mines de Potasse (Case 21/76) [1976] ECR 1735. And Verein für Konsumenteninformation v. Karl-Heinz Henkel (Case C-167/00) [2002], I-8111, I-8141.

[40] Magnus et al. 2016, pp. 269–270.

[41] Article 3:305a(3) DCC.

Regarding the autonomous definition of tort, Briggs, for example, discusses whether claims that are based on unjust enrichment also fall under the scope of tort. He doubts if such claims can fall under Article 7(2) Brussels I-bis, since claims of this type are not founded on liability for having done wrong.[42] Because the ECJ has not given any indication that it would exclude such actions from Article 7(2) Brussels I-bis, he nevertheless takes the view that claims founded on unjust enrichment do fall within the scope of Article 7(2) Brussels I-bis.[43] In Réunion Européenne[44] the ECJ ruled that Article 7(2) Brussels I-bis applied simply because Article 7(1) Brussels I-bis could not be applied. And in Fonderie Officine Meccaniche Tacconi SpA, the ECJ did not clarify what is meant by liability. Again the simple absence of a contract and a reference to Kalfelis made the ECJ decide that the case would fall under Article 7(2) Brussels I-bis. A better definition of tort ex Article 7(2) Brussels I-bis has not been given since Kalfelis, although the Attorney General (A-G) in Engler v. Verstand tried to analyse the requirements for liability in tort (these were a breach of a legal rule[45]), damage[46] and compensation.[47] The court, however, used the rule from Kalfelis instead.

A collective action is ultimately aimed at securing compensation for the individual victims. Although an organisation will only be able to demand a declaratory judgment in which the unlawfulness is ruled on, the goal of the action remains being awarded monetary damages. For these reasons a collective action which is not a contractual matter must fall under Article 7(2) Brussels I-bis.[48]

In what way, however, can the connecting link of Article 7(2) Brussels I-bis be used in a collective action? If Article 7(2) Brussels were applicable in collective action procedures, even the contractual-based procedures, then the connecting link is the place where the harmful event occurred or may occur. As mentioned above, this place is intended to cover both the place where the damage occurred (the so-called Erfolgsort[49]) as the place of the event giving rise to it (the so-called Handlungsort).[50] The party to the proceedings (the interest group), however, has not suffered any damage. Hence there is no Erfolgsort in relation to the party to the proceedings.[51]

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[42] Briggs 2009, p. 256.

[43] Otherwise the general rule of Article 4 Brussels I-bis would be the only rule left for such situations.

[44] Case C-51/97 Réunion européenne SA v. Spliethoff's Bevrachtingskantoor BV [1998] ECR I-6511.

[45] Opinion A-G, C-27/02, Petra Engler v. Janus Verstand GmbH [2005], ECR I-418, para 59.

[46] Ibid., para 61.

[47] Ibid., para 63.

[48] See also Magnus et al. 2016, pp. 273–276.

[49] Indirect financial damage or adverse consequences of an event which has already caused damage do not establish jurisdiction. See Magnus et al. 2016, pp. 305–306 and Marinari v. Lloyd's Bank (Case C-364/93) [1995] ECR I-2719.

[50] Ibid, para 24.

[51] In VKI v. Henkel, Article 7(2) Brussels I-bis could be used because the organisation requested injunctive relief.

There is, however, a Handlungsort. Although the individual victims are not a party to the proceedings, in a mass dispute it is undeniable that an action has caused individuals to suffer damage. In a collective action procedure in which an organisation claims a declaratory judgment to declare an act unlawful in both a securities dispute and a financial product mass dispute, there are similarities with the VKI v. Henkel case. In the VKI v. Henkel case it was also undeniable that an action caused damage. VKI demanded an injunction, although it did not suffer damage itself. Although the final goal of a collective action is to facilitate the separate claiming of monetary damages by individual victims, in common with an injunction its formal claim (declaring the act unlawful) does not have to be linked to individuals. These two types of claims are different, but because both claims are not related to individual situations and because the ECJ allowed a court to assume jurisdiction in such a case on Article 7(2) Brussels I-bis, a court should also be able to base its jurisdiction in a collective action on this same special ground of jurisdiction.

As a result, Article 7(2) Brussels I-bis should be applicable in a collective action, but only in relation to the Handlungsort.

6.8 Effect of Grounds of Jurisdiction on the Goals of Collective Redress

The application of the various grounds of jurisdiction in a 'cross-border collective action procedure' has been set out in the preceding subsections. In common with the KapMuG chapter, in this chapter the preceding subsections have covered the use of the various grounds of jurisdiction in relation to various situations in which a collective action can be used. In the following subsection, I will examine the effect the application of these jurisdictional grounds has on the goals of collective redress mechanisms. Collective redress mechanisms are intended for a certain purpose. Is it still possible to achieve these goals while utilising certain grounds of jurisdiction?

In the following subsections I will analyse the effect of the application of the various grounds of jurisdiction on the goals of collective redress mechanisms that were set out in Sect. 1.6.

6.8.1 Effective Legal Protection

Given the arguments presented in the preceding sections in which the application of the various grounds of jurisdiction in relation to a collective action were set out, the application of the grounds of jurisdiction can be divided into two groups. One group of grounds can actively be used by parties to the collective action to confer jurisdiction to the Dutch court (both the submission rule and the choice of forum agreement can be used by the interest group and the defendant to confer jurisdiction).

The second group of grounds of jurisdiction can be used by the parties to passively confer jurisdiction to the Dutch court (for example, the parties can confer jurisdiction pursuant to Article 4 Brussels I-bis to the Dutch court if the defendant is domiciled in the Netherlands (as the parties are bound by the defendant's domicile, they can only passively use the ground of jurisdiction)). The passive grounds of jurisdiction that can be used in a collective action can be found in Articles 4 and 7(2) Brussels I-bis.

In relation to the active grounds of jurisdiction, these grounds of jurisdiction can only be used to confer jurisdiction when the defendant agrees to resolve the dispute before the specific court. Should the defendant not agree to have—in this case—the Dutch court resolve the dispute through use of the collective action, the interest group is forced to try to confer jurisdiction to the Dutch court through use of the passive grounds of jurisdiction. As the feasibility of using the active grounds of jurisdiction depends on the willingness of the defendant, it is difficult to ascertain the effect of these active grounds of jurisdiction on the goal of *effective legal protection*. However, should the defendant agree to confer jurisdiction to the Dutch court, it would be possible to resolve the dispute (partly, because of the nature of the collective action) and thus provide—at least, with respect to the grounds of jurisdiction—effective legal protection. Whether the system of the collective action will affect the goal of *effective legal protection* also depends on whether the collective action judgment can be recognised and/or enforced outside the Netherlands. The importance of the recognition and enforcement phase becomes obvious when the defendant refuses to cooperate and the Dutch court can base its jurisdiction solely on one of the passive grounds of jurisdiction. In that event the court must base its jurisdiction on either Article 4 (domicile of the defendant) or Article 7(2) (place where the damage occurred: more specifically, the place where the damage took place) Brussels I-bis. When the defendant is domiciled in the Netherlands, the Dutch court can also assume jurisdiction and decide on the collective action, but when the defendant is domiciled in another Member State, a collective action will become more complex. In that event, the Dutch court would only be able to assume jurisdiction if the damage in the mass dispute had been caused in the Netherlands.[52] If the damage was caused in the Netherlands and the Dutch court were able to resolve the dispute through use of the collective action, the individual plaintiffs/victims would still be required to start individual actions in order to claim monetary damages. It is, however, questionable whether these individual victims may start proceedings in the Netherlands, because the grounds of jurisdiction do not apply the same way as they do in relation to the interest group. For example, it is possible that a court will have to base its jurisdiction on a choice of forum agreement that has been entered into between the defendant and the victim/plaintiff. As a result, there is a realistic chance that the individual victims will not file a claim for monetary damages before the Dutch court—at least, not unless the defendant

[52] As was set out in the preceding sections, the Dutch court can assume jurisdiction pursuant to Article 7(2) Brussels I-bis if the damage was caused in the Netherlands (i.e., the Handlungsort was in the Netherlands).

agrees. It must be certain that the passive grounds of jurisdiction will in no way compromise the goal of effective legal protection. This, however, does depend on the possible recognition and/or enforcement of the collective action judgment outside the Netherlands. Should the collective action judgment be usable in the country in which the individual victims are able to start separate claims for monetary damages, it could still be possible for the collective action to be used in a cross-border context and offer effective legal protection.

6.8.2 Efficient Legal Protection

As indicated in Sect. 1.6.2, a procedure offers efficient legal protection if the costs and the necessary time are kept as low as possible. Empirical research is in principle necessary, in order to see whether grounds of jurisdiction affect the time and costs associated with the use of a collective redress mechanism. Since there is little to no experience with cross-border mass disputes, it is difficult to acquire empirical data. As a result, this book focuses only on the requirements of a procedure and the foreseeable costs and amount of time that is necessary to resolve a mass dispute through use of collective redress mechanisms and certain jurisdictional grounds. As stated above, a collective action procedure consists of two parts. Firstly there is the collective action itself, through which a certain damage-causing action can be declared unlawful. Secondly, there are the separate individual procedures the victims will have to start in order to file for compensation. This is in itself a rather inefficient process in terms of time and money. In this subsection, however, I will only go into the effect the various grounds of jurisdiction will have on the collective action itself.

A striking feature of cross-border collective actions is the fact that the use of the current grounds of jurisdiction gives the defending party great power. For example, in the active grounds of jurisdiction (submission rule and the choice of forum agreement), the victims and the interest group will have to persuade the defendant to either enter an appearance or agree on a certain choice of forum. These required negotiations automatically mean that the procedure will take more time and involve more costs and effort. These grounds will be used only when the defending company is not domiciled in the Netherlands. As argued in the preceding sections, it is unrealistic to expect that the defendant will immediately agree on conferring jurisdiction to a court outside of its domicile.

Should the defendant be domiciled in the Netherlands, then the general provision of Article 4 Brussels I-bis would offer the most probable ground of jurisdiction. In this case, since it is not necessary to agree on a certain forum, this ground will probably provide the desired efficient legal protection that follows from the goals of collective redress mechanisms. If the defendant is domiciled in the Netherlands, the individual victims would also be able to confer jurisdiction to the Dutch court in the subsequent individual claims for monetary damages (provided that a choice of forum agreement does not confer jurisdiction to another Member State's court).

Regarding the special grounds of jurisdiction, only Article 7(2) Brussels I-bis can be used in a cross-border collective redress procedure. This ground of jurisdiction will link a certain court to the Member State where the event giving rise to the damage occurred (Handlungsort). Should this event have occurred in the Netherlands, then the Dutch court would be able to assume jurisdiction and the efficient legal protection that should be offered would not be affected by the ground of jurisdiction. In that event, however, it is questionable whether the individual victims could also confer jurisdiction to the Dutch court. If this is not be possible, the effectiveness of the collective action will depend on the recognition and/or enforcement of the collective action judgment. Nevertheless, it would mean that the individual victims that cannot start proceedings in the Netherlands would be confronted with more costs and that it would take longer to resolve the dispute.

In the end, the grounds that can be used to base a court's jurisdiction on in a cross-border collective action affect the efficiency of the legal protection that is offered when parties are dependent on the willingness of the defendant to go to a certain court.

6.8.3 Administrative Burden of the Judiciary

Whereas in a KapMuG procedure there is a fair chance that several courts can assume jurisdiction regarding a mass dispute, this cannot be the case in a collective action. In the first phase of a collective action, there are only two parties to the proceedings: the defendant and the interest group. If individual victims in a mass dispute decide to start a collective action, they must always set up an interest group that can actually instigate the collective action. As a result, apart from the defendant, there is only one party to which the connecting links in the grounds of jurisdiction have to relate. Thus in any situation where a court bases its jurisdiction on a certain ground, only one court can have jurisdiction.

Should the individual victims not agree on the way a collective action is organised, it could happen that there are several interest groups. The intentions or goals of these different organisations do not necessarily have to differ.[53] If, for example, two interest groups have started two separate proceedings in the same mass dispute and in the same Member State, it could happen that these two procedures are conflicting. Since these procedures are contained in a single Member State (the Netherlands), there is only a marginal chance that the two following judgments will be irreconcilable.[54]

Summarising, because of the structure of a collective action and the interest group(s) involved, it is not possible for several courts from different Member States

[53] In the Dutch DSB matter, in which a bank sold its customers unnecessary policies, the bank was confronted with several foundations that claimed to represent groups of individual victims. There was, however, no clear distinction between the various groups of victims.

[54] The marginal chance is, of course relative, since there is always a chance that one court has no knowledge of a comparable judgment made by another court.

to have jurisdiction in a mass dispute. Although it is possible that several Dutch courts will have jurisdiction in such a mass dispute (because of the rules in the internal jurisdiction in the Netherlands), there is only a marginal chance that this will result in irreconcilable judgments. As a result, in the first phase of a collective action, the administrative burden of the judiciary is regarding relatively small.

Taking the second phase of a collective action procedure into account, would greatly add to the administrative burden. In the event these individual procedures cannot be started in the Netherlands, they will have to be started in another Member State. It is questionable whether the resulting judgment will be recognisable and/or enforceable in those Member States. Nevertheless, overall, more courts would be involved in resolving a mass dispute that could be resolved by one court (namely, the Dutch court) if that Dutch court could assume jurisdiction in relation to both the parties to the collective action and the parties to the subsequent individual procedures.

6.9 Conclusions

The use of an interest group as a party to the collective action proceedings has as its corollary that many of the grounds of jurisdiction in the Brussels Regulation cannot be used. Only the general provision of Article 4 Brussels I-bis and the special ground of jurisdiction of Article 7(2) Brussels I-bis can be used to confer jurisdiction to a Dutch court. These grounds of jurisdiction do provide the efficient and effective legal protection a collective action is intended to offer. This conclusion does not take the chances of recognition and enforcement into account, since this could be of influence on the effectiveness and efficiency of the legal protection. Moreover, the administrative burden of the judiciary does not increase when these grounds of jurisdiction are used.

References

Briggs A (2009) Civil Jurisdiction and Judgments. Informa Law, London

Danov M (2010) 'The Brussels I Regulation; Cross-border collective redress proceedings and judgments'. Journal of Private International Law 2

Kuypers PHLM (2008a) Forumkeuze in het Nederlandse internationaal privaatrecht. Kluwer, Deventer

Magnus U et al (2016) 'Brussels I Regulation'. Sellier, Munich

Tang S (2011) 'Consumer collective redress'. Journal of Private International Law 1

Veenstra KJ (2003) 'Artikel 5 EEX en afgebroken onderhandelingen'. NTBR

Chapter 7
Jurisdiction and the WCAM

Abstract Various connecting factors can be used in order to confer jurisdiction to a certain court (e.g. the court parties choose in a choice of forum agreement, the domicile of the defendant, the Erfolgsort/Handlungsort, the place of performance of an obligation). In order to determine the competent court in a collective settlement procedure, these connecting factors must be put in perspective with the particularities of the collective settlement procedure (i.e. an interest group is a party to the procedure, rather than the actual plaintiff parties). This chapter sets out whether and how jurisdiction can be conferred to a certain court with respect to a collective settlement procedure. In addition, it is analysed whether the way jurisdiction can be conferred to a certain court is in line with the goals of both collective redress and the Brussels I-bis Regulation.

Keywords Collective settlement · Interest group · Opt-out · Settlement agreement · Jurisdiction · Choice of forum clause · Domicile of the defendant · Submission · Handlungsort · Erfolgsort · Place of performance

7.1 Introduction

Of the three types of collective redress mechanism, the KapMuG procedure is closest to the type of regular action for which the Brussels Regulation was devised. The KapMuG can be seen as a bundling of individual actions, one of which will partly serve as a model. The collective action is the first collective redress mechanism that departs from the assumption underlying the Brussels Regulation, namely that the two (or several) parties in a procedure are the parties that are actually involved in the dispute. The party to the proceeding that is initiating the action is an interest group that has neither actually concluded a contract with the defendant nor suffered damage. The actual victims in the mass dispute are not parties to the proceeding. However, these individual victims are—at least, in non-cross-border disputes—bound by the settlement agreement after it has been declared binding. As

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a result, the Amsterdam Court of Appeal is required to assume jurisdiction in relation to these individual victims as well.[1]

The collective redress mechanism that departs most from the structure of a standard two-party dispute is the third: the WCAM. The parties to a WCAM procedure are again (in line with the collective action) an interest group and the defending company, instead of the actual victims in a mass dispute. The procedure is, however, based on a settlement agreement between the perpetrator/defending company and one or more interest groups, which is entered before the actual procedure takes place.[2] The individual victims are seen as interested parties and not as actual parties to this settlement and the proceedings. They are, however, bound by the judgment.[3] As a result, although they are the victims that suffered the damage, they are only indirectly involved in the proceedings that will eventually bind them. Before the actual proceedings take place, the Amsterdam Court of Appeal will have to assume jurisdiction.

The Shell case was the first time the WCAM was used in an international context. That case was the first large cross-border mass dispute that was resolved in the EU through a collective redress mechanism.[4] Although the Brussels Regulation was created assuming that procedures would be between only two parties, the large number of parties in the Shell case made it necessary for the settlement to be made binding for all victims. Because no legislative changes to the Brussels Regulation were planned for the next few years, the court tried to use the current rules to make the settlement binding for all national and international victims.[5] Some years later, in the Converium case, the court made a second, different, settlement binding.[6] The creative solutions the Court of Appeal came up with will be covered in the following sections, while also paying attention to possible other interpretations of the various private international law rules the Brussels Regulation has to offer.

In the following sections, the application of the grounds of jurisdiction of the Brussels Regulation in a hypothetical cross-border mass dispute that is to be resolved through the WCAM will be set out. Again, the application of the various grounds of jurisdiction will be given in the same order as was set out in the introduction to Part II of this book. Since the procedural role of the parties to the

[1] The question of whether individual victims who are not domiciled in the Netherlands can actually be bound by a settlement agreement that has been declared binding by a Dutch court will be covered in Chap. 12.

[2] Contrary to the interest groups in a collective action, the organisation(s) that is (are) involved in a WCAM procedure actually have to prove that they represent the individual victims.

[3] As has been set out in Chap. 4, the victims have the option of opting out of the binding settlement.

[4] See Amsterdam Court of Appeal 29 May 2009, NJ 2009, 506 (Shell case).

[5] The Shell settlement was made binding in 2009. The plans for the evaluation of the Brussels Regulation did contain some references to collective redress, but these were not that substantial.

[6] See Amsterdam Court of Appeal 12 November 2010, NJ 2010, 683 (Converium case) for the court of appeal's decision on its jurisdiction and Amsterdam Court of Appeal, 17 January 2012, *LJN*: BV1026 for the decision in which the settlement agreement was made binding.

proceedings as well as that of the individual victims differ from the roles the parties have in a KapMuG or collective action procedure, and since this procedural role defines the use of the grounds of jurisdiction, the position of the parties involved in the first section will be set out first.[7]

7.2 Procedural Role of Parties and Applicability of the Brussels Regulation

The structure/nature of the WCAM procedure raises an important question: namely of whether this type of procedure is within the scope of the Brussels Regulation. The substantive scope of the Brussels Regulation is limited by civil and commercial matters.[8] In a WCAM procedure the perpetrator and the interest group apply for a request to bind the agreed settlement to all of the individual victims in a mass dispute. These individuals do not necessarily have to put up a defence if they do not agree with the binding and the settlement. They could simply opt out of the settlement. Although interested parties can file a statement of defence in the WCAM procedure,[9] it is more likely that a party that disagrees with the content of the settlement agreement will opt out of the binding agreement rather than file a statement of defence. If no party files a statement of defence, the WCAM procedure could be seen as non-contentious and it questionable whether non-contentious proceedings fall under the scope of the Brussels Regulation. The fact that putting up a defence is not as important as the opt-out procedure does not imply that the WCAM does not comply with the minimum rights that defendants in a procedure are entitled to. Moreover, in his Explanatory Report on the Brussels Convention, Jenard states that 'The Convention also applies irrespective of whether the proceedings are contentious or non-contentious'.[10]

Because of its structure and nature, it is unclear whether the WCAM procedure falls under one of the exceptions of Article 1(2) Brussels I. A WCAM settlement agreement that has been declared binding has many similarities with the 'judicial arrangements' or 'analogous proceedings' that are described in Article 1(2) Brussels I.[11] The described proceedings that are excluded from the Brussels Regulation, however, have a distinct link with insolvent companies. According to Schlosser, these excluded types of proceeding must be seen in conjunction with the

[7] For the entire description of the WCAM procedure, see Chap. 4.

[8] See Article 1 Brussels I-bis.

[9] See Article 1014 DCCP.

[10] Jenard Report, p. 9. See also Van Lith 2011, pp. 40–41. The question of whether the WCAM judgment can actually be seen as a judgment or a settlement will be set out in Sect. 12.2. In that chapter the question of whether a WCAM procedure is contentious or non-contentious will also be addressed.

[11] For the similarities between insolvency proceedings and the WCAM procedure, see also Vriesendorp 2010, pp. 173–186.

Insolvency Regulation[12]: such proceedings should fall either under the Brussels Regulation or the Insolvency Regulation.[13] Schemes of arrangement, which are also comparable to WCAM settlements, fall under the Brussels Regulation.[14] As the WCAM can be used in proceedings against both solvent and insolvent companies, it is difficult to determine whether and, if so, under what circumstances, the WCAM procedure will fall either under the Brussels Regulation or the Insolvency Regulation. As this book focuses only on proceedings against solvent companies, it is assumed that the WCAM procedure will fall under the Brussels Regulation instead of the Insolvency Regulation. As the WCAM procedure will consequently not fall under the exclusion of Article 1(2) Brussels I, in my opinion, the WCAM will fall under the substantive scope of the Brussels Regulation.[15]

In a collective action, the individual victims are not a party to the proceedings. The eventual collective action judgment only has res judicata in relation to the interest group. Hence the only parties in a collective action are the perpetrator/defendant and the interest group. The position of the parties involved in a mass dispute that is to be resolved through the WCAM procedure is also different.

In the first phase of a WCAM procedure, only the perpetrator and the interest group will enter and thus are party to the settlement agreement. In the second phase, again only the perpetrator and the interest group will be party to the proceedings. According to the Amsterdam Court of Appeal, the perpetrator is no longer a formal defendant: he and the interest group are together the applicant requesting that the settlement be made binding. The Amsterdam Court of Appeal deems as defendants individual victims in the mass dispute who, after the settlement agreement has been declared binding, will lose their right to file a claim for damages.

Another possible vision, based on a strict interpretation of the rules concerning a Dutch application procedure, is that there are two applicants of the request to make the settlement agreement binding and, in principle, no defendants. Since the settlement agreement is made binding in relation to the individual victims through an application proceedings, pursuant to Dutch law they must be seen as interested parties to the proceedings.[16] Only if they choose to put up a defence against the binding request can the individual parties be seen as defendants.[17] If they do not lodge a defence, there are no defendants in the procedure. This causes the parties involved to swap roles to a certain extent: the perpetrator is seen as the applicant and the victim is seen as an interested party. Should an interested party in a regular application procedure disagree with the application, it could lodge a defence. This

[12] Council Regulation 1346/2000 on Insolvency proceedings of 29 May 2000.

[13] Schlosser Report, para 53. See also Magnus et al. 2016, p. 72.

[14] Jenard Report, p. 12. See also Magnus et al. 2016, pp. 73–74.

[15] Also see Polak 2006, p. 2553.

[16] In an application procedure, the court will demand that the party that has filed the request and, in addition, the possible interested parties will be summoned to an oral hearing (Article 279(1) DCCP). The interested parties will have the option of lodging a defence (Article 282 DCCP).

[17] See Van Schaick 2011, p. 97. See also the opinion of the A-G in Case C-39/2002, Maersk Oil and Gas v. Firma M. de Haan [2004], para 37.

would automatically change the interested party into a formal defendant. Below, I will set out both possible visions in relation to the grounds of jurisdiction. In the following sections, both views on the roles of parties to the WCAM procedure will be covered. As will be explained in the section related to the submission rule and the section related to Article 4 Brussels I-bis, the two interpretations of the parties will not lead to different conclusions in relation to the grounds of jurisdiction.[18]

7.3 Submission Rule

The fact that the individual victims can have two possible roles in a WCAM procedure (either as a defendant, or as an interested party that will become a defendant only after filing a statement of defence) affects the submission rule.

The English text of the Brussels Regulation requires the defendant to enter an appearance. Since the *defendant* should enter an appearance in order to confer jurisdiction pursuant to Article 26 Brussels I, it is importance first to ascertain whether there is a defendant in the proceedings. In the opinion of the Amsterdam Court of Appeal, the individual victims must by definition be seen as defendants, as their right to file a claim themselves is taken away after the settlement agreement is made binding. As a result, should an individual victim enter an appearance, the Dutch court would be able to assume jurisdiction pursuant to Article 26 Brussels I.[19]

The other, stricter, view on the WCAM procedure is that the procedure recognises as defendants only those interested parties that lodge a defence.[20] Hence, if the individual victims do not lodge a defence, it is not be possible for the Dutch court to assume jurisdiction pursuant to Article 26 Brussels I.

If the individual victims are automatically defendants, or if they lodge a defence and become defendants, "the question arises of when they will enter an appearance." As stated earlier, an autonomous meaning could be given to entering an appearance. It can be defined as the legal presence of the *defendant* in the process, which would make the defendant a party in the proceedings.[21] How and when a defendant becomes a party in the proceedings depends on the local procedural

[18] It has been suggested that the use of an application and the way a court will assume jurisdiction in such an application procedure is comparable to the cross-border use of schemes of arrangement in the UK, because the UK court also assumes jurisdiction in relation to third parties in an application procedure. See Kuipers 2013, pp. 225 et seq.

[19] Briggs 2009, p. 131. The so-called lex fori regit processum rule applies. This has been confirmed by the ECJ in C-119/84, Capelloni et Aquilini v. Pelkmans [1985], ECR 3147, paras 20–21.

[20] See Van Schaick 2011, p. 97.

[21] Magnus et al. 2016, p. 673. See also Rauscher 2006, p. 460.

law.[22] According to Dutch law, not only the defendant that lodges a defence or appears at the hearing has entered an appearance, but also the interested party whose lawyer is registered in the specific case but does not lodge a defence.[23] The Dutch interpretation of entering an appearance in application procedures leads to two conclusions: (i) interested parties that do not lodge a defence can also enter an appearance and become a part of the proceedings, and (ii) the defending party must be known as a defendant/interested party, otherwise his lawyer cannot register himself in the specific case.[24] In summary, in both interpretations of the role of the victims in a WCAM procedure, victims can enter an appearance in a WCAM procedure either by lodging a defence or by requesting a lawyer to register himself as their legal representative.

In a WCAM procedure, all known individual victims are served notice and thus informed of the hearing before and at which the parties (including the interested parties) can lodge a defence. It is, however, assumed that individual victims who do not agree with the settlement agreement will not lodge a defence, but will simply opt out of the settlement agreement after it has been made binding. As a result, no statements of defence can be expected from individual victims who do not agree with the settlement agreement. Hence, whatever the view of the role of individual victims as defendants, it is not to be expected that victims will enter an appearance by actually lodging a defence.

As mentioned above, what individual victims could do to enter an appearance without lodging a defence is to assign themselves (separately or collectively) an attorney and inform the parties to the WCAM procedure of the assigned attorney(s). Although the victims are not obliged to lodge a defence, the parties to the WCAM would be able to assume jurisdiction pursuant to Article 26 Brussels I.[25] This could be impractical, since recent mass disputes have involved several thousands of victims, and in order for the Dutch court to have jurisdiction, each of these individual victims would have had to enter an appearance by registering an attorney. Moreover, since there is a chance that not every interested party will receive the mandatory written notification, it seems unlikely that every interested party will have knowledge of the pending case and be able to enter an appearance by assigning a lawyer. In addition, the WCAM procedure is specifically intended to prevent the individual parties being obliged to play a specific individual role in the proceedings. The interest group will represent the interests of the individual victims in order to prevent proceedings in which several thousands of individual victims are heard individually.

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[22] Briggs 2009, p. 131; and Magnus et al. 2016, p. 672. The so-called lex fori regit processum rule applies. This has been confirmed by the ECJ in C-119/84, Capelloni et Aquilini v. Pelkmans [1985], ECR 3147, paras 20–21.

[23] Van Schaick 2011, pp. 97–98.

[24] This example follows from the fact that a lot of Dutch application proceedings are contentious. A defending party is often already known and sent a copy before the application is filed at a court.

[25] HR 26 June 2009, *NJ* 2010, 127. See also Van Schaick 2011, p. 98.

Summarising, it is possible for individual victims to enter an appearance, but due to the impracticalities, it is highly unlikely that the individual victims will enter an appearance in a WCAM procedure, making it improbable that a court would be able to assume jurisdiction pursuant to Article 26 Brussels I.

7.4 Jurisdiction in Consumer-Related Matters

As it would be difficult for a Dutch court to base its jurisdiction on Article 26 Brussels I, it is necessary to look into the other possible grounds of jurisdiction. The ground of jurisdiction that—with the exception of the submission rule—precedes most grounds of jurisdiction is the choice of forum agreement. As there are two types of choice of forum clauses (Article 19 Brussels I-bis in relation to consumer-related matters and Article 25 Brussels I-bis in relation to regular (non-consumer) matters), this section will firstly set out whether a WCAM matter can be described as consumer-related. As has been set out in the previous chapters, consumer-related matters are contractual.[26] As a result, this section will cover only the financial product type of mass dispute.

The perpetrator and the interest group in a WCAM procedure are the only parties that request the settlement agreement be made binding and they are the only parties to the settlement agreement.[27] Section II/4 can, however, only be used in matters that relate to a contract concluded by a consumer. Looking at the parties in the procedure, the grounds (both the ground in Article 18 and the choice of forum agreement in Article 19 Brussels I) of jurisdiction in Section II/4 cannot be used, since the agreement that forms the basis for the dispute is not a consumer agreement. The perpetrator and the interest groups are the parties to this contract and neither the perpetrator, which in our hypothetical case is a bank, nor the interest group, operating in the context of its trade or profession, can be seen as consumers according to Article 17 Brussels I. In addition, although the interest group has to actually represent the consumers/victims of the mass dispute and these rules are intended to protect parties that are financially and legally weaker,[28] the consumer-related grounds cannot be used. The contract on which the dispute is based has to be concluded by a person who is dealing outside his trade or profession.[29] As a result, the rules of Section II/4 Brussels I-bis cannot be used in a WCAM context.

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[26] As indicated in the previous chapters, the basic principle in the shareholder mass dispute is to claim damages from the registered company. Since in principle shareholders only have a contract with the bank/broker from which they acquired the shares, in this book the "shareholder mass dispute" will be seen as merely contractual.

[27] Van Lith 2011, p. 50.

[28] Case C-89/91 Shearson Lehman Button [1993] ECR I-139, para 18. See also Poot 2006, p. 177.

[29] Case C-269/95, Benincasa v. Dentalkit [1997] ECR I-3788, paras 15–17.

7.5 Choice of Forum Agreement

Since the grounds of jurisdiction in consumer-related matters cannot be used in a WCAM procedure, the choice of forum agreement in consumer-related matters in relation to the WCAM was not be analysed in this book. Consequently, only the use of the 'regular' choice of forum agreement of Article 25 Brussels I-bis in relation to the WCAM procedure will be set out. The use of such an agreement would, to a certain extent, have the same characteristics as that of the choice of forum agreement that can be used in a collective action.[30] In principle, the individual victims have no role in the proceedings in a WCAM procedure either. The subject of the WCAM procedure, however, is an agreement, while the collective action (Article 3:305a DCC) concerns a claim (at least, in relation to the type of mass disputes that are covered in this book) for a declaratory judgment. Since the WCAM procedure involves a settlement agreement, the usability of a choice of forum in a WCAM procedure can relate to either (i) a possible choice of forum agreement that is entered into between the individual victims and the perpetrator (this choice of forum agreement could be part of the underlying agreement that relates to the financial product), or (ii) the choice of forum agreement that is part of the settlement agreement that will have to be made binding and which is entered into by the interest group and the perpetrator. A possible third choice of forum agreement in relation to the WCAM procedure is a choice of forum agreement that is entered into by the interest group, the perpetrator and each individual victim. As has been stated in Sect. 7.3 , it is, however, unlikely and unrealistic for each individual victim to be involved in the WCAM proceedings. Based on the same arguments, it is also unlikely and unrealistic to have the individual victims enter into a choice of forum agreement to confer jurisdiction to the Dutch court. Hence, this possible choice of forum agreement was not covered in this book.

Both the first and the third possible uses of a choice of forum agreement in a WCAM procedure rely heavily on the effect of a choice of forum agreement on third parties.[31] In the following subsections, I will first set out the first possible use of a choice of forum agreement and then the possibilities of using a choice of forum agreement which is embedded in the settlement agreement.

[30] For the choice of forum agreement in relation to a collective action, see Sect. 6.4 of this book.

[31] Because the individual victims are not actually a party to the agreement before the procedure to bind them to the settlement agreement has started. I will therefore have to look into the possibilities of a Gerling construction.

7.5.1 *Choice of Forum Agreement Between the Victims and the Perpetrator*

The Dutch court could possibly assume jurisdiction in a WCAM procedure with regard to the individual plaintiffs if they agreed on the court's jurisdiction through a choice of court agreement. This agreement will have to be entered into before the dispute arises. The difference between the collective action and the WCAM procedure is, however, that in a WCAM settlement individual victims do not necessarily have to be involved with the interest group (which is the party to the proceedings), since the group of people that will be bound by the settlement is not fully known. Moreover, the individual victims will become a party in the WCAM procedure (either as defendants or as interested parties that are summoned), but this is not the case in a collective action procedure.

In the hypothetical financial product mass dispute the individual victims could enter in a separate choice of forum agreement with the bank. As mentioned in Sects. 5.4 and 6.4, the cooperation of the bank is required to arrive at a choice of forum agreement. As most banks use general terms and conditions in which they have also incorporated a choice of forum clause, the court to which the individuals want to confer jurisdiction must also be the court the bank desires. It seems unlikely that a bank would want to confer jurisdiction to a court which does not offer a certain procedural advantage (or a court which places the bank in a disadvantageous position). It is up to the individual victims to convince the bank to agree to confer jurisdiction to the Amsterdam Court of Appeal and use the WCAM to resolve the mass dispute. It thus also depends on the advantages of the WCAM procedure for resolving a mass dispute (if the perpetrator will also benefit from the use of the WCAM to resolve a mass dispute, it could be more likely that the perpetrator would wish to cooperate in conferring jurisdiction to the Dutch court through use of a choice of forum agreement). The question remains of whether the individual victims, not all of whom are Dutch, would want to confer jurisdiction to a court which does not have the same domicile as they do, in order to resolve a dispute which may not yet have arisen. Moreover, to enter a choice of forum agreement with the entire group of future individual victims requires some coordination.

In the hypothetical securities mass dispute, parties do not have a contractual relationship with the perpetrator with which they can link a possible choice of forum agreement. Why would someone agree to a choice of forum agreement if these parties do not have a relationship to start with? As a result, if the shareholders wish to have a choice of forum agreement with the registered company, they will have to enter such an agreement separately, not linked to the underlying agreement which creates the relationship.

Just as in the case of the hypothetical financial product mass dispute, such an agreement is theoretically possible, but there are several impracticalities which make the use of such a choice of forum agreement unlikely. Furthermore, an alternative solution could be to confer jurisdiction through a choice of forum clause in the registered company's articles of association, as the choice of forum agreement

used would apply both to each individual shareholder and to the interest group with which the company will enter a settlement agreement. Before the company will change its articles it has to be convinced that the WCAM is the best procedure to follow, which implies that the Amsterdam Court of Appeal is the best court at which to solve securities disputes.

Summarising, in the situations described above, a choice of forum agreement could be used to confer jurisdiction to the Amsterdam Court of Appeal, but there are some impracticalities that can prevent the registered company from cooperating to confer jurisdiction.

7.5.2 Choice of Forum Agreement as Part of the Settlement Agreement

It has been suggested that a choice of forum agreement in the settlement agreement could also have an effect in relation to the individual victims in a mass dispute.[32] By analogously applying the Gerling case[33] the effect the agreement between Gerling and the International Road Transport Union (IRU) on the affiliated national associations as beneficiaries might also work in a WCAM case. In such a case the beneficiaries would be the individual victims. The choice of forum agreement between the parties of the settlement agreement would also bind the actual victims of the mass dispute, even though these victims would not have signed this choice of forum agreement.[34]

As explained in Sect. 6.4, a choice of forum agreement will have an effect only on those parties that entered into the agreement and on possible third parties that have accepted the choice of forum agreement. Based on the Axa case,[35] which is referred to in Sect. 6.4, it must be concluded that an individual victim may not rely upon a choice of forum agreement between the interest group and the perpetrator, unless the individual victim has actually consented to that choice of forum agreement under the conditions laid down in Article 25 Brussels I-bis. It is questionable whether all of the individual victims must explicitly agree to such a choice of forum agreement, as this would require each individual victim to be registered and coordinating that all of these victims accept the choice of forum agreement. As argued in the above subsections, such a direct involvement of the various individual victims is unrealistic and unlikely. As the individual victims are thus not by definition bound by a choice of forum agreement between the interest group and the

[32] Van Lith 2011, pp. 54–56. See also Poot 2006, pp. 178–180, in which she doubts if such a choice of forum agreement could have effect against the individual victims.

[33] Case C-201/82 Gerling v. Tesoro dello Stato [1983], ECR 2517.

[34] Van Lith 2011, p. 55. See also Briggs 2009, p. 184.

[35] Case C 543/10, Refcomp v. Axa [2013].

perpetrator, the choice of forum agreement which is part of the settlement agreement seems to be a ground of jurisdiction that should be eschewed.

7.6 General Provision and Co-Defendants

As has been set out in the section that covered the submission rule, in a WCAM procedure the definition of a defendant is not the same as that used in regular procedures. The perpetrator and the organisation that represents the victims will resolve the dispute by signing a settlement agreement. After this agreement has been signed, both the interest group and the perpetrator have the obligation to compensate the victims. The court procedure to request the binding of the settlement agreement in relation to the individual victims is commenced by an application. Both the perpetrator and the interest group are applicants to the request to bind the settlement agreement. As the perpetrator is one of the applicants to the binding request, he cannot be seen as a defendant in the court procedure, even though he is the party that will compensate the victims. This is important in relation to Article 4 Brussels I-bis. Based on this ground, defendants domiciled in a Member State shall be sued in the courts of that Member State. The court of the perpetrator's domicile cannot assume jurisdiction pursuant to Article 4 Brussels I-bis, because the perpetrator is not a defendant. The same goes for the court of the interest group's domicile. This leaves the actual victims of the mass dispute as possible defendants. As is set out in Sect. 7.2, there can be two situations in which these victims can be seen as a defendant/person being sued: (i) either automatically, because upon the filing of the action the victims will lose their right to file a claim (this is the view that is being used by the Amsterdam Court of Appeal), or (ii) once the individual victims have lodged a defence.

When does a party, however, become a defendant pursuant to Article 4 Brussels I-bis,[36] given that this provision does not contain the term 'defendant'? Article 4 Brussels I-bis states that a person shall be *sued* before the court of this person's domicile. With the use of this terminology it seems that the Brussels Regulation is primarily aiming at contentious procedures in which there is a plaintiff that actively sues a defendant.[37] It has been suggested in an English case that 'suing' contemplates pursuing a substantive cause of action[38] and that a defendant has to be

[36] See Jenard Report, pp. 18–19. Schlosser also refers to the person that is to be sued, albeit indirectly, as a defendant. See Schlosser Report, pp. 99–100. The ECJ also sees the person being sued as a defendant. See case C-412/98 Group Josi Reinsurance Company SA v. Universal General Insurance Company [2000], ECR I-5925, para 35.

[37] Jenard, however, argued that the Brussels Convention (and thus also the Brussels Regulation) applies to both contentious as non-contentious matters. See also the definition of 'judgment' in Article 2 Brussels I-bis in Sects. 10.2 and 12.2.

[38] See also Briggs 2009, pp. 200–202.

summoned to answer a claim by an opponent.[39] It has also been suggested that it is not sufficient that the defendant is summoned only to respond to an application for orders ancillary to substantive proceedings pending before a particular court.[40] By analogy with this reasoning, an application for an anti-suit injunction[41] (which, in principle, partly has the same consequence as a binding WCAM settlement agreement in that an individual victim loses his right to start a claim after the WCAM settlement has been made binding) would not mean that the respondent (this would, in the case of a WCAM procedure, be the interested party/victim to the mass dispute) was being sued, according to Briggs.[42] To prevent such a counter-intuitive situation, it has been suggested that a person who is summoned to court and made respondent to an application, and who stands at risk of being ordered by the court to perform an act, is being sued and can/must be seen as a defendant.[43]

When this interpretation of 'being sued' is used in relation to a WCAM procedure, the individual victims that can be bound by the settlement agreement cannot be seen as persons that are being sued, as they are not at risk of being ordered to perform an act.[44] The loss of the victims' right to claim damages individually cannot be seen as an order to act that follows from the binding of the settlement agreement. To lose one's right to file a claim individually (or to refrain from filing an individual claim) is normally just a procedural implication when a certain case is resolved through a court procedure, and is not a specific order to act.

Another effect a binding settlement will have on the individual victims is that they will have the right to receive a certain amount of compensation. Having the right to a certain amount of compensation cannot be seen as a risk of being ordered to act.

In addition, an order which causes a party to lose its right to file a claim is comparable to the above-mentioned anti-suit injunction. It might be that the loss of an individual victim's right to file a claim after the settlement is made binding is equivalent to an anti-suit injunction. In the case of an anti-suit injunction, the

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[39] Court of Appeal 12 October 1999, *W.L.R.* 2000, 603, 615–616 (The Ikarian Reefer No. 2).

[40] See also Briggs 2009, pp. 200–202. Court of Appeal 12 October 1999, *W.L.R.* 2000, 603, 615–616 (The Ikarian Reefer No. 2).

[41] Also see Van Lith 2011, p. 105.

[42] See Briggs 2009, p. 201. Based on Briggs argument, I assume that an anti-suit injunction is more of a procedural claim, rather than a substantive claim. Otherwise, the consequence of such a claim (losing a right to sue), would have to be seen as a substantive cause of action, which would make the counterparty a defendant.

[43] See Briggs 2009, p. 201.

[44] With respect to claims for a declaratory judgment, it could be argued that the "defendant" in such a procedure does not run the risk of being ordered to perform an act, but rather runs the risk of a change in his legal position (e.g. the conclusion that a person to the proceedings has acted unlawfully or can be held liable). In case this thought would be applied to the WCAM procedure, it must be concluded that the individual victims' legal position will not be changed due to a WCAM procedure. The individual victims will either be awarded damages or not and they will subsequently lose their right to file a claim or not. Such a conclusion does not change their legal position.

individual victims are explicitly ordered not to start proceedings against the perpetrator. The ECJ, however, has decided that specific anti-suit injunctions are prohibited.[45] In the Turner case, the ECJ decided the following:

> (…) the Convention is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.[46]

In my opinion, losing your right to file a claim cannot be seen as an order to act, and thus the WCAM procedure cannot be seen as a procedure in which the individual victims are sued. If the loss of a person's right must be seen as an order to act, such a procedure must be seen as an anti-suit injunction, a procedure which is prohibited by the ECJ.

This conclusion is, however, contradictory to the Dutch version of the Brussels Regulation, as that version does not refer to the person that is sued, but to the person that is summoned (Dutch: *oproepen*). The use of this term focuses the requirements to base a court's jurisdiction on Article 4 Brussels I-bis on the action that institutes the proceedings, whereas the English wording *to sue* also focuses on standing at risk of being ordered by a court to perform an act. The latter does not seem to be part of the description in the Dutch wording of Article 4 Brussels I-bis. Using only the Dutch wording of the Regulation seems to make it possible to base a court's jurisdiction on Article 4 Brussels I-bis by simply instituting proceedings. This being so, the Dutch court would be able to assume jurisdiction in relation to all the Dutch victims that are summoned to the WCAM proceedings. For the sake of harmonised regulations I will, however, uphold the English text of the Regulation.[47]

Next to the two above-mentioned interpretations of Article 4 Brussels I-bis in relation to the WCAM procedure, it remains strange that interested parties have the option of lodging a defence against the request for a binding declaration.[48] It seems counterintuitive that there is doubt whether the interested parties are actually being sued even though at the same time they have the option of lodging a defence. It could be argued that due to this option, interested parties must automatically be seen as defendants that are being sued (which could mean either running the risk of being ordered to act or—when the Dutch text of the Regulation is used—of being summoned to a procedure). Jenard's explanation of Article 4 Brussels I-bis names

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[45] Case C-159/02, Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA [2004], ECR I-3565. See also Stefanelli 2012, pp. 166 et seq.

[46] Case C-159/02, Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA [2004], ECR I-3565, para 31.

[47] In the German text of the Brussels Regulation, the verb that is used in Article 4 Brussels I-bis (*verklagen*) is comparable with the English *to sue*. The same applies to the French verb *attraire* that is used in the French text.

[48] According to Article 1014 DCCP, not only interested parties are allowed to lodge a defence, but also interest groups that claim act on behalf of the interests of parties involved with the mass dispute.

the person that is to be sued 'the defendant'.[49] Although it is possible to put up a defence against the request to make the settlement binding,[50] this possibility has been used in only three recent WCAM cases.[51] On these occasions only one or several parties put up a defence against the request for binding settlement and they did not lodge a defence in relation to an order to act. Furthermore, such a defence is not logical, since—at least if it would result in the loss of one's right to file an individual claim as an order to act—a defence against the loss of the right to file a claim can be lodged by opting out of the settlement agreement. Lodging a defence does not necessarily constitute that the party is being sued or runs the risk of being ordered to act. Hence, as it is not known which order the interested parties in a WCAM can act on to lodge a defence, the fact that the interested parties can lodge a defence does not necessarily mean that they are being sued pursuant to Article 4 Brussels I-bis. In addition, should lodging a defence mean that a party would automatically become a respondent, pursuant to which the court of that party's domicile would be able to assume jurisdiction pursuant to Article 4 Brussels I-bis, it would mean that the Dutch court could assume jurisdiction only in relation to the parties that have knowledge of the proceedings and are willing to lodge a defence. This, however, is possible only when the person that is sued actually knows that he is being sued. Also, in that event the general provision would become an impractical ground of jurisdiction, as it would require every defendant to enter an appearance.

In summary, a court cannot assume jurisdiction in relation to the victims pursuant to Article 4 Brussels I-bis, since losing a right to file a claim or receiving a right to compensation cannot be seen as an order to act. In addition, being sued in order to take away a right to file a claim is prohibited. Neither can lodging a defence while a person is not ordered to act be seen as a ground for assuming jurisdiction pursuant to Article 4 Brussels I-bis. Should the Dutch text of Article 4 Brussels I-bis be used, however, then a court could assume jurisdiction pursuant to Article 4 Brussels I-bis if the victim has been summoned correctly.[52] In that event, the court

[49] See Jenard Report, pp. 18–19. The Schlosser Report also names the person that is to be sued a defendant, although not explictly. See Schlosser Report, pp. 99–100. The ECJ too sees the person being sued as a defendant. See case C-412/98 Group Josi Reinsurance Company SA v. Universal General Insurance Company [2000], ECR I-5925, para 35.

[50] Article 282 DCCP. Also see Dutch Parliamentary Documents TK 29414, 2003–2004, nr. 3, p. 27.

[51] In the Des case, the Dexia case, the Shell case and the Converium case there were parties that lodged a defence. Most of these defences were based on the ground that the compensation that is awarded through the settlement was not reasonable.

[52] The known victims in a WCAM procedure are summoned directly. To ensure that all the victims are summoned, the parties to the WCAM procedure are obliged to publish notifications in newspapers and/or popular magazines. This is also of importance in relation to the jurisdiction of the court, because Article 26(2) Brussels I-bis states: 'The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.'

would be able to assume jurisdiction only in relation to the 'defendants' that are domiciled in the Netherlands. A possible solution in order to also assume jurisdiction in relation to other victims might be to use Article 8 Brussels I.

7.6.1 Co-Defendants Pursuant to Article 8(1) Brussels I-Bis

As was discussed above, in both the Shell and Converium cases the Amsterdam Court of Appeal did assume jurisdiction in relation to the Dutch victims, pursuant to Article 4 Brussels I-bis. In relation to the non-Dutch victims, the Amsterdam Court of Appeal assumed jurisdiction pursuant to Article 8(1) Brussels I-bis. This provision states that a person that is domiciled in a Member State may also be sued if he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are 'so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings' (Article 8(1) Brussels I-bis).

In relation to the use of Article 8(1) Brussels I-bis in a WCAM procedure, the non-Dutch victims must be seen as defendants. To achieve this, the Amsterdam Court of Appeal decided to see the individual victims in both the Shell case and the Converium case as defendants[53] because if the Court of Appeal were to declare a WCAM settlement binding, the individual victims would lose their ability to file an individual claim. Because of this loss, the individual victims are seen as defendants.[54] Consequently, should any Dutch individual victims be involved in the WCAM procedure, the Amsterdam Court of Appeal could always assume jurisdiction in relation to this group of Dutch victims. The Court of Appeal argued that Article 8(1) Brussels I-bis would serve as a ground of jurisdiction for the court for other non-Dutch victims.

The use of Article 8(1) Brussels I-bis must also be viewed next to the strict use of Article 4 Brussels I-bis, which is described above in Sect. 7.6. As has been set out in the previous section, losing one's right to file an individual claim cannot be seen as being sued and thus becoming a defendant. In my opinion, the victims can thus not be seen as defendants, making it impossible to use Article 8(1) Brussels I-bis to confer jurisdiction to the Dutch court for the non-Dutch victims.[55]

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[53] The court of appeal's jurisdiction was based not only on Article 4 Brussels I-bis, but also on Article 8(1) Brussels I-bis.

[54] Amsterdam Court of Appeal 29 May 2009, NJ 2009, 506 (Shell case), Amsterdam Court of Appeal 12 November 2010, NJ 2010, 683 (Converium case on jurisdiction) and Amsterdam Court of Appeal 17 January 2012, LJN: BV1026.

[55] See also Lein 2012, pp. 129–142 in which the author gives a short overview of possible grounds of jurisdiction in collective redress proceedings, especially the WCAM procedure. See also Kramer 2014, pp. 249–258 for an overview of the application of jurisdictional grounds in Brussels I-bis and the WCAM.

Given that the Amsterdam Court of Appeal sees the victims as defendants, it is necessary to look at the other requirements of Article 8(1) Brussels I-bis. To apply Article 8(1) Brussels I-bis, the various claims that are brought must be so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. This requirement resembles the lis pendens rule requirements, which will be covered in Sect. 8.2.

Judgments may be regarded as irreconcilable when the divergence arises in the context of the same situation of law and fact. Hence, it is not sufficient that there is a divergence in the outcome of the dispute.[56] However, the ECJ has also argued that there can be no same situation of facts when defendants are different and the infringements they are accused of, which were committed in different Contracting States, are not the same.[57] Should the WCAM, or any other collective redress mechanism, not be used to resolve a mass dispute, then the resulting outcome and the factual and legal situation cannot be seen as the same, as, among others, different law will apply to the various claims and the claims themselves are likely to differ (e.g. distinction between consumer agreements and non-consumer agreements).[58]

Although it seems that Article 8(1) Brussels I-bis cannot be used to confer jurisdiction to the non-Dutch victims, Van Lith mentioned that during the interviews she had with various experts, some interviewees argued that the WCAM must be seen as a particular procedure and Article 8(1) Brussels I-bis should be applied less restrictively.[59] The judiciary seems to agree, since Article 8(1) jo. Article 4 Brussels I-bis has been used to assume jurisdiction in both the Shell case and the Converium case.

Based on the above, it is unlikely that in a WCAM procedure jurisdiction can be conferred to the Dutch court in relation to non-Dutch victims pursuant to Article 8 (1) Brussels I-bis, for two reasons. Firstly, because—just as in the case of the Dutch victims—the non-Dutch victims cannot be seen as defendants and secondly, because it is unlikely that if the various individual cases were to be decided on separately, these cases could be seen as the same. This being so, the chances of irreconcilable judgments are slim. Irreconcilable judgments in relation to the WCAM will be set out in further detail in Chap. 8.

7.7 Jurisdiction in Contractual Matters

Since, because of the settlement agreement, a WCAM procedure is partly contractual in nature it is necessary to ascertain to what extent the WCAM procedure can be designated as contractual pursuant to the settlement agreement and/or pursuant to a possible agreement concluded between the victims and the perpetrator.

[56] Case C-539/03, Roche Nederland v. Primus [2006], ECR I-6569, para 26.

[57] Case C-539/03, Roche Nederland v. Primus [2006], ECR I-6569, para 27.

[58] See also Van Lith 2011, p. 47.

[59] Van Lith 2011, p. 47.

With respect to the agreements that have been concluded between the victims and the perpetrator, it must be concluded that the same sort of interest group that is involved with a collective action is also involved with the collective settlement. As a result, jurisdiction in relation to this organisation in a collective settlement procedure cannot be based on Article 7(1) Brussels I-bis.[60]

It might also be possible to see the settlement agreement that the interest group and the perpetrator will conclude as the contract to which the mass dispute relates. Article 7(1) Brussels I-bis can perhaps be used to base a court's jurisdiction on the settlement agreement. In that case, the perpetrator and the interest group remain the applicants to the binding procedure. The interest group will be a party to this contract, which makes it possible for a court to also assume jurisdiction in relation to this organisation (as in the first example, jurisdiction could be assumed only in relation to the perpetrator). It remains, however, a question who the other parties to this contract are and where the place of performance of this contract is. As the individual victims are not a party to this contract until it is made binding by the Amsterdam Court of Appeal, it seems that it is not possible to base jurisdiction on Article 7(1) Brussels I-bis. In the Converium case, the Court of Appeal reasoned by referring to the Effer v. Kantner case[61] that a court can also assume jurisdiction on Article 7(1) Brussels I-bis if the contract is in dispute. Such an event would be comparable with the application of the settlement agreement in relation to the victims, as the request to make the settlement agreement binding should be seen as if it is the settlement agreement that is in dispute. In the Effer case, the question was whether a third involved party (Hykra) had or had not concluded an agreement on behalf of Effer.

The ECJ stated that:

> (…) in the cases provided for in Article 5(1) [now Article 7(1) Brussels I-bis] of the Convention, the national court's jurisdiction to determine questions relating to a contract includes the power to consider the existence of the constituent parts of the contract itself, since that is indispensable in order to enable the national court in which proceedings are brought to examine whether it has jurisdiction under the Convention. If that were not the case, Article 5 (1) of the Convention would be in danger of being deprived of its legal effect, since it would be accepted that, in order to defeat the rule contained in that provision it is sufficient for one of the parties to claim that the contract does not exist. On the contrary, respect for the aims and spirit of the Convention demands that provision should be construed as meaning that the court called upon to decide a dispute arising out of a contract may examine, of its own motion even, the essential preconditions for its jurisdiction, having regard to conclusive and relevant evidence adduced by the party concerned, establishing the existence or the inexistence of the contract.[62]

In my view, however, the application of the rule in Effer v. Kantner cannot be used in a collective settlement procedure. When both parties to the proclaimed

[60] See Sect. 6.6.

[61] Amsterdam Court of Appeal, 12 November 2010, LJN: *BO3908*, para 2.8. See Case C-38/81, 4 March 1982, Effer v. Kantner.

[62] Effer v. Kantner para 7. See also Magnus et al. 2016, p. 172.

contract (in the case of the collective settlement these parties are the perpetrator and interest group on the one hand, and on the other hand, the individual victims) claim that there is no contract, a court cannot assume jurisdiction.[63] In the Converium case, not only did the individual victims in the WCAM procedure dispute the existence of a contract (as they did not explicitly accept the offer to settle the dispute), but also the applicants to the binding request (the perpetrator and the interest group) explicitly stated that the settlement would have effect only if it were made binding.[64] Hence there can only be a contract if these conditions are met. Moreover, in the Handte case, the ECJ stated that the phrase 'matters relating to a contract', as used in Article 7(1) Brussels I-bis is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.[65] As the settlement would bind the victims only if the Amsterdam Court of Appeal was to actually make the settlement binding, the agreement cannot be seen as a freely assumed contract on which to base a court's jurisdiction.[66]

In the Handte case, which involved a manufacturer and a sub-buyer, the ECJ reasoned that the manufacturer had no contractual relationship with the sub-buyer and undertook no contractual obligation towards that buyer, whose identity and domicile may be unknown to him.[67] It appears that in most of the Member States the liability of a manufacturer towards a sub-buyer for defects in the goods sold is not regarded as being of a contractual nature.[68] The same should hold for the collective settlement, which should also cover those victims who are unknown to both the perpetrator and the interest group. As some of these victims remain unknown to the applicants of the binding request, it is impossible to assume that there is a contractual basis between all of these victims and the applicants, on which the court can base its jurisdiction.

It has been suggested that there is a pre-contractual relationship between the individual victims and the applicants of the request for a binding settlement.[69] Following the Tacconi case, the ECJ, however, stated that disputes concerning pre-contractual liability fall within the scope of Article 7(2) Brussels I-bis.[70] As a result, the Amsterdam Court of Appeal cannot assume jurisdiction pursuant to Article 7(1) Brussels I-bis in relation to a possible pre-contractual relationship.

Summarising, Article 7(1) Brussels I-bis cannot be used by a court to assume jurisdiction in relation to the interest group. It is not possible to assume jurisdiction

[63] Pertegás et al. 2004, p. 186.

[64] Amsterdam Court of Appeal, 12 November 2010, LJN: *BO3908*, para 2.8.

[65] Case C-26/91, Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA [1992], ECR I-3967, para 15.

[66] See also Poot 2006, p. 176.

[67] C-26/91, Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA [1992], ECR I-3967, para 20.

[68] Ibid.

[69] See Amsterdam Court of Appeal 12 November 2010, *JOR* 2011, 46.

[70] C-334/00 Tacconi v. HWS [2002] ECR I-7357, paras 15 and 21.

if the settlement agreement is used as a basis. As the court procedure will create the agreement, it is not possible to use the Effer case to base jurisdiction on, since the victims are not a party to the settlement agreement.

7.8 Jurisdiction in Tortious Matters

As stated in the previous two chapters, from the perspective of private law, disputes can either be contractual or tort-based matters. If a matter is contractual, it cannot be tortious. Although in the case of the hypothetical securities mass dispute the underlying dispute is tortious, the WCAM procedure is contractual because the procedure is based on the settlement agreement that has to be made binding. Article 7(2) Brussels I-bis can therefore play no role in a WCAM procedure.

When this Article 7(2) Brussels I-bis, however, does play a role in a WCAM procedure, quod non, then the same issues apply when a court has to assume jurisdiction in a tort-based collective action procedure. Article 7(2) Brussels I-bis conveys jurisdiction in matters of tort, delict or quasi-delict to the court in the place where the harmful event occurred or may occur.[71] In the Kalfelis case the ECJ stated that: 'tort, quasi-tort and delict cover all actions which seek to establish liability of a defendant and which are not related to a contract within the meaning of Article 7(1)'.[72] When the settlement agreement has been made binding, it does not mean that the individual victims to the mass dispute are suddenly liable for their actions. Moreover, only when parties have actually suffered damage can a court's jurisdiction be conferred on the basis of Article 7(2) Brussels I-bis. Since neither the interest group nor the perpetrator has suffered damage, a court's jurisdiction in a WCAM procedure cannot be based on Article 7(2) Brussels I-bis.

7.9 Effect of Ground of Jurisdiction on the Goals of Collective Redress

The preceding subsections discussed the use of the various grounds of jurisdiction in relation to various situations in which the WCAM procedure can be used. It was concluded that none of the grounds of jurisdiction work in relation to a WCAM procedure or are practical. This consequently will have an effect on the goals of collective redress. In the following subsection I therefore describe the effects the application of these jurisdictional grounds have on the goals of collective redress

[71] Since jurisdiction in tortious matters is not regulated separately, this section will deal with the jurisdictional grounds for both consumers as non-consumers.

[72] Kalfelis v. Bankhaus Schröder Münchmeyer Henst & Cie. (Case 189/87) [1988] ECR 5565.

mechanisms. Collective redress mechanisms are intended for a certain purpose. Is it still possible to achieve these goals, while utilising certain grounds of jurisdiction?

7.9.1 *Effective Legal Protection and Finality*

In common with the two other collective redress mechanisms, a WCAM procedure is aimed at guaranteeing the effective legal protection of the victims of mass disputes. In other words, the procedure is intended to achieve that the victims are compensated for the loss that is caused by the mass dispute. Since the WCAM procedure is also an opt-out system, another goal of this procedure is to offer finality, in that the WCAM should resolve a mass dispute conclusively.

When a court has to base its jurisdiction on the submission rule, jurisdiction will depend on the defendant entering an appearance. If the applicants to the settlement reach every interested party/victim and if these victims agree on entering an appearance in the procedure, then the WCAM procedure could guarantee the necessary effective legal protection. Taking as an example the Shell case, approximately 20% of the group of victims could be reached through mail or e-mail. For the remaining 80% of the group of individual victims, the presence of the settlement agreement and the application to bind the agreement had to be announced through public announcements in newspapers and other media.[73] As it is therefore unclear if each individual victim was reached in order to enter an appearance, it would not be possible to base the court's jurisdiction on the submission rule. Consequently, in the Shell case the submission rule cannot be used to assume jurisdiction in relation to all individual victims and thus guarantee that the WCAM procedure can resolve the mass dispute for all parties involved. Thus, this ground of jurisdiction cannot provide for the effective legal protection the WCAM procedure is aiming for. If every victim does enter an appearance, however, in theory the submission rule can be used to confer jurisdiction to the Amsterdam Court of Appeal and resolve the mass dispute.

Since the provisions of Section II/4 cannot be used by non-consumers, these provisions cannot be used to guarantee the effective legal protection the WCAM has to offer.

The choice of forum agreement can be used to guarantee effective legal protection when the WCAM procedure is being used in a cross-border matter. The jurisdiction of the court will depend on whether the perpetrator and the individual victims have concluded such an agreement. But, as mentioned in Sect. 7.5, the impracticalities of using a choice of forum agreement prevent this ground from being used to confer jurisdiction. Theoretically, such a choice of forum agreement

[73] See Amsterdam Court of Appeal 29 May 2009, OR 2009, 109 (Shell case) paras 5.7–5.14. In the Converium case approximately 12,000 victims were summoned directly (see Amsterdam Court of Appeal 17 January 2012, LJN: BV1026, para 5.2.2).

could be used, but not in relation to all of the victims. Chances are slim that this option will be used and that pursuant to this ground of jurisdiction the goal of guaranteeing effective legal protection will be assured.

If a choice of forum agreement were to be used in relation to the settlement agreement, it could be used as a ground of jurisdiction through which effective legal protection can be guaranteed. However, again there are impracticalities that make this option unattractive.

With respect to the way the Amsterdam Court of Appeal has used the general provision, the WCAM procedure in combination with Article 8(1) Brussels I-bis could be used to offer effective legal protection, as the Amsterdam Court of Appeal sees the individual victims as defendants. Should there be a group of victims who are domiciled in the Netherlands, the Court of Appeal could assume jurisdiction in relation to this group pursuant to Article 4 Brussels I-bis. Additionally, under Article 8(1) Brussels I-bis the court could assume jurisdiction in relation to the victims who are domiciled outside of the Netherlands Then, no extra actions are required for the court to assume jurisdiction in relation to each individual victim. The Court of Appeal could resolve the entire dispute through use of the WCAM, offering the finality this procedure is intended to secure. If these provisions are interpreted more strictly, the use of a WCAM procedure in a cross-border context cannot guarantee effective legal protection, because resorting to Articles 4 and 8(1) Brussels I-bis in this way would mean that non-Dutch victims are not covered by these grounds of jurisdiction.

For the same reasons as applied to the collective action, the special grounds of jurisdiction of Article 7(1) Brussels I-bis cannot be used to assume jurisdiction in relation to the individual victims, as these victims are not a party to the settlement agreement. Hence, this ground of jurisdiction cannot be used to resolve the mass dispute, let alone resolve it conclusively.

With respect to Article 7(2) Brussels I-bis, the applicants of the request to bind the settlement have not actually suffered damage themselves. As a result, this ground of jurisdiction cannot be used in a WCAM procedure and as a result cannot guarantee the effective legal protection the mechanism is intended to provide.

7.9.2 Efficient Legal Protection

One of the aims of a collective redress mechanism, and hence also of the WCAM procedure, is to reduce the costs, effort and time involved in resolving a mass dispute. In a cross-border mass dispute, it is questionable whether this aim can be achieved, since the private international law rules will affect the resolution of the mass dispute.

When looking at the effects described above, specifically those that are expected when basing a court's jurisdiction on the submission rule, the following can be concluded. When a court's jurisdiction in a cross-border WCAM procedure is to be based on the submission rule, all the victims are required to enter an appearance. In

a WCAM context this means that possibly thousands of individual victims will have to enter an appearance and incur the necessary costs, before a court can base its jurisdiction on the submission rule. In view of the expected costs and effort, the use of the submission rule as a basis of a court's jurisdiction is unlikely to guarantee that the legal protection the WCAM will offer is efficient. Moreover, should the court have to have jurisdiction over all of the individual victims, all the victims (known and unknown) would eventually have to enter an appearance. Given that the notification period is already lengthy and costly, this is undesirable. Should the submission rule be used in a WCAM context, it is unlikely to guarantee the efficient legal protection the WCAM aims to provide.

Some grounds of jurisdiction cannot be used in a WCAM context because of either the construction with a settlement agreement or because of the role the various parties have in this specific procedure. This applies to the grounds of jurisdiction in consumer-related matters. Since the parties to the settlement agreement are not consumers, it is not possible to use the grounds in Section II/4 Brussels I-bis.

Regarding a choice of forum agreement, the use of this ground depends on the cooperation of the other parties. Should individual victims conclude such an agreement with a bank, it is likely the bank already has a choice of forum clause in its general terms and conditions. It is questionable whether a bank would be willing to cooperate and confer jurisdiction to a Member State other than the State of the court to which the bank has conferred jurisdiction through its initial choice of forum agreement. Hence, all depends on the persuasive power of the group of victims and the efficiency and effectiveness of the collective redress mechanism. The same holds for the use of a choice of forum agreement in a securities dispute. In such a case, the victims would have to enter into separate agreements and they will have to convince the registered company the same way as in the financial product mass dispute. This has consequences for the efficiency of the procedure, should the perpetrator not want to resolve the mass dispute through the WCAM before a Dutch court, because convincing the perpetrator to confer jurisdiction is likely to be time-consuming and the effort required will result in more costs.

The same cost and effort can be expected if either the individual victims should be seen as third parties to a choice of forum agreement in the settlement agreement, or the interest group should be seen as a third party to a choice of forum agreement that has been concluded between the individual victim and the perpetrator. This is because the third party is required to approve the choice of forum agreement(s) in order for jurisdiction to be conferred on a certain court. This requires both time and money, because of the number of individual victims. As a result, the choice of forum agreement can be used in relation to the WCAM, but this ground of jurisdiction does not guarantee that the legal protection the WCAM has to offer will be efficient.

With respect to how the Amsterdam Court of Appeal has used the general provision, in combination with Article 8(1) Brussels I-bis, the WCAM procedure could be used to offer efficient legal protection, as the Court of Appeal automatically sees the individual victims as defendants. The Court of Appeal can assume

jurisdiction in relation to the Dutch and non-Dutch victims quite easily: No extra actions are required for the court to assume jurisdiction in relation to every individual victim. The Court of Appeal could resolve the entire dispute through use of the WCAM, offering the finality this procedure is intended to secure. The only extra costs are the separate summons/service documents that have to be sent to the individual victims. This is, however, a requirement of the WCAM itself, and neither these costs nor the extra time required are a consequence of the grounds of jurisdiction. If these provisions are interpreted more strictly, the use of a WCAM procedure in a cross-border context cannot guarantee efficient legal protection, because using Articles 4 and 8(1) Brussels I-bis in this way would mean that non-Dutch victims are not covered by these grounds of jurisdiction.

For the same reasons as apply to the collective action, the special grounds of jurisdiction of Article 7(1) Brussels I-bis cannot be used to assume jurisdiction in relation to the individual victims, as these victims are not a party to the settlement agreement. Hence, this ground of jurisdiction cannot be used to resolve the mass dispute, let alone resolve it conclusively. The goal of guaranteeing efficient legal protection cannot be achieved.

With respect to Article 7(2) Brussels I-bis, the applicants of the request to bind the settlement have not actually suffered damage themselves. As a result, this ground of jurisdiction cannot be used in a WCAM procedure and as a result cannot guarantee the efficient legal protection the mechanism is intended to offer.

7.9.3 Administrative Burden of the Judiciary

Based on the above it can be concluded that a court does not have many grounds of jurisdiction it can use to resolve a cross-border mass dispute through use of the WCAM. In relation to the grounds of jurisdiction, the administrative burden of the judiciary in a WCAM procedure would increase if a court would have to examine the basis for jurisdiction in relation to the individual victims. For example, if it were necessary for victims to enter an appearance at a court before jurisdiction could be assumed, courts would be confronted with extra and unnecessary procedures. The same applies for the use of a choice of forum agreement, as the court will have to ascertain whether, for example, every known victim has concluded a choice of forum agreement. If jurisdiction is assumed, as was done in the Shell case, the administrative burden will not increase, since the Court of Appeal assumes that the individual victims immediately become defendants.

7.9.4 Conclusion

Summarising, not many grounds of jurisdiction can be used to assume jurisdiction in a WCAM case: only the submission rule, the choice of forum agreement (either

as part of the relationship between the perpetrator and the victim or as part of the settlement agreement) and Article 4 read in conjunction with Article 8(1) Brussels I-bis pursuant to the interpretation of the Amsterdam Court of Appeal.

Both the submission rule as the choice of forum agreement require much coordination in order for a court to assume jurisdiction in relation to all the known victims. Moreover, these grounds cannot be used in order to assume jurisdiction in relation to the unknown victims. As a result, these grounds cannot guarantee effective and efficient legal protection. Because the court will have to check whether it has jurisdiction in relation to the various individual victims, the administrative burden is very high. Consequently, the goal of minimising the administrative burden cannot be achieved either.

Only the use of Article 4 jo. 8(1) Brussels I-bis is congruent with the goals of collective redress, as the costs and the time required are not astronomical and the administrative burden of the judiciary is quite low. These grounds of jurisdiction make it possible to assume jurisdiction in relation to all of the victims, allowing the resolution of the entire mass dispute.

The opt-out character of the WCAM procedure results in the binding of victims who are not directly involved with the court proceedings. In a cross-border mass dispute, not all victims will be domiciled in the Netherlands. In such cases, private international law goals such as the principle of proximity are not complied with. The effect of the use of the grounds of jurisdiction in cross-border WCAM procedures on the goals of private international law will be covered in the next section.

References

Briggs A (2009) Civil Jurisdiction and Judgments. Informa Law, London

Kramer XE (2014) 'Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries'. Pacific McGeorge Global Business & Development Law Journal, 2014

Kuipers JJ (2013) 'Schemes of arrangement and voluntary collective redress: a gap in the Brussels Regulation'. Journal of Private International Law 2

Lein E (2012) 'Cross-border collective redress and jurisdiction under Brussels I: a mismatch'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford

Magnus U et al (2016) 'Brussels I Regulation'. Sellier, Munich

Pertegás M et al (2004) Enforcement of International Contracts in the European Union. Intersentia, Oxford

Polak MV (2006) 'Iedereen en overal? Internationaal privaatrecht rond Massaclaims'. NJB 41

Poot MF (2006) 'Internationale afwikkeling van massaschades met de wet collectieve afwikkeling massaschade'. Geschriften vanwege de vereniging Corporate Litigation 2005–2006. Kluwer, Deventer

Rauscher T (2006) Europaïsches Zivilprozeßrecht Kommentar I. Munich

Stefanelli J (2012) 'Parallel litigation and cross-border collective actions under the Brussels I-bis framework: lessons from abroad'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford

Van Lith H (2011) The Dutch collective settlements act and private international law. Maklu, Apeldoorn
Van Schaick AC (2011) 'Eerste aanleg', Asser Procesrecht 2. Kluwer, Deventer
Vriesendorp RD (2010) 'Faillissement en massaschade, twee kanten van dezelfde medaille'. Massificatie in het privaatrecht: opstellen ter gelegenheid van het 200-jarig bestaan van het genootschap Iustitia & Amicitia. Kluwer, Deventer

Chapter 8
Parallel Proceedings

Abstract Various rules in the Brussels I-bis Regulation aim to prevent parallel proceedings and—in the end—conflicting judgments. This is already done in an early stage, at the moment a certain court needs to decide whether it has jurisdiction (the Brussels I-bis Regulation provides courts with a ground to refuse jurisdiction in case another court for example already has jurisdiction). The idea of collective redress mechanisms is that a bundle of comparable matters are resolved in a single procedure. Given the fact that under some proceedings (opt-in procedures), not all parties to a mass dispute will be a party to the collective redress procedure, in what way can the rules in the Brussels I-bis Regulation in relation to parallel procedures be applied.

Keywords Parallel procedures · Lis pendens · Related actions · Conflicting judgments

8.1 Introduction

In cross-border mass disputes, due to the numerousness of victims and the various domiciles these victims can have, there is always a risk of parallel proceedings. Victims in a mass dispute can start parallel proceedings in different Member States, either deliberately (in the case of victims wanting to start more than one procedure to try to improve the likelihood of their claims being granted by a court), or by accident (should the victims have no knowledge of an already initiated/pending procedure in the same mass dispute, but in another Member State). One of the specific aims of the Brussels Regulation is to avoid such parallel proceedings, since parallel proceedings are in violation of the Regulation's goal of legal certainty, as they could eventually cause irreconcilable or inconsistent judgments. Articles 29–34 Brussels I-bis containing the lis pendens rule and the rule concerning related actions are aimed at preventing such parallel proceedings.[1]

[1] See Case C-351/89, Overseas Union Insurance Ltd v. New Hampshire Insurance Co. [1991], ECR I-3317, para 16.

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In the following sections the use and usability of both the lis pendens rule and the rule concerning related actions in a cross-border collective redress situation will be set out. Are these two rules applicable to the three collective redress mechanisms and what is their effect on the goals of the collective redress? Moreover, is the result of using these rules in relation to one of the three collective redress mechanisms still in line with the goals of the Brussels Regulation?

8.2 Lis Pendens

8.2.1 Requirements

Article 29(1) Brussels I-bis states that 'where proceedings involving *the same cause of action* and between *the same parties* are brought in the courts of different Member States, any court other than the court first seised *shall of its own motion* stay its proceedings until such time as the jurisdiction of the court first seised is established.' As is stated in Article 29(2) Brussels I-bis' where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court'. These provisions aim to prevent conflicting judgments that have a mutually exclusive legal effect. Hence, Article 29 Brussels I-bis will have two distinct effects in the described situation, (i) staying proceedings when a court is the second court to a matter and (ii) declining jurisdiction when another court has established jurisdiction. Since the Brussels I-bis came into force, this provision also states that the lis pendens rule is without prejudice to Article 31(2) Brussels I-bis, which states, without prejudice to Article 26 Brussels I-bis, that where a court of a Member State on which an agreement as referred to in Article 25 Brussels I-bis confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until the court seised on the basis of the agreement has declared that it has no jurisdiction under the agreement. This reference to Article 31(2) Brussels I-bis was added to address the problem of torpedo actions, i.e., actions in which a court of another Member State (to date this has mostly been the Italian court) is asked for a negative declaratory judgment.[2]

Before the lis pendens rule will have this effect, two requirements have to be met: (i) the parallel procedure needs to have the same cause of action and (ii) the parties involved in the parallel procedure have to be the same. Although the lis pendens rule differs per translation of the regulation, not only the *cause of action* but also the *object of the action* has to be the same for this rule to be applicable.[3]

[2] See also Stefanelli 2012, p. 153.

[3] In the French version the 'same object' is explicitly mentioned. Although this is not mentioned in the English version of the Regulation, the English test must be interpreted as if both the same cause of action as the same object are explicitely mentioned. See Case C-144/86, Gubisch Maschinenfabrik KG v. Palumbo [1987], ECR 4861, para 14. See Briggs 2009, p. 315.

The same cause of action means that the facts and rule of law are the same. What is meant by 'the same object' is that the result the first action is intended to obtain must be the same as that of the second 'parallel' action. Both of these criteria have to be satisfied for the lis pendens rule to be applicable and have effect.[4] Should the intended results of the actions be diametrically opposed (e.g. parties in one instance claim that they are *not* liable and in the other 'parallel' instance they are being sued for damages and should be found liable), the objects could still be seen as the same.

The requirement of Article 29 Brussels I-bis that the rule applies only when the parties in both procedures are the same, has some nuances. The ECJ has ruled that in cases where not all of the parties are the same, Article 29 Brussels I-bis only applies to those parties that are the same in both cases.[5] The nuances of the various requirements will be covered later in this chapter, when looking at the application of the lis pendens rule in relation to the three types of collective redress mechanisms.

8.2.2 Application of Lis Pendens Rule to Collective Redress Mechanisms

Regarding the use of the lis pendens rule in relation to the KapMuG, Chap. 2 explained that the individual victims that are part of the KapMuG procedure are bound by the KapMuG judgment. Should a party start individual proceedings in Germany and subsequently join a KapMuG procedure, the lis pendens rule will prevent irreconcilable judgments should either party (individual plaintiff or the perpetrator/defendant) to the KapMuG procedure start a second procedure in another Member State.[6] Because the individual victims are required to start an individual procedure in Germany before they can start a KapMuG procedure, the parties in a possible second procedure between the perpetrator and any of the individual victims would have to be the same as those in the German procedure used to commence a KapMuG procedure. If both the KapMuG proceedings and the parallel individual proceedings are intended to achieve compensation for the various victims, the requirement to have the same cause of action in both proceedings is also complied with. As a result, the lis pendens rule will prevent parallel proceedings when an individual procedure that is part of a KapMuG procedure is the first procedure pending. Since Brussels I-bis, however, this would be different if the second procedure is started before the court of a Member State that can base its jurisdiction on a choice of forum clause, without prejudice to the submission rule (see Sect. 8.2.1). Should, however, the second procedure be a

[4] Briggs 2009, p. 315.

[5] See Magnus et al. 2016, pp. 727–728. The owners of the cargo lately laden on board the ship 'Tatry' v. The owners of the ship 'Maciej Rataj' (Case C-406/92), [1994], ECR I-5439, para 2.

[6] Although the individual victims are seen as 'Beigeladenen' in the model case procedure, they are not actually a party to the model case proceedings. Therefore in this book, the applicability of the lis pendens rule in relation to the model case procedure will not be analysed.

collective action or a WCAM procedure, the cause of action (as is explained in the present section) is not the same. Hence, parallel collective actions and/or WCAM procedures next to an already pending KapMuG procedure are possible, resulting in possibly irreconcilable judgments.

In the case of group actions such as the collective action and the WCAM procedure, the use of the lis pendens rule is different. If one of the victims in a mass dispute starts an individual procedure but an interest group has already started a collective action to protect the interest of, among others, this individual victim, the lis pendens rule would have no effect, because the interest group is an entirely different party than the individual victim. The fact that both the individual victim and the interest group have a common legal interest is of no influence. This follows from the wider interpretation of the 'same parties' in the case of Drouot Assurances SA v. Consolidated Metallurgical Industries et al.[7] In the Drouot case, in which both the insurer and the insured started parallel proceedings, the ECJ stated that when '*the interests of the insurer are identical to and indissociable from those of its insured* the parties should be seen as one and the same'.[8] However, the ECJ also stated that:

> (..) as regards the subject matter of two disputes, there may be such a degree of identity between the interests of an insurer and those of its insured that a judgment delivered against one of them would have the force of res judicata as against the other. That would be the case, inter alia, where an insurer, by virtue of its right of subrogation, brings or defends an action in the name of its insured without the latter being in a position to influence the proceedings. In such a situation, insurer and insured must be considered to be one and the same party for the purposes of the application of Article 21 of the Convention.[9]

This case is specifically related to insurance-related matters and a subrogation relation. Because of the specific legal relationship between the parties in this case, it has been argued that the legal rule the ECJ established in this case cannot apply to relations between victims in a mass dispute and the interest group in a collective action.[10] Moreover, in the case of the Dutch collective action, there is no res judicata effect that will bind the individual victims to the collective action judgment. The collective action is aimed solely at acquiring a judgment that can be used by the individual victims in the mass dispute, in order to individually claim monetary damages. Hence, the interest group and the individual victim(s) cannot be considered to be one and the same party. Moreover, as the only outcome possible for an interest group in a collective action is to obtain a declaratory judgment that the defendant has acted unlawfully, the object of the matter in a collective action procedure differs from the object of the individual victims in a mass dispute, as these victims tend to aim for monetary damages instead of a declaratory judgment.

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[7] See Case C-351/96, Drouot Assurances v. CMI [1998], ECR I-3075.

[8] See Case C-351/96, Drouot Assurances v. CMI [1998], ECR I-3075, para 25.

[9] See Case C-351/96, Drouot Assurances v. CMI [1998], ECR I-3075, para 19. See also Magnus et al. 2016, pp. 727–728.

[10] See also Tang 2011, pp. 126–127.

Thus when one of the proceedings in which a court has to ascertain jurisdiction is a collective action, the lis pendens rule cannot be applied in order either to stay proceedings or to decline jurisdiction.

In Chap. 7, the individual victims—although each is neither a claimant nor a defendant[11]—in a WCAM proceeding have been deemed interested parties to such a procedure.[12] Should these victims start a second procedure in another jurisdiction, the parties to this procedure would have to be seen as being the same as those in the WCAM proceeding—at least vis-a-vis the individual who started the second procedure. This also corresponds with the interpretation of 'the same parties' in the Drouot case. A WCAM judgment will have the force of res judicata in relation to individual victims.[13] After the Amsterdam Court of Appeal has made the WCAM settlement binding, the agreement will have the same effect in relation to the individual victims as to the interest group, providing that the requirement that the parties in the alleged parallel proceedings should be the same is met.

Since individual victims can be seen as the same party/parties to a WCAM proceeding, the only question that remains is whether a WCAM procedure will also have the same cause of action as a parallel individual procedure in another Member State. This means that the WCAM procedure must have the same end result in mind as the second 'parallel' procedure. Strictly speaking, the cause of action of a WCAM procedure is that the victims in the related mass dispute are bound by the settlement agreement. The consequence is that the victims shall receive compensation and they will lose their right to claim damages individually.

At first sight it seems that the cause of action could be the same. However, the cause and the object cannot be the same. The legal relationship on which the claim is based in the WCAM differs from that in the individual procedure, since the WCAM claim is based on the settlement agreement and the individual claim is based on an individual legal relationship between the victim and the perpetrator. The object is also different, since the WCAM procedure is specifically aimed at binding the settlement whereas the individual procedure is aimed at individual compensation. Because the object of a WCAM procedure and any individual procedure that is started by one of the victims in a mass dispute cannot be the same, the lis pendens rule cannot apply in relation to a WCAM procedure.

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[11] According to the ECJ, the procedural position of each party in both parallel proceedings is irrelevant. See The owners of the cargo lately laden on board the ship 'Tatry' v. The owners of the ship 'Maciej Rataj' (Case C-406/92), [1994], ECR I-5439, para 31.

[12] See Chap. 7 for the situations in which the victims can be seen as parties to the WCAM proceedings.

[13] This of course depends on whether the individual victims will use their right to opt out of the WCAM settlement. See the report of the British Institute on International Comparative Law on The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process, p. 32. However, only after the settlement agreement has been made binding and as a result the WCAM procedure has ended can parties make use of their right to opt out. The opt-out right will thus have no influence on the use of the lis pendens rule.

Summarising, the lis pendens rule can be applied in a mass dispute context only when the first (or second) procedure is a KapMuG procedure. As a result, there is a real likelihood of parallel proceedings in relation to collective action and WCAM procedures.

8.3 Related Actions

8.3.1 Requirements

Based on Article 30 Brussels I-bis, any court other court than the court first seised *may* stay its proceedings where *related actions* are *pending* in the courts of different Member States. Contrary to Article 29 Brussels I-bis, this provision aims at preventing *inconsistent*, instead of *conflicting or irreconcilable*, judgments that have different conclusions but are legally compatible.[14]

Pursuant to Article 30 Brussels I-bis, proceedings are pending when both courts are seised in accordance with Article 32 Brussels I-bis. A court is seised when the first authoritative step is taken in the initiation of proceedings under the national law of a Member State. The autonomous definition given in Article 32 Brussels I-bis prevents any doubts whether or not a court is seised with a matter. It gives a definition because the formal steps to initiate a procedure can differ between Member States.

Also pursuant to Article 30 Brussels I-bis, proceedings will be deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. Similarly to Article 29 Brussels I-bis, this means that actions are related where the cause of action is the same, but the parties are different parties.[15] Article 30 Brussels I-bis also applies to cases where different causes of action are brought between the same parties.[16] Hence there are two types of related actions according to Article 30 Brussels I-bis: (i) cases where the cause of action is the same, but the parties differ and (ii) cases where the parties differ, but the cause of action is the same. Unlike Article 29 Brussels I-bis, Article 30 Brussels I-bis allows a court to look at issues raised by claim, defence, and counter-claim or cross-claim.[17]

Article 30 Brussels I-bis allows the second seised court to stay the proceedings in order to await the outcome of an action which is still pending in the court seised

[14] Magnus et al. 2016, pp. 737–738.

[15] The owners of the cargo lately laden on board the ship 'Tatry' v. The owners of the ship 'Maciej Rataj' (Case C-406/92), [1994], ECR I-5439, I-5479.

[16] Case C-144/86, Gubisch Maschinenfabrik KG v. Palumbo [1987], ECR 4861.

[17] See Briggs 2009, p. 338 and Research in Motion (UK) Ltd v. Visto Corp [2008] EWCA Civ 153, 2008 2 All ER (Comm) 650.

first.[18] Article 30(2) Brussels I-bis permits the second seised court to decline jurisdiction over the action, if this action may be consolidated into the procedure pending at the court seised first. This would be possible only if the court seised first also has, independently, jurisdiction over the action which is proposed to be dismissed by the court seised second.[19] Although the articles on related actions aim to prevent inconsistent judgments, the options offered by Article 30 Brussels I-bis are permissive and not mandatory. Jenard, however, states that:

> Where actions are related, the first duty of the court is to stay its proceedings.[20]

In addition, AG Lenz argued in Owens Bank v. Bracco that in the event of doubt, the second action should cease.[21] AG Lenz came up with three factors which may be relevant in deciding to stay the proceedings of the court seised second:

- the extent of the relatedness and the risk of mutually irreconcilable decisions;
- the stage reached in each set of proceedings; and
- the proximity of the courts to the subject matter of the case.[22]

Before going into the effect this provision could have on the resolution of a cross-border mass dispute in the EU, it first has to be ascertained whether the rule can be applied in a mass dispute situation. In other words, are KapMuG procedures, collective actions and WCAM procedures actions that are related to each other or are they parallel individual actions?

8.3.2 Application of Related Actions Rule to Collective Redress Mechanisms

By virtue of the fact that a KapMuG procedure is a collection of individual procedures that are bound by the outcome of the model case proceedings, it falls under the lis pendens rule and hence it must be concluded that the rule concerning related actions could also be applied: if the victims were to start individual proceedings in another Member State, the parties would be the same as in the KapMuG procedure. As the lis pendens rule, however, already applies, the use of Article 30 Brussels I-bis is superfluous in relation to the KapMuG, as parallel litigation is already being prevented by the much stronger lis pendens rule. However, if parties other than the parties to the KapMuG procedure have started proceedings in another Member

[18] Briggs 2009, p. 337.

[19] Briggs 2009, p. 337.

[20] See Jenard Report, p. 41.

[21] See AG Lenz in Case C-129/92, Owens Bank Ltd. v. Fulvio Bracco Industria Chemica SPA [1994], ECR I-117, para 25.

[22] See AG Lenz in Case C-129/92, Owens Bank Ltd. v. Fulvio Bracco Industria Chemica SPA [1994], ECR I-117, para 76.

State in relation to the same mass dispute (and thus the same cause of action), there is a chance of inconsistent judgments: two courts would decide on the same mass dispute, albeit that these disputes have different parties. If, for example, a KapMuG procedure is pending and different parties were to start a regular procedure to claim monetary damages, the cause of action and the object would be the same. In such an event, the court seised second could stay its proceedings. Should, however, the second procedure be a collective action or a WCAM procedure, the cause of action is not the same—as is explained in this section and the previous section. Hence, parallel collective actions and/or WCAM procedures next to an already pending KapMuG procedure are possible, resulting in possible inconsistent judgments.

Should the parallel procedure be a collective action, the parties in the collective action, would not be the same, as explained in Sect. 8.2. As it is only possible to file for a declaratory judgment through the collective action, the cause of action between the collective action and individual proceedings aimed at getting monetary damages would not be the same either. The rule concerning related actions can therefore be applied only when the parallel proceedings which have been started in another Member State are intended to obtain a declaratory judgment that rules on whether the defendant has acted unlawfully.[23] If the parallel proceedings do not have the same cause of action, the court where the collective action is pending cannot stay the proceedings by invoking the ground that there is a related action pending before another court which was seised with the matter first. Such a situation could result in inconsistent judgments.

Section 8.2 has set out that the individual victims can be seen as parties to a WCAM procedure. Hence, in a WCAM procedure, if the cause of action differs from the parallel procedure—which is quite likely because a WCAM procedure is intended to achieve a binding settlement agreement rather than monetary damages—both procedures are nevertheless related. As a result, if a WCAM procedure is pending a court that is seised with a second procedure pending in the same case between the same parties but without the same cause of action may stay the procedure by invoking Article 30 Brussels I-bis.

As Jenard stated in his report, when there is any reason to doubt that the two pending proceedings before different courts will cause irreconcilable judgments, the court seised second should either stay proceedings or try to consolidate them. The three factors AG Lenz came up with (Lenz factors), could help in deciding whether a court should use Article 30 Brussels I-bis to stay the pending procedure, including in the event of collective redress.[24] In order to avoid any doubt whether parallel collective actions and WCAM procedures can be seen as related, these factors should be applied to both the collective action and the WCAM procedure.

Regarding the use of Article 30 Brussels I-bis in relation to a collective action procedure, the first Lenz factor (the extent of the relatedness and the risk of

[23] Since this is the only kind of judgment that can be received through a collective action.

[24] See AG Lenz in Case C-129/92, Owens Bank Ltd. v. Fulvio Bracco Industria Chemica SPA [1994], ECR I-117, para 76.

mutually irreconcilable decisions) can be of great influence in deciding whether a court should stay its proceedings in a mass dispute. As is set out above, a collective action procedure will be related to a parallel individual claim in another Member State only if the cause of action (and thus also the end result both actions intend to achieve) is the same. Strictly speaking, this is the case only when the parallel individual procedure is intended to obtain a declaratory judgment that states the defendant has acted unlawfully. As a result, parallel procedures intended to obtain monetary damages will not be affected by Article 30 Brussels I-bis, which is puzzling. This could, for example, lead to a situation in which the outcome of a collective action is that the defendant has not acted unlawfully, while in an individual action in another Member State before a court seised second, the court could award monetary damages because there was no way to stay proceedings and await the outcome of the collective action. In this view, collective actions and any other individual procedure in the same mass dispute are very related and could cause irreconcilable and/or inconsistent judgments (which cannot be prevented by invoking Articles 29 and 30 Brussels I-bis).

If Switzerland had been a party to the Brussels Regulation, the third Lenz factor could have been of influence in the WCAM procedure concerning the Converium claim. Thus, had a second procedure been initiated before a Swiss court, this third 'proximity' factor could have formed a ground for the Swiss court not to stay its proceedings ex Article 30 Brussels I-bis and the pending WCAM procedure in the Netherlands, since the Swiss court was the court that is the most appropriate court due to its proximity (domicile of the defendant and many of the plaintiffs).[25] On the other hand, the Swiss court might have had to stay its proceedings anyway when the WCAM proceedings were nearly ended (see the second Lenz factor). Thus Article 30 Brussels I-bis can be invoked in a variety of combinations of pending mass disputes. This, however, is also the most important disadvantage of Article 30 Brussels I-bis: it can be used in various situations, but courts are not obliged to use it.

Although the provision does not prevent a proliferation of different courts seizing jurisdiction and causing possible irreconcilable judgments, Article 30 Brussels I-bis does have a distinct collective redress feature. Article 30(2) Brussels I-bis states that where related actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof. This provision offers courts seised second the opportunity to try and resolve the mass dispute collectively. Although the provision seems to facilitate the collective redress of mass disputes, Article 30(2) Brussels I-bis is also not mandatory. On the contrary, a court can merely decline jurisdiction and try to consolidate the various actions on the application of one of

[25] It should, however, be noted that this provision is not a forum non conveniens or forum conveniens discretion. The question of which court could be the more convenient or appropriate does not arise. See Danov 2011, p. 121.

the parties. As a result, this provision will probably be resorted to only when the parties to the second action had no knowledge of the first action. Alternatively, the defendant in the second action will probably be the only party that will apply for the consolidation of actions, as clearly the claimants did not start a second procedure in order to consolidate it with the first action they already had knowledge of. Hence the possibility of consolidating proceedings depends on the will of the various parties to actually consolidate.

8.4 Conclusions

Whereas Article 29 Brussels I-bis is intended to prevent *conflicting/irreconcilable* judgments, Article 30 Brussels I-bis is intended to preventing *inconsistent* judgments that have different conclusions but are legally compatible. The lis pendens rule will prevent conflicting judgments only if the two formal criteria are met: both proceedings will have to focus on the same parties and the same cause of action.[26] Given these strict requirements, it is unlikely that jurisdiction concerning both the WCAM procedure and the collective action in relation to parallel procedures can be affected. Hence, there is a chance of conflicting judgments in relation to the WCAM and collective action.

The Brussels Regulation, through Article 30 Brussels I-bis, however, does offer a possibility for courts to either stay or consolidate parallel WCAM proceedings or collective actions. This provision is, however, not mandatory. Moreover, the possibility to consolidate depends on the will of one the parties at the second action that is seised, as one of the parties has to apply for the consolidation.

8.5 Parallel Proceedings and Collective Redress Goals

It is difficult to analyse the effect of the two rules in the Brussels Regulation on parallel litigation on the goals of collective redress mechanisms, because there are numerous situations in which both rules can be invoked.[27] Below I will explain in more general terms the consequences of both rules, the possibility of parallel proceedings and the consequent conflicting or inconsistent judgments on the goals of collective redress mechanisms.

If the lis pendens rule can be invoked, which (in relation to collective redress mechanisms) is in the event of a KapMuG procedure, the goal of offering effective

[26] The same facts and rule of law and the proceedings have to be aimed at achieving the same end result.

[27] The first procedure is, for example, a KapMuG procedure and the second one is an individual procedure of a party to the KapMuG. Another example is an individual procedure as the first procedure and a WCAM procedure as the second.

legal protection is partly achieved. In relation to the KapMuG procedure, this rule prevents parallel litigation if the German court before which the KapMuG procedure is pending is the court seised first. These proceedings will continue and the KapMuG can still be used to resolve the cross-border mass dispute. Regarding the proceedings that are pending before the court seised second, the lis pendens rule will force the parties in these proceedings to have the mass dispute resolved before the court seised first. As a result, it is more likely that the mass dispute in relation to the parties in the KapMuG procedure will actually be resolved (contrary to the situation when parallel proceedings are allowed and conflicting judgments arise). In the absence of conflicting judgments, the KapMuG can offer the effective legal protection the KapMuG procedure was intended to provide. The other side of the picture, however, is that should the individual procedure that (together with other individual actions) starts a model case procedure be the procedure seised second, the court would have to decline jurisdiction. This could mean that the goal of effective legal protection is not achieved.

Since the parties in the proceedings before the court seised second will have to join the KapMuG proceedings, they will have to start a new procedure and thus incur more costs for legal aid in Germany. As well as the time it would cost for the court seised second to resolve the mass dispute, it would probably also cost them time to join the KapMuG proceedings.

As for the reduction of the administrative burden of the judiciary, the fact remains that in situations in which the lis pendens rule is invoked or is invokable, more than one court is involved and is requested to resolve a cross-border mass dispute. This means that the administrative burden for the judiciary is greater than in situations in which only one court is involved. The administrative burden is greater no because of the lis pendens rule, however, but is caused by the party that commenced the second procedure. Because of the lis pendens rule, it is unlikely that two procedures will actually be finalised, which would result in irreconcilable judgments.

With regard to the collective action and the WCAM procedure, the lis pendens rule is not applicable. As a result, irreconcilable judgments are possible.[28] Such conflicting judgments reduce the effectiveness of the legal protection both collective redress mechanisms are intended to ensure. Conflicting judgments could, for example, cause problems in the recognition and enforcement phase of a cross-border dispute. As will be explained in the Part III of this book, irreconcilable judgments can be a ground to refuse the recognition and enforcement of a judgment. Thus the resolution of the mass dispute can be delayed when there is a discrepancy between the resolution of the collective action or WCAM procedure

[28] Although these judgments are not irreconcilable pursuant to the definition used in Article 29 Brussels I-bis, they are conflicting, as it is possible that in an individual case the perpetrator can be found not liable, whereas a WCAM judgment could force the perpetrator to pay monetary damages.

and the parallel individual procedure. This will reduce the effective legal protection the collective redress mechanisms have to offer. It could also mean that parties will incur more costs, as the recognition/enforcement of a judgment might be disputed and thus become part of a procedure. Parties will have to incur more costs with respect to legal fees for advice on how to address the discrepancy between the two judgments. This will reduce the efficient legal protection the mechanisms are intended to ensure. In addition, a possible dispute in relation to the recognisability and enforceability of a conflicting judgment will add to the administrative burden of the judiciary.

The rule on related actions is to some extent usable in all three types of collective redress mechanisms. As it is not mandatory, whether or not a court will stay its proceedings is uncertain. Hence, it is difficult to ascertain what effect the rule on related actions would have on the goals of collective redress or whether the effect on these goals could even be beneficial. Should a court seised second stay its proceedings pursuant to Article 30 Brussels I-bis, the rule would prevent inconsistent judgments. In a collective redress case this would mean, for example, that a group using for example the KapMuG will be compensated differently than a group of plaintiffs in the same mass dispute that has chosen to resolve the dispute by means of a collective action. As the rule is not mandatory, there is a real possibility of inconsistent judgments.

Should the rule on related actions be applied, it would prevent possible inconsistent judgments. If the rule is not used, and there is a real possibility that courts will decide inconsistently, parties could try to appeal in order to obtain a different judgment. For example, if the parties in a KapMuG procedure were to be awarded amount X and the parties in a collective action were to be awarded the smaller amount Y, the parties to the collective action could lodge an appeal in the hope of obtaining a higher amount of damages. This would mean that the collective action part of the mass dispute would not yet be completely resolved. Moreover, lodging an appeal would mean the parties would have to incur costs and spend more time. In addition, the appeal would increase the administrative burden of the judiciary. Such an appeal/additional procedure is of course hypothetical and it would also depend on the difference in the amount of damages and the willingness of the parties to actually lodge a defence. It is, however, more likely that parties will lodge an appeal if judgments are inconsistent. As the rule on related actions is not mandatory, it does not reduce this likelihood. Hence, if the rule is not used, it will detrimentally affect the three goals of collective redress.

Consequently, as with the lis pendens rule, the rule on the related actions would have detrimentally affected the effective and efficient legal protection that the collective action and WCAM procedure should offer. Moreover, it would probably add to the administrative burden of the judiciary.

References

Briggs A (2009) Civil Jurisdiction and Judgments. Informa Law, London
Danov M (2011) Jurisdiction and judgments in relation to EU competition law claims. Hart Publishing, Oxford
Magnus U et al (2016) 'Brussels I Regulation'. Sellier, Munich
Stefanelli J (2012) 'Parallel litigation and cross-border collective actions under the Brussels I-bis framework: lessons from abroad'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford
Tang S (2011) 'Consumer collective redress'. Journal of Private International Law 1

Chapter 9
Goals of the Brussels Regulation Regarding Jurisdiction

Abstract In order to check whether the jurisdictional rules in the Brussels I-bis Regulation should and could be used in a collective redress context, the goals of the Brussels Regulation are analysed. What is the aim of the Brussels Regulation with respect to jurisdiction and do these goals for example exclude the jurisdictional grounds in collective redress proceedings? These issues will be covered in this chapter.

Keywords Goals Brussels Regulation · Legal certainty · Most appropriate court

9.1 Interim Conclusions Regarding Jurisdiction

Based on the previous chapters, it must be concluded that in relation to mass disputes, not all grounds of jurisdiction can be used by a court to assume jurisdiction. This is caused by, among others, the different structure of the collective redress proceedings in relation to regular two-party proceedings. In the case of the KapMuG procedure, some grounds of jurisdiction cannot be used, because of the combination of the requirement of using this procedure (i.e. that it must be possible to resolve the entire mass dispute) plus the diversity of the parties (more specifically, the diversity of nationalities of parties). In the case of the collective action, the inadmissibility of certain grounds arises because an interest group has been included as a party to the proceedings; also, the fact that the procedure actually consists of two procedures (the actual collective action and the subsequent individual proceedings) means that certain grounds of jurisdiction cannot be used to resolve an entire mass dispute. The two usual reasons why most grounds of jurisdiction cannot be used when the WCAM is used to resolve a mass dispute are because an interest group is a party to the proceedings and also the fact that the procedure is contractual and intended to bind parties that are not party either to the contract or to the procedure.

As a consequence of the above, there are only limited situations in which the use of a collective redress mechanism to resolve a cross-border mass dispute is actually in compliance with the goals/principles of collective redress. In all three collective redress mechanisms this occurs only when the court of the defending party's domicile

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has jurisdiction. In most other situations the legal protection the collective redress mechanisms are intended to offer is either less effective or less efficient. In addition, should a court other than the court of the defendant's domicile have assumed jurisdiction, it is likely that the administrative burden of the judiciary will increase. This raises the question of whether the grounds of jurisdiction are not suitable for collective redress mechanisms because the principles/goals of the Brussels Regulation do not take mass disputes and collective redress mechanisms into account, or because it is merely coincidental that these grounds are not suitable for collective redress mechanisms and mass disputes. This will be elaborated in the next subsection.

9.2 Goals of the Brussels Regulation

9.2.1 Legal Certainty

One of the goals of the Brussels Regulation in relation to the grounds of jurisdiction is the goal of offering legal certainty. As mentioned in Sect. 1.7.4, the goal of legal certainty contains several sub-principles. First of all, legal certainty should be offered in relation to the plaintiff, in that the plaintiff should be able to easily identify the court before which he may bring an action.[1] Secondly, legal certainty should be offered also to the defendant, in that he should be able to reasonably foresee the court before which he may be sued. There should, for example, always be a link between the Member State of the court that has jurisdiction and the underlying mass dispute. Otherwise the court's jurisdiction would not be foreseeable. More concretely, these sub-principles require that (i) there is clarity to the rules of jurisdiction, (ii) it has to be avoided that jurisdiction is multiplied as regards one and the same legal relationship, and (iii) national courts should be able readily to decide whether they are competent to hear a case.[2]

Clarity to the rules of jurisdiction requires that it is possible to reliably foresee which court will have jurisdiction. If there were exceptions to the grounds of jurisdiction, it would become uncertain which court will be able to assume jurisdiction.[3] In the case of the KapMuG and the individual procedures that will have to be filed after a collective action procedure, the rules of jurisdiction are clear. Because every victim is a party to the KapMuG proceedings, the regular use of the grounds of jurisdiction applies, making it foreseeable which court will be able to assume jurisdiction. This differs in the case of the collective action and the WCAM procedure, because in those proceedings the victims are represented by an interest

[1] Case C-125/92 *Mulox v. Geels* [1993], ECR I-4075, para 11. See also Pontier and Burg 2004, p. 93.

[2] See Pontier and Burg 2004, p. 94. Since courts do not have to go into the substance of the matter in the case of a mass dispute, this sub-principle will not be covered here.

[3] See Case C-241/83, *Rösler v. Rottwinkel* [1985], ECR 99, para 23. See also Case C-269/95 *Benincasa v. Dentalkit* [1997], ECR I-3767, para 28. See also Pontier and Burg 2004, pp. 95–97.

group. As this organisation has neither suffered damage itself nor was it a party to the agreement that led to the damage, the court that has to base its jurisdiction on one of the grounds of jurisdiction has no real link to the actual dispute between the perpetrator and the victims. The same holds for the WCAM procedure, in which the victims are also represented by an interest group. In addition, the way the Amsterdam Court of Appeal uses the WCAM procedure by assuming jurisdiction if there is a small group of Dutch victims (even when there may be large groups of non-Dutch victims) means that it is impossible for the perpetrator to foresee which court can assume jurisdiction in a mass dispute that can be resolved through use of the WCAM. On the other hand, however, the WCAM procedure is based on negotiating a settlement agreement first, before requesting the Court of Appeal to make the agreement binding. As a result, the fact that the Court of Appeal in Amsterdam will assume jurisdiction is made clear to all parties involved in the proceedings. The jurisdiction of the Amsterdam Court of Appeal is, however, not foreseeable for the victims not involved in the proceedings and who will probably learn from the jurisdiction of the court after they have been notified of the request to make the settlement agreement binding. This means that the rules of jurisdiction in relation to the WCAM procedure are not as clear as they are in relation to the KapMuG procedure.

Regarding the second point (that legal certainty as to jurisdiction should be guaranteed, namely *avoiding further multiplication of jurisdiction as regards one and the same legal relationship*, this point can be specified in two separate sub-principles. The first sub-principle is intended to avoid a situation in which alternative courts have jurisdiction. When a jurisdictional ground uses a connecting link in a dispute to assume a court's jurisdiction (for example, the place of performance of an obligation or the Handlungsort in a tortious matter), alternative courts can also assume jurisdiction pursuant to, for example, Article 4 Brussels I-bis.

When applying this first sub-principle in a cross-border mass dispute that is to be resolved through use of the KapMuG and in which the defendant is domiciled in Germany, the required coordination between the plaintiffs must be borne in mind. Given the criteria described above, the requirement to coordinate that the various plaintiffs will file their claim with the German court makes it possible that more than one court will have to assume jurisdiction in the same mass dispute. This possibility, however, has nothing to do with the way the terms and conditions of a connecting link are interpreted. The possibility for parties to go to a court other than the court of the defendant's domicile arises because the plaintiffs are domiciled in various different Member States. The connecting links differ because of the different situations, not because of the interpretation. As a result, legal certainty in the sense that jurisdiction of alternative courts should be avoided, cannot be guaranteed. The same counts for the collective action and the WCAM procedure, as parties can always opt to confer jurisdiction to a certain court.

Thus, although the lis pendens rule is the most important rule in the Brussels Regulation on the basis of which legal certainty and prevention of multiple jurisdictions can be prevented, the grounds of jurisdiction in relation to collective actions also play a part in upholding this specific goal. As has been explained

above, the collective action procedure as a whole can be divided into two parts: (i) the actual collective action and (ii) the subsequent individual procedures. And as has also been explained above, it might be that the individual victims of the mass dispute are bound by a choice of forum agreement which does not apply in the collective action procedure. As a result, it could be possible that before the collective action is filed the individual proceedings will have to be filed with a court other than the Dutch court.

The second sub-principle relating to the principle of avoiding further multiplication of jurisdiction over one and the same legal relationship is aimed at avoiding fragmentation of proceedings. This means that concepts constituting the substantive scope of jurisdiction (for example, who falls under the consumer-related jurisdictional grounds) should not be interpreted restrictively and the connecting link in some jurisdictional rules should not be interpreted too broadly.[4] In a mass dispute, fragmentation of proceedings can occur even when the substantive scope of jurisdiction and the connecting link in some jurisdictional rules is not interpreted too broadly or restrictively. This, however, has nothing to do with too restrictive interpretations of the concepts constituting the substantive scope nor with too broad interpretations of the connecting link in the jurisdictional rules.[5] It has to do with what these individual parties think is the most appropriate court and procedure for filing their claim. If the defendant is domiciled in Germany, if parties choose to go to the court of their own domicile (in the case of consumers in the hypothetical contractual mass dispute) or (in the case of shareholders in the hypothetical securities dispute) to the court of the Erfolgsort, the interpretation of either the substantive scope or the connecting link is not of influence on their choice. Again, the varying domiciles of the plaintiffs has as a consequence that proceedings can be started in different Member States, resulting in fragmentation of proceedings.

Multiplication of jurisdiction also relates to the applicability of the lis pendens rule and the rule on related actions. As was determined in Chap. 8, judgments can be seen as irreconcilable only when both the parties and the cause of action in the two proceedings are the same. With collective redress (especially with group actions, such as the collective action and the collective settlement), parties automatically cannot be seen as the same. As a result, there can be—formally at least—no irreconcilable judgments in mass disputes that are resolved through use of group actions (at least, based on the strict definition of irreconcilable judgments). As indicated in the previous sections, the outcome of collective redress proceedings and individual proceedings can nevertheless be conflicting if it is related to the outcome for the various individual victims.[6] As such, there is a risk that

[4] See Pontier and Burg 2004, p. 107.

[5] See Pontier and Burg 2004, p. 107.

[6] See Chap. 8, footnote 28.

irreconcilable judgments and jurisdiction will be multiplied in respect of one and the same legal relationship.

Due to the application of the rule on related actions, it is very probable that parallel judgments in mass disputes are inconsistent. In that event, the goal of offering legal certainty cannot fully be complied with. There is no legal certainty that different parties in the same mass dispute in which the claims have the same characteristics will obtain different amounts of compensation or, for example, can be found liable in one Member State but not liable in another. As a result, in the case of parallel litigation, in a collective action or collective settlement cases the goal of offering legal certainty cannot be achieved.

Summarising, due to the construction of group actions, judgments will not be formally designated as irreconcilable while—in essence—they are actually conflicting. Neither the lis pendens rule nor the rule on related actions will actively prevent such parallel proceedings, and thus it is possible for parties to try to start several proceedings and aim for the most favourable judgment. The resulting irreconcilable and inconsistent judgments are in violation of the Brussels I-bis goal of legal certainty. In addition, the situation is in violation with the goal of having the dispute resolved by an appropriate court, as it could very well be that the dispute will be resolved first by an inappropriate court. This being so, it seems to be difficult to uphold the principle of legal certainty in the case of cross-border mass disputes.

9.2.2 Most Appropriate Court

The goal of conferring jurisdiction to the most appropriate court is both a stand-alone goal as a sub-goal of the main goal of the rights of the defence. If the procedures are started in the defendant's domicile, the procedure is started in the most appropriate court. The defendant's domicile is the place where the rights of the defendant are protected most.[7]

Four sub-principles can be distilled from the main goal of 'disputes in an appropriate court'. The first two relate (i) to protection of weaker parties and (ii) party autonomy. clause incorporated in a contract Whereas party autonomy can be directly related to the choice of forum agreement and the submission rule,[8] the sub-principle that relates to the protection of weaker parties is not limited to the protective grounds of jurisdiction. There are three different points of view through which this principle can be approached. A party can be weaker:

[7] Case C-220/84 *Autoteile v. Malhé* [1985], ECR I-2273, para 15. See also Pontier and Burg 2004, p. 56.

[8] Since the sub-principles that belong to the principle of 'party autonomy' are directly related to two different grounds of jurisdiction, I will not cover them in relation to the other grounds of jurisdiction.

a. due to its procedural position;
b. due to this socio-economic position;
c. if it is unaware of a jurisdiction clause incorporated in a contract by the other party. (This, however, relates to the other sub-principle of party autonomy.)[9]

Looking at the defendant's procedural position, the defendant is by definition the weaker party which needs to be protected, since he is the party that is being sued.[10] Consequently, the general provision of Article 4 Brussels I-bis is taken as the starting point in every procedure.[11] Parties in a procedure can also have a weaker position from a socio-economic point of view. Consumers, for example, are also seen as the weaker party in a procedure. These socio-economically weaker parties are seen as less experienced in legal matters than the non-consumers' party.[12] Should jurisdiction be conferred to either the defendant's domicile or the plaintiff's domicile, one of the weaker parties (be it the procedurally weaker party or the socio-economically weaker party) is always put at a disadvantage. Since courts from various Member States can assume jurisdiction in mass disputes, this is especially true for collective procedures, especially when the plaintiffs are consumers or, for example, individual shareholders in a securities mass dispute. As a result, in a cross-border mass dispute there always are weaker parties that are less protected by the court that will assume jurisdiction. With respect to the KapMuG procedure, this would mean that if the German court assumes jurisdiction in the situation in which the defendant is domiciled in Germany, the German court would not be seen as the most appropriate court in relation to the consumers/weaker parties that are domiciled in another Member State.

With respect to the collective action and the WCAM, because of the addition of an interest group, it is unclear whether there actually is a weaker party. With respect to the collective action, an interest group can represent the interests of all the victims in a mass dispute and thus also represents the interests of possible consumers/weaker parties in such a dispute. However, the organisation cannot use any of the grounds of jurisdiction for this category of weaker parties. Strictly speaking, such an interest group cannot be identified as a consumer or a collection of consumers. As is required, such an organisation is a legal person with its own identity and hence cannot be seen as a socio-economically weaker party. In addition, because it is the party that initiates the collective action procedure, it does not have a procedurally weaker position.

When looking at the second stage of a collective action (i.e., the individual procedures that are necessary to claim damages) , it is best to start these proceedings in the Member State in which the collective action judgment was delivered (in the hypothetical example of the Dutch collective action this would be the Netherlands).

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[9] See Pontier and Burg 2004, p. 117.

[10] Case C-295/95 *Farrel v. Long* [1997], ECR I-1683, para 19.

[11] Practically, there a considerable number of important provisions that supersede the general provision as a ground of jurisdiction. This was set out in the introduction to Part II of this book.

[12] For example, see Case C-89/91 *Shearson v. TVB* [1993], ECR I-139, para 18.

In such an event, it could be that the Dutch court, which has to base its jurisdiction on either Article 4 or 7(2) Brussels I-bis, would not be the most appropriate court because many of the plaintiffs would be weaker parties because of their weaker socio-economic positions as consumers or individual shareholders. On the other hand, the fact that collective redress mechanisms are likely to be more effective and efficient must also be taken into account. The use of a collective action, for example, can be seen as beneficial for socio-economically weaker parties if the legal protection the mechanism is supposed to offer is effective and efficient. This pleads for courts that have the ability to resolve a mass dispute through use of a collective redress mechanism to be seen as more appropriate than courts without such mechanisms.

The third sub-principle that falls under the main goal 'most appropriate court' is the sub-principle of sound administration. It requires courts that assume jurisdiction to also have a practical advantage of first-hand knowledge of the facts, ease of taking evidence and/or knowledge of the applicable law.[13] Consequently, such a court also offers certain procedural economic advantages (as such a court would, from an efficiency perspective, can resolve a dispute more easily due to the fact that it has first-hand knowledge of the facts, ease of taking evidence and/or knowledge of the applicable law). In a cross-border mass dispute this means that the German or Dutch court (depending on which mechanism is used) should only assume jurisdiction when it has a practical advantage over other courts with respect to the facts and evidence required to eventually resolve the mass dispute. For the hypothetical financial product dispute, the court of the bank's domicile will probably have the best position in terms of examining the facts and the evidence that is necessary to resolve the case. For the hypothetical securities dispute, however, the court of the domicile of the various shareholders will be better placed to collect all the necessary facts and evidence. Since registered companies have a large number of shareholders which are often domiciled in different Member States, it is possible for various courts to have jurisdiction. This would, however, not be in line with the fourth sub-principle: that entire disputes should be decided by a single court.[14]

9.2.3 Preliminary Conclusions

In view of the foregoing, it can be concluded that the principles of the Brussels Regulation, specifically the principles of offering legal certainty and conferring jurisdiction to the most appropriate court, result in a mismatch with the rules on jurisdiction in collective redress matters. It is difficult to ensure legal certainty in a mass dispute involving several thousands of parties, especially in relation to the rules of jurisdiction, since there are so many links on the basis of which a court can

[13] See Pontier and Burg 2004, pp. 162 et seq.

[14] See Pontier and Burg 2004, p. 232.

assume jurisdiction. In addition, because there are thousands of parties in a mass dispute it is difficult to confer jurisdiction to an appropriate court. This shows that the current Brussels Regulation was devised with two-party conflicts or individual parties in mind. When a dispute is resolved through use of a collective redress mechanism, the principles of legal certainty and conferring jurisdiction to an appropriate court can still be used, but in a collective context.

Reference

Pontier JA, Burg E (2004) EU principles on jurisdiction and recognition and enforcement of judgments in civil and commercial matters according to the case law of the European Court of Justice. TMC Asser Press, The Hague

Part III
Recognition and Enforcement of Foreign Collective Redress Judgments

Chapter 10
Recognition and Enforcement of KapMuG Judgments

Abstract Although under the Brussels Regulation it is not required to commence a procedure in order to have a judgment recognised and/or enforced in another Member States, the Regulation contains various grounds based on which the recognition and/or enforcement can be refused. These grounds relate to—among others—the correct service of the parties involved, the rules on public order in the Member States were recognition/enforcement is sought, and possible conflicts with other judgments or procedures in other states. A lot of parties are involved in a collective redress procedure and it depends on the type of mechanism whether and how the parties involved need to be served correctly. This chapter will set out whether a KapMuG judgment can be recognised and or enforced in another Member State based on the rules in the Brussels Regulation.

Keywords Recognition · Enforcement · Judgment · Court settlement · Public order · Service of documents · Conflicting judgments

Introduction to Part III. (Recognition and Enforcement of Foreign Collective Redress Judgments)

When a court has assumed jurisdiction on one of the grounds in the Brussels Regulation and, through a collective redress mechanism, subsequently ruled on the particular mass dispute, the question is whether that particular collective redress judgment will be recognisable and enforceable outside of the original court's Member State. Chapter III of the Brussels Regulation contains rules guaranteeing the free movement of judgments—an important goal of the regulation—in the various Member States. In the following chapters, both the rules concerning recognition of foreign judgments and the rules concerning enforcement of foreign judgments in mass disputes will be set out. As has been done in the previous chapters on the grounds of jurisdiction, the rules on the recognition and enforcement will be covered per collective redress mechanism.

Before the specific rules on recognition and enforcement can be applied to a collective redress judgment, it is necessary to ascertain whether the collective

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redress judgment is either a 'judgment; as defined under Article 2 Brussels I-bis or (perhaps in the case of a WCAM judgment) a collective settlement as defined under Article 2 Brussels I-bis. The Brussels Regulation uses an automatic recognition system, which does not require a separate procedure to be brought to apply for the recognition of a judgment.[1] When a judgment is recognised, it will achieve the same effect in the Member State in which recognition is sought as it does in the Member State in which the judgment was given.[2] This was also the opinion of Jenard, who stated in his report that recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given.[3] Not only final judgments (judgments that have res judicata) but also judgments rendered in interlocutory or ex parte procedure may be recognised.[4] Should such recognition be challenged, in accordance with the procedures provided for in Sections II and III of the third chapter of the Regulation, the judgment has to be recognised in a different procedure (Article 36(2) Brussels I-bis) in which a party specifically requests a declaration of recognition. Such a declaration can be requested only by an interested party, which means—according to Jenard—that any person who is entitled to the benefit of the judgment in the State in which it was given has the right to apply for an order for its recognition.[5] Among the questions that I will address below is whether individual victims in a group action and also the interest group that represents the interests of the victims of a mass dispute can be seen as interested parties.

The most important part of the recognition phase occurs when an interested party can try to block the recognition of a judgment. At the request of interested parties, judgments are not recognisable in the five situations mentioned in Article 45 Brussels I-bis. The question is whether these grounds can also be used to block the recognition of a collective redress judgment. These grounds also form the grounds for refusal of the enforcement of judgments. For the enforcement of a judgment a party was required to apply for this enforcement in a so-called exequatur procedure.

During the process in which the proposal for Brussels I-bis was put forward, it became clear that there was a general support for the abolition of the exequatur procedure as a means to achieve a free movement of judgments in the European Union.[6] The degree of trust between Member States is the primary prerequisite for abolishing the exequatur procedure. Member States should be able to trust each other's legal system and respect (and thus recognise and enforce) judgments made in other Member States. This degree of trust in relation to collective proceedings

[1] See Article 36(1) Brussels I-bis.

[2] Case C-45/86, Horst Ludwig Martin Hoffmann v. Adelheid Krieg [1988], ECR 645.

[3] Jenard report, p. 43.

[4] Rosner 2004, p. 159.

[5] Jenard report, p. 49 (As Wautelet stated in Magnus et al. 2016, the statement concerned the possibility of requesting the enforcement of a foreign judgment. It is submitted that it applies likewise to requests for recognition. See Magnus et al. 2016, p. 820).

[6] COM (2010) 748 final [14.12.2010], pp. 5–6.

caused the Commission to doubt whether collective judgments would be recognised and enforced between Member States, especially in the case of collective proceedings regarding illegal business practices. The Commission noted that

> The existing mechanisms to compensate a group of victims harmed by illegal business practices vary widely throughout the EU. Essentially, every national system of compensatory redress is unique and there are no two national systems that are alike in this area.[7]

In the final version of Brussels I-bis, which replaced the first Brussels Regulation as of 10 January 2015, the abolition of the exequatur procedure, however, also applies to collective proceedings. In short, Brussels I-bis will not have a separate exequatur procedure. It remains possible, however, to challenge both the recognition and enforcement of foreign judgments. The grounds that can be used in order to challenge foreign judgments have not been modified. It is therefore expected that the use of the grounds for refusal of recognition and enforcement in relation to collective redress mechanisms will remain unchanged. I will therefore discuss the application of the rules regarding the recognition and the enforcement of judgments together.

The effects on the goals of collective redress of the application of the rules on recognition and enforcement on the collective redress judgments will also be analysed in Part III. In a similar way as was done with the grounds of jurisdiction, I will analyse the use of the rules concerning the recognition and enforcement in mass disputes and the theoretical effects on the goals of the collective redress mechanism. How efficient and effective is the legal protection that the various mechanisms should offer when the rules on recognition and enforcement of foreign judgments are used in a cross-border mass dispute? In addition, the effect on the goals of the Brussels Regulation itself will also be analysed in Part III. For example, I will examine whether it is possible to guarantee the free movement of judgments when the current rules on recognition and enforcement are used in a cross-border mass dispute.

10.1 Introduction

As has been set out in Chap. 2, should individual victims in a mass dispute wish to resolve the dispute through a KapMuG procedure, they must first file an individual claim with a German court.[8] When sufficient individual cases are pending and the requirements of the KapMuG are met, one of the individual cases can be used as a model case. Pursuant to the judgment that follows from this model case procedure, which is binding for the individual victims, the victims can resolve their individual proceedings. In a cross-border mass dispute, non-Germans can also be part of the

[7] COM (2010) 748 final [14.12.2010], p. 8.

[8] Insofar as the KapMuG procedure is also seen as an opt-in system, since it is required to file an individual claim first. See Stadler 2009, p. 42.

KapMuG proceedings. Since the model case judgment will only have an effect on the individual procedures that initiated the model case procedure, possible recognition and enforcement issues relate only to the judgments that follow from these individual proceedings.[9] Such issues can arise when a non-German victim has been part of a KapMuG procedure and at the same time is also part of proceedings to resolve the mass dispute outside of Germany. These non-German proceedings can be either individual proceedings or collective redress proceedings. Although the lis pendens rule would normally prevent parallel litigation in relation to a KapMuG procedure, as was set out in Chap. 8, the lis pendens rule only applies to the KapMuG procedure when it is the second procedure seised (if it is the procedure seised first, the KapMuG procedure may continue, as the procedure seised second will have to be stayed). As has been explained in Chap. 11, there is always a chance that a court will interpret the requirements of 'same parties' or 'same cause of action' differently, making it possible for proceedings to be started parallel to the already pending KapMuG procedure. Moreover, when there is a procedure with an opt-out character, it is possible that the individual victim who is part of the KapMuG proceedings will also fall under, for example, a WCAM settlement. Although it is unlikely that an individual victim would not know of this WCAM settlement[10] or that he would start a parallel procedure, it is nevertheless necessary to examine the rules concerning recognition of the KapMuG individual judgment.

Before going into the grounds upon which recognition can be refused, I will examine whether the individual KapMuG judgment that is the object of recognition may even fall under the rules of recognition of the Brussels Regulation. Then I will discuss the grounds for refusal of recognition followed by the rules concerning enforcement of the KapMuG judgment. After the application of the various rules has been discussed, the effect the application of these rules will have on the goals of collective redress and of private international law will be analysed.

10.2 'Judgment' or Court Settlement?

Section I of the third chapter of the Brussels Regulation deals with recognition of judgments from other EU Member States. According to Article 2 Brussels I-bis, the first Article of that chapter, any judgment given by a court or tribunal of a Member

[9] For an insight in the possibilities to see the KapMuG model decision as an object of recognition, please see Reuschle et al. 2008, Section 16, note 33.

[10] Not only are pending WCAM settlements promoted heavily through announcements in international newspapers, it is likely that a victim who has started an individual procedure to initiate a KapMuG procedure—and thus has knowledge of the damage he has suffered due to the mass dispute—would also know if other similar actions are pending in other states. He would probably have obtained this knowledge from his attorney, or directly from the perpetrator, who probably wishes to use the collective settlement's opt-out character to resolve the mass dispute through a single procedure.

State, whatever it may be called (including a decree, order, decision or writ of execution, as well as a determination of costs or expenses by an officer of the court), shall be seen as a judgment according to the Brussels Regulation. It is immaterial whether one of the parties in the proceedings that led to the judgment that has to be recognised is not domiciled in a Member State. Moreover, even if the judgment was directed at parties that are not domiciled in a Member State, the judgment still falls under the Brussels regime of recognition.

As described in the introduction of Part III of this book, the individual judgments that will be based upon the model case procedure are the object of recognition, not the model case procedure itself.[11] This means that the object of recognition is an ordinary judgment that has been given by a German court to a single victim. Moreover, since such a judgment falls under the Brussels I-bis definition of 'judgment' and parties have not entered into a settlement, Article 59 Brussels I-bis does not apply. Hence the standard recognition scheme of the Brussels Regulation applies in KapMuG matters.

Although the individual KapMuG judgments are to be recognised as ordinary judgments, the rules on recognition and enforcement will be set out briefly in this chapter, as they will be used as a starting point in the recognition and enforcement of collective action and collective settlement judgments.

To recognise a KapMuG judgment, the standard rule of Article 36 Brussels I-bis applies. This provision states that the judgment shall be recognised in other Member States without any special procedure being required. Should it, however, be necessary to reaffirm the recognition of this judgment, Article 33(2) Brussels states that an interested party may apply for a decision that the judgment be recognised. Article 36(2) Brussels I-bis refers to Sections 2 (concerning the enforcement of judgments) and 3 (concerning the certificates necessary to validate the enforceability of judgments) of Chapter III of the Brussels Regulation. In cases where it is necessary to explicitly decide on the recognition of a judgment, the procedure followed should be the same as that used to decide on the enforcement of judgments. In this procedure, the grounds of jurisdiction on which the judgment that is to be recognised is based plays only a marginal role. Article 45(1)(e) Brussels I-bis states that a judgment cannot be recognised when the jurisdiction of the court of the Member State of origin conflicts with the grounds of jurisdiction in, among others, consumer-related matters.[12] For example, if a court has assumed jurisdiction in relation to both non-consumers and consumers based upon Article 7(1) Brussels I-bis, it would be in violation of Articles 17–19 Brussels I-bis and the judgment could not be recognised. In this book, however, it is assumed that these rules will not be violated.

[11] See Sect. 2.3.

[12] Insurance-related matters and matters that come under the rules for exclusive jurisdiction also fall under Article 35(1) Brussels I-bis. Cases provided for in Article 72 Brussels I-bis also fall under the recognition exception of Article 35 Brussels I-bis. Since this book does cover the situation in which parties in a mass dispute are not domiciled in a Member State, I do not discuss this provision.

The substantive grounds on which recognition can be refused are laid down in Article 45(1) Brussels I-bis. It is generally understood that these grounds are self-contained and as a consequence will not overlap.[13]

10.3 Non-Recognition and Non-Enforcement of a KapMuG Judgment

As is mentioned above, the recognition of a KapMuG judgment relates to the individual procedures that follow the actual model case proceedings. This means that the recognition in a KapMuG context does not differ much from the recognition of any other ordinary single-party judgment. The only difference is that part of the KapMuG judgment is based on the model case proceedings. The use of this model case procedure will have to be taken into account when reviewing the feasibility of recognising the individual KapMuG judgment.

The recognition and enforcement of any judgment can be blocked when the judgment is in violation of one of the five grounds of Article 45(1) Brussels I-bis. Recognition and enforcement can be challenged when:

- the judgment is in violation with the public policy of the Member State in which recognition or enforcement is sought;
- the defaulting defendant was not served in sufficient time;
- the judgment is irreconcilable with a judgment given in dispute between the same parties in the Member State in which recognition is sought;
- the judgment is irreconcilable with an earlier judgment given in another Member State or a third State involving the same cause of action and between the same parties; and
- the judgment is in violation with Sections 3, 4, 5 and 6 of Chapter II.[14]

The application of these grounds to an individual KapMuG judgment will be covered in the next sections.

Next to the grounds for refusal of recognition and enforcement in the Brussels Regulation, pursuant to Recital 30 of the Brussels Regulation, parties are also allowed to invoke the grounds for refusal available under national law and within the time-limits laid down in that law. As it is not this book's focus to look into the national laws of the Member States, I will focus only on the grounds for refusal of the recognition and enforcement of judgments that are laid down in the Brussels Regulation.

[13] See Briggs 2009, p. 687.

[14] Since this last ground relates merely to a violation of the grounds of jurisdiction and does not relate specifically to the collective redress mechanism itself, this book covered only the first four grounds.

10.3.1 Public Policy

For the recognition of the KapMuG judgment to be deemed to be infringing public policy, it is required that recognition of the judgment in question is manifestly contrary to the public policy in the Member State in which recognition is sought. This so-called public policy exception specifically aims at the *recognition* of the judgment, not the judgment itself as this would mean that the court has to go into the correctness of the judgment (going into the correctness of the judgment is prohibited by the prohibition of révision au fond in Article 52 Brussels I-bis).[15] As a consequence, issues that were considered in the original procedure are rarely subjected to a public policy appeal. Moreover, a simple difference in legislation would not lead to an infringement of public policy. This again would make it necessary to review the first judgment as to its substance.[16] As a result, should a KapMuG judgment have to be recognised in another Member State in which such a collective redress mechanism is unknown, the public policy ground for recognition should in principle not prevent the KapMuG judgment from being recognised.

The concept of public policy should only be used in exceptional cases.[17] This was reaffirmed when the Brussels Convention was amended into the Brussels Regulation and the word 'manifestly' was added to Article 45(1)(a) Brussels I-bis.[18] The ECJ also reaffirmed this in the Hoffmann v. Krieg case, in which the ECJ had to answer a preliminary question which involved a recognition problem based on public policy. In this specific matter, the court chose Article 45(1)(d) Brussels I-bis as a basis for refusing recognition, instead of Article 45(1)(a) Brussels I-bis, again stating that the public policy exception should be used in exceptional cases only. The ECJ later clarified when the public policy exception may be used. For example, it stated that the grounds for exception do not overlap.[19] This means that when, for example, Articles 45(1)(b) or 45(1)(c) Brussels I-bis apply, parties cannot use the public policy exception.[20]

In the Krombach v. Bamberski case,[21] the court reiterated—with a reference to Article 45(3) Brussels I-bis[22]—that the public policy exception cannot be used in

[15] Jenard Report, p. 46.

[16] Magnus et al. 2016, pp. 883–884.

[17] Jenard Report, p. 44. See also Kramberger Skerl 2011, pp. 461 et seq.

[18] See Commission of the European Communities, Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (1999) 348 final, p. 23 and Rosner 2004, p. 161.

[19] Briggs 2009, p. 440.

[20] Case C-145/86, Hoffman v. Krieg [1988], ECR 645, para 21 and Case C-78/95, Bernardus Hendrikman and Maria Feyen v. Magenta Druck & Verlag GmbH [1996], ECR I-4943, para 23.

[21] Dieter Krombach v. André Bamberski (Case C-7/98), [2000], ECR I-1035.

[22] Article 45(3) Brussels I-bis states that the public policy test may not be applied to the rules relating to jurisdiction.

order to review the jurisdiction of the court of origin. With regard to this exception, the ECJ stated that:

> Recourse to the public policy clause in Article 27, point 1, of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.[23]

In other words, the public policy exception can be used only in cases where a fundamental right (according to the recognising country) has been infringed.[24] A distinction can be made between an infringement of the substantive public policy and an infringement of the procedural public policy. Infringements of the substantive public policy rarely occur rarely.[25] A court that is seised with the recognition or enforcement of a certain judgment is limited in its ability to review the judgment to its substance. Hence the ECJ's decision that an infringement must constitute a manifest breach of a rule of law. In a later decision, the ECJ repeated the previous statement that the public policy exception should be used in exceptional cases only, but the court also added that it is for the national courts to define the public policy concept.[26] The ECJ stated:

> The court of the State in which enforcement is sought cannot, without undermining the aim of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, refuse recognition of a decision emanating from another Contracting State solely on the ground that it considers that national or Community law was misapplied in that decision.[27]

It went on to say:

> an error of law such as that alleged in the main proceedings does not constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought.[28]

Although such a manifest breach is also a requirement for an infringement of the procedural public policy, there is no requirement to look into the substance of a matter. Only the procedural aspects are reviewed. In the Gambazzi case, the ECJ tried to construe an autonomous definition of the term public policy by stating that

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[23] Dieter Krombach v. André Bamberski (Case C-7/98), [2000], ECR I-1035, para 37.

[24] Examples of case law in which public policy is considered infringed can be found in the Heidelberg Report, pp. 241 et seq.

[25] See Magnus et al. 2016, pp. 883–884.

[26] Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento (Case C-38/98), [2000], ECR I-2973.

[27] Renault v. Maxicar, para 4.

[28] Ibid, para 34.

public policy was 'a manifest and disproportionate infringement of the defendant's right to be heard'.[29]

Thus the procedural public policy is comparable to the ground of refusal of recognition and enforcement in Article 45(1)(b) Brussels I-bis.[30] The procedural conditions that are necessary for a fair legal process and which are not covered by Article 45(1)(b) Brussels I-bis, will fall under Article 45(1)(a) Brussels I-bis.[31]

Looking at the KapMuG procedure and the above-mentioned considerations of the ECJ, it seems unlikely that the recognition or enforcement of a KapMuG judgment can be withheld by recourse to the public policy exception. The defending company will be summoned to appear before the courts in all of the pending individual procedures. Next, one of these procedures will be used as a model for all of the other procedures. It is unlikely that the defendant's right to be heard in both the individual procedures, but especially in the model procedure, will be infringed, as it will be the judgments that follow from the model procedure that will be used to bind the defending company in all of the other individual cases. Although it is hypothetically possible that the defendant's right to be heard could be infringed manifestly and disproportionately in a KapMuG procedure, it is highly unlikely, since the KapMuG is intended to achieve a model case judgment in which the defendant is heard or has been given the chance to be heard.

10.3.2 Defaulting Defendant

Article 45(1)(b) Brussels I-bis continues with the notion that a defendant should have the right to be heard. This provision is, however, more specific than the broad public policy exception. Pursuant to Article 45(1)(b) Brussels I-bis, a judgment shall not be recognised (and therefore also not be enforced) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.

In cases where a defendant is domiciled in one Member State and is sued in another and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction, unless its jurisdiction is derived from the provisions of the Brussels Regulation.[32] Moreover, as long as the court has no indication that the

[29] Case C-394/07, Gambazzi v. Daimler Chrysler Canada Inc. [2009], ECR I-0000, para 48.

[30] Magnus et al. 2016, p. 890.

[31] Magnus et al. 2016, p. 895.

[32] This would occur only if the procedure is commenced before a court which is not the court of the defendant's domicile, nor the court where the damage occurred (in the case of a tort case), and/or not the court where the performance of the obligation took place (in the case of a contractual matter). Moreover, the defendant could not have appeared before the court voluntarily

defendant was properly notified, the court should stay its proceedings pursuant to Article 28(2) Brussels I-bis. These provisions avert proceedings in which defendants are in default of appearance are prevented. Hence, there is only a small chance that a judgment will be given in a procedure in which the defendant has not appeared.

In the event that the court has not complied with Article 28 Brussels I-bis and has continued the proceedings, Article 45(1)(b) Brussels I-bis will serve as a ground for refusal of recognition/enforcement of this judgment. Three conditions will have to be met before this provision can be used. First, the judgment must be given in default of appearance. Second, the defendant must not be served with the document instituting the proceedings, or with an equivalent document, in sufficient time and in such a way as to allow him to arrange for his defence. Thirdly and finally, the recognition and enforcement of the judgment cannot be withheld in cases where the defendant, failed to commence proceedings to challenge the judgment, although he had the opportunity to do so.[33]

Although it is possible that a judgment in a KapMuG procedure would be given in default of appearance, it is unlikely that a defendant would not be not properly notified. By contrast with, for example, a WCAM procedure, there can be only one defendant in a KapMuG procedure. Since there are two courts that will look at the individual proceedings,[34] it is unlikely that the requirement to notify a defendant properly would be overlooked and consequently that Article 28(2) Brussels I-bis would be infringed twice. As a result, it is unlikely that the recognition and enforcement of a KapMuG judgment would be refused pursuant to Article 45(1)(b) Brussels I-bis.

10.3.3 Irreconcilable Judgment

As the Brussels Regulation contains the previously mentioned lis pendens rule, the situation described in Article 45(1)(c) Brussels I-bis will, according to Jenard, only occur rarely.[35] Jenard presumably based this pronouncement on the assumption that

(Footnote 32 continued)

(Article 26 Brussels I-bis). From a collective redress perspective, such an event would take place when, for example, a French company is sued in Germany by a Dutch plaintiff and the damage occurred in France. Should the French company not enter an appearance, Article 28(1) Brussels I-bis would prevent the German court from having jurisdiction.

[33] See Briggs 2009, p. 693 and Case C-420/07, Apostolides v. Orams [2009], ECR I-0000, para 78.

[34] The court of the individual procedure that that will, among other things, initiate the model case procedure, will look at the notification, as will the court that has jurisdiction over the model case procedure. The latter court will have to be sure that there are also other procedures that are pending and could use the model case procedure.

[35] Jenard Report, p. 45. See also Briggs 2009, p. 699.

the Brussels Convention (and later the Regulation) would only be used for disputes between two or several[36] parties comprising only one plaintiff. As was discussed in Chap. 8, the lis pendens rule and the rule concerning related actions[37] can stop irreconcilable collective redress judgments only partially. Although the lis pendens rule applies to KapMuG procedures, since the individual victims will have to file claims individually, it is questionable whether a situation could occur in which Article 45(1)(c) Brussels I-bis would apply.

Article 45(1)(c) Brussels I-bis prohibits the recognition of judgments that are *irreconcilable* with a judgment given in a dispute between the *same parties* in the Member State in which recognition is sought. The first question that has to be asked is *What are irreconcilable judgments according to Article 45(1)(c) Brussels I-bis*? Can the same interpretation of irreconcilable judgments be used as is used in the lis pendens rule? The ECJ provided an autonomous definition of the term irreconcilable' in the Hoffmann v. Krieg case. In the case of Articles 45(1)(c) and 45(1)(d) Brussels I-bis, judgments are seen as irreconcilable if they 'entail legal consequences that are mutually exclusive'.[38] This ground for refusal will also be used in situations where the local order has taken the form of a *judgment* by consent.[39] Should the local judgment with which it is irreconcilable be a contractual settlement of claims, Article 45(1)(c) Brussels I-bis cannot be used as a ground for refusal.[40]

The requirement of 'irreconcilable' judgments does not mean that both proceedings have to concern the same legal problem.[41] Briggs gives a short overview of case law in which the ECJ argued that judgments were irreconcilable.[42] In Gubisch Maschinenfabrik v. Palumbo[43] a judgment that damages be paid for breach of contract was not seen as irreconcilable with a decision that the contract had been lawfully rescinded for misrepresentation.[44]

The requirement of 'the same parties' must be construed the same way as in Article 29 Brussels I-bis. Pursuant to Article 45(1)(c) Brussels I-bis, local judgments are given automatic priority; they will prevail, irrespective of which judgment was given first or which proceedings started first.[45]

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[36] In the event of multiple defendants and the use of Article 8(1) Brussels I-bis.

[37] It must be noted that the scope of both Articles 45(1)(c) and 45(1)(d) Brussels I-bis is narrower than that of Articles 27 and 28 Brussels I-bis, as neither Articles 45(1)(c) nor 45(1)(d) Brussels I-bis cover the case of related actions. See Magnus et al. 2016, p. 919.

[38] Hoffman v. Krieg, para 22.

[39] See Briggs 2009, p. 699.

[40] Case C-414/92 Solo Kleinmotoren GmbH v. Emilio Boch [1994], ECR I-2237.

[41] Magnus et al. 2016, p. 924.

[42] See Briggs 2009, pp. 701 et seq.

[43] Case C-144/86, Gubisch Maschinenfabrik v. Palumbo [1987], ECR 4861.

[44] For more examples, see Briggs 2009, p. 701.

[45] Magnus et al. 2016, pp. 925–926. Because Article 45(1)(c) Brussels I-bis can be used even when a judgment in the local state was not given first, this provision can also be seen as a distinction to the public policy ground for refusal of recognition and enforcement of judgments, as local rules/local judgments can be given preference. See for example the request of the Dutch

When individual victims in a mass dispute have used the KapMuG to resolve the dispute, Article 45(1)(c) Brussels I-bis can be invoked if the individual KapMuG judgment is irreconcilable with a judgment that has been given between the same parties in the Member State in which recognition is being sought. Should a defendant not be found liable pursuant to a judgment from, for example, France, while the defendant is obliged to pay damages pursuant to a KapMuG procedure, the KapMuG judgment would be irreconcilable with the French judgment. Hence, in this hypothetical instance, recognition of the KapMuG judgment can be refused when recognition is sought in France. It is, however, likely that if the French judgment was started earlier than the KapMuG procedure, the lis pendens rule would have prevented the irreconcilability in the first place. As is set out in Sect. 8.2, the lis pendens rule would apply in KapMuG matters and comparable individual claims in other Member States. As a result, there is only a marginal chance of irreconcilable judgments, making it unlikely that Article 45(1)(c) Brussels I-bis would be used as a ground for refusing recognition/enforcement.

10.3.4 Conflict with a Judgment Given in Another Member State

While Article 45(1)(c) Brussels I-bis goes into irreconcilable judgments from the Member State in which recognition is sought, Article 45(1)(d) Brussels I-bis states that a judgment shall not be recognised (and therefore also not enforced) when it is (i) irreconcilable with (ii) an earlier judgment given in *another* Member State or in a third State (iii) involving the same cause of action (iv) and between the same parties. In addition (v), the earlier judgment must fulfil the conditions necessary for recognition in the Member State addressed. Hence, there are in total five conditions that have to be fulfilled before Article 45(1)(d) Brussels I-bis can be used in order to prevent the recognition and enforcement of a judgment. For this provision, the term irreconcilable is interpreted in the same way as in Article 45(1)(c) Brussels I-bis: judgments are irreconcilable when they lead to or involve legal consequences which are mutually exclusive.[46]

In a KapMuG context, Article 45(1)(d) Brussels I-bis applies when the KapMuG judgment is to be recognised in, for example, Spain, while an earlier judgment from another Member State has ruled, for example, that the defending company is not liable. Both judgments will have to relate to the same cause of action and will concern the same parties. The KapMuG judgment will not be recognised in Spain if it does not comply with the conditions to enable it to be recognised. This means that

(Footnote 45 continued)

Supreme Court for a preliminary ruling with respect to Article 45(1)(c) dated 28 November 2008 (*NJ* 2008/624). Because the case was dropped, these questions, however, remained unanswered.

[46] ECJ Hoffman v. Krieg, para 25.

the judgment must actually be a judgment ex Article 2 Brussels I-bis and it must not fall under the other grounds for refusal of recognition in Article 45 Brussels I-bis.[47] Depending on the earlier procedure and the applicability of the grounds for refusal of recognition/enforcement, the judgment could be irreconcilable with the KapMuG judgment. Just as with Article 45(1)(c) Brussels I-bis, the KapMuG judgment will have to be found irreconcilable with another, earlier judgment. Since both the parties and the cause of action in both judgments are the same, again the lis pendens rule should have prevented the occurrence of these irreconcilable judgments. As a result, in my view, the situation described in Article 45(1)(d) Brussels cannot occur in relation to a KapMuG procedure either.

10.3.5 Summary

Summarising, a KapMuG procedure is initiated by individual procedures and various plaintiffs. Should it be necessary to have the KapMuG judgment, which is an individual judgment, recognised and/or enforced, the various courts that have jurisdiction to decide on an appeal relating to the recognition and enforcement of that KapMuG judgment will have to examine if the defendant is summoned correctly. Due to the way the KapMuG is construed it is possible, but highly unlikely, that a defendant will not be heard in the KapMuG procedure. Hence, it is also very unlikely that a judgment will be contrary to public policy. Consequently, blocking the recognition and enforcement of a KapMuG judgment under Articles 45(1)(a) and 45(1)(b) is unlikely to happen. Moreover, since the KapMuG procedure falls under the requirements of the lis pendens (see Sect. 8.2), it is unlikely that it will be irreconcilable with another judgment from either the country in which recognition/enforcement is sought or from another Member State or third State. Should there be an irreconcilable earlier judgment, however, Articles 45(1)(c) and 45(1)(d) Brussels I-bis can be used as grounds to refuse the recognition or enforcement of the KapMuG judgment.

If the ground for refusal of recognition and enforcement of Article 45(1)(c) Brussels I-bis applies, it would in principle mean that the judgment cannot be recognised and enforced in that Member State only.[48] This would mean that should one of the parties request the recognition of the KapMuG judgment or appeal against it, one victim or part of the group of victims would retain the right to file a claim again. Should Article 45(1)(d) Brussels I-bis apply, any interested party could challenge the recognition and enforcement of the KapMuG judgment, which would open up opportunities to start re-litigation of the mass dispute. Although chances are slim that a KapMuG judgment would not be recognised and/or enforced in

[47] Which means that the earlier judgment may not be manifestly contrary to public policy or given in default of appearance.

[48] Since the earlier irreconcilable judgment was given in this Member State only.

another Member State, if a judgment is not recognised and/or enforced it would in any case mean that some parties would have to start proceedings again in order to resolve the mass dispute, but more importantly it would also mean that there could be large differences in judgments. These re-litigating parties could start proceedings under another court or under different laws. Moreover, they could use evidence that they discovered after the KapMuG judgment was given.

10.4 Goals of Collective Redress

In the part of this book where the grounds of jurisdiction in a certain collective redress procedure are set out, the effects of the various grounds of jurisdiction on the goals of collective redress were also analysed. This was per ground, because parties and courts are free to base a court's jurisdiction on a certain ground. As these grounds all apply to different situations (in the case of Article 7(2) Brussels I-bis the ground for jurisdiction can relate to the place where the damage occurred which, in the case of a mass dispute, can be in various Member States), it was necessary to investigate whether there is a difference in the use and the effect of a certain ground.

In terms of the recognition and enforcement of judgments, the effect of the various grounds on which the recognition or enforcement can be withheld is the same. A judgment will either be recognisable/enforceable or not; this is no different if the public policy exception is used or if there is an irreconcilable judgment in another Member State. The effect that non-recognition or non-enforcement will have does, however, differ between the various collective redress mechanisms. In the case of a KapMuG procedure, the questions regarding recognition are aimed at the individual judgments. Should one of these individual judgments for some reason not be recognisable, this does not automatically mean that all of the other individual judgments are not recognisable. Questions regarding recognition are very case-specific in relation to the individual KapMuG proceedings, which makes it difficult to set out the effects the applicability of the grounds for recognition will have on the use of and the achievement of the goals of collective redress.

As explained in the previous sections, it is unlikely that a KapMuG judgment will not be recognisable or enforceable. Should such an event nevertheless occur, the effect this will have on the entire collective redress procedure is minor. For example, should the defendant not be heard in one individual procedure, it is only the recognition of this individual judgment that can be blocked. As a result, the various other individual procedures will be left alone. The effective legal protection collective redress procedures are aimed at will hence still be realised, except in relation to the unrecognisable/enforceable judgment. In addition, it will still take less time and be cheaper to resolve a mass dispute by using a KapMuG procedure than by not using the model case procedure. The fact that one judgment is not recognisable since it is in violation of one of the grounds for refusal of recognition does not alter the fact that the KapMuG will still provide more efficient legal protection than the standard procedures.

It is difficult to reach a conclusion about the effects the use of Articles 45(1)(c) and 45(1)(d) Brussels I-bis will have on the goals of collective redress. If the KapMuG judgment is not recognisable or enforceable because it is irreconcilable with an earlier judgment in the Member State in which recognition or enforcement is sought, the earlier judgment will still apply as a resolution to the dispute. For example, the defending company could have filed for a negative declaratory judgment in which the company is found not liable in relation to a certain individual victim. Should this individual plaintiff join a later KapMuG procedure, the defending company could successfully appeal against the recognition and enforcement of this KapMuG judgment. The reason that the KapMuG judgment is not recognisable is, however, because the plaintiff chose to start a second procedure himself. It is not possible to attribute the non-recognition to the provisions on recognition and enforcement.[49] Moreover, the fact that the KapMuG judgment will probably not adversely affect this individual victim is due solely to the existence of the earlier proceedings in which the defending company was found not liable. Although more than one court will have to look into the dispute between the defending company and the individual victim, the increase in the administrative burden on the judiciary is attributable solely to the actions of the individual victim who started a second procedure, or to the fact that this second procedure was not stopped by invoking the rules of lis pendens and related actions. As mentioned above, this is also the starting point of this book and it is therefore unlikely that this individual victim will be able to join a KapMuG procedure. However, should the court that is dealing with the KapMuG procedure allow the individual victim to join the action, the effects flowing therefrom cannot be attributable to Article 45(1)(c) Brussels I-bis.

References

Briggs A (2009) Civil Jurisdiction and Judgments. Informa Law, London
Kramberger Skerl J (2011) 'European Public Policy'. Journal of Private International Law
Magnus U et al (2016) 'Brussels I Regulation'. Sellier, Munich
Reuschle F et al (2008). Kölner kommentar zum Kapmug. Verlag C.H. Beck, Munich
Rosner N (2004) Cross-border recognition and enforcement of foreign money judgments in civil and commercial matters. Thesis Groningen University
Stadler A (2009) A test case in Germany: 16,000 private investors vs. Deutsche Telekom. ERA Forum 10

[49] It is, however, possible to attribute the fact that the KapMuG judgment is not recognisable to the lis pendens rule. This rule should have prevented the irreconcilable procedures in the first place.

Chapter 11
Recognition and Enforcement in Relation to a Collective Action Procedure

Abstract Although under the Brussels Regulation it is not required to commence a procedure in order to have a judgment recognised and/or enforced in another Member States, the Regulation contains various grounds based on which the recognition and/or enforcement can be refused. These grounds relate to—among others—the correct service of the parties involved, the rules on public order in the Member States were recognition/enforcement is sought, and possible conflicts with other judgments or procedures in other states. A lot of parties are involved in a collective redress procedure and it depends on the type of mechanism whether and how the parties involved need to be served correctly. This chapter will set out whether a collective action judgment can be recognised and or enforced in another Member State based on the rules in the Brussels Regulation.

Keywords Recognition · Enforcement · Judgment · Court settlement · Public order · Service of documents · Conflicting judgments

11.1 Introduction

Since a collective action has res judicata effect only in relation to the interest group, it is questionable whether the recognition or the enforcement of such a judgment even plays a role in private international law. This will depend, among other things, on the role of the precedential effect the collective action judgment has in private international law and on the rules for recognition and enforcement themselves. The collective action procedure consists of two phases: the collective action itself and the necessary individual procedure that will follow this collective action. In contrast to the KapMuG procedure, in a collective action procedure these two phases are clearly separated.[1] Due to these two separate phases, it is necessary to look into two

[1] Where a KapMuG procedure is initiated by various individual procedures that will have to be judged pursuant to the model case judgment, the collective action will be started by an interest group. The individual victims may use the judgment that is received in the collective action, but are not obliged to do so.

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separate possibilities for using the rules of recognition and enforcement in a collective action procedure. Although it would be normal procedure for the individual foreign victims to start individual proceedings in the Netherlands after receiving the collective action judgment, it is also possible that these non-Dutch individual victims will start individual proceedings in their own domicile. The main question that will be have to be answered in this chapter is whether both the collective action judgment and the subsequent Dutch individual judgment can be recognised and/or enforced in another Member State. The first question to be answered, however, is whether the precedent effect of the collective action judgment also has a cross-border effect. If this is not the case, it would not be possible to use the collective action judgment in a Member State other than the Netherlands. Consequently, the question of whether the precedent effect will have a cross-border effect will be set out first, before going into the actual recognition and enforcement of collective action judgments.

11.2 Cross-Border Effect on Third Parties

In order for both the collective action judgment and the individual judgment that followed it to be recognised and enforced, they must fall under the definition of a judgment ex Article 2 Brussels I-bis. Such a judgment must emanate from a judicial body of a Member State deciding on its own authority on the issues between the parties.[2] Since both judgments comply with this requirement and since both judgments followed from an inquiry in adversarial proceedings,[3] they can be seen as judgments ex Article 2 Brussels I-bis.

Because of the role of the group action, it is also of importance to look at Article 27 Brussels I-bis, which states that a judgment shall not be recognised if it conflicts with the sections concerning grounds of jurisdiction in insurance and consumer-related matters or the rules concerning exclusive jurisdiction, or if there are earlier agreements between Member States.[4] Since only the grounds of jurisdiction in relation to consumer-related matter are applicable to the cases that are used as examples in this book, this rule might only apply when the grounds of jurisdiction in consumer-related matters are not used correctly. As can be seen in Sect. 6.3, however, these rules cannot be used in a collective action procedure[5] because consumers are not a party to the actual collective action proceedings.

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[2] Case C-414/92, Solo Kleinmotoren v. Boch [1994], ECR I-2237, para 17.

[3] See Case C-125/79 Denilauler [1980] ECR 1553, para 13 and Case C-394/07, Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company [2009], ECR I-2563 para 23.

[4] As mentioned earlier, this book does cover situations in which party in a mass dispute whichis not domiciled in a Member State. Moreover matters relating to insurance or one of the exclusive grounds of jurisdiction will not be covered.

[5] Case C-167/00 Verein für Konsumenteninformation v. Karl Heinz Henkel [2002], ECR I-8111, para 38.

The individual victims in the financial product mass dispute are, however, consumers and should base jurisdiction of the court before which their individual claim is pending on the grounds of jurisdiction in consumer-related matters. If this individual action that took place before a Dutch court must be recognised or enforced, it may not conflict with the grounds of jurisdiction in consumer-related matters.

In principle, judgments have res judicata effect only in relation to the parties that are part of the proceedings. They can, to a certain extent, have a binding effect on other parties that were not part of the actual proceedings (a precedent effect or a third-party effect). The degree to which 'non-parties' are bound by a certain judgment differs per country. In England and Wales, for example, only the highest court is allowed to deviate from judgments from itself or from lower courts.[6] In the Netherlands, precedents are always conditional.[7] The extent to which parties can be bound by a precedent depends, among others, on the position of the court, the establishment of the judgment, the way the judgment is made public and the acceptance of the judgment by other lawyers (judges, attorneys and scholars).[8] A precedent of judgments in the Netherlands originates from legal principles such as the principle of equality, the principle of legal certainty and the principle of the protection of legitimate expectations.[9] Although it is not explicitly specified in the law itself, the collective action can be used only if the subsequent judgment has a certain precedential effect. Otherwise the action would not serve the individual victim's benefit. Article 3:305a(5) DCC, however, offers the option with which individual victims can explicitly oppose the precedential effect of a collective action judgment. Hence, the precedent effect of a collective action judgment cannot be based merely on the above-mentioned legal principles: the precedent also follows from the law itself. Should a collective action be used in a cross-border mass dispute to partly resolve the dispute, the subsequent judgment would be a precedent for those parties that start their individual proceedings to claim monetary damages in the Netherlands.

It is unclear whether this precedent effect is also a cross-border precedent effect and how this precedent effect can be used in another Member State. Article 36(2) Brussels I-bis states that any *interested party* can apply for a decision that the judgment be recognised. According to Jenard 'any person who is entitled to the benefit of the judgment in the State in which it was given has the right to apply for an order'.[10] Because of the lack of an autonomous definition by the ECJ, the term 'interested parties' should not be restricted to the actual parties to the original proceedings. As a result, the interest group that initiates the collective action and the defendant are *not* the only interested parties that can apply for a decision that the

[6] See Teuben 2004, pp. 247–249.

[7] Teuben 2004, p. 283.

[8] Groenendijk 1981, pp. 78–79.

[9] See Teuben 2004, pp. 238–239.

[10] See Jenard Report, p. 49.

judgment be recognised in another Member State. Since the interest group aims to protect the same interests of the various individual victims by initiating the collective action, in my view these individual victims must also be seen as 'interested parties' ex Article 36(2) Brussels I-bis.[11]

Should an interested party/individual victim wish to make use of the collective action judgment in his own domicile (not being the Netherlands, but, for example, Germany or France), then he could apply for a decision that the judgment be recognised in this Member State. According to Jenard, 'recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given'.[12] A foreign judgment which has been recognised must in principle have the same effects in the State in which enforcement is sought as it does in the State in which the judgment was given.[13] Insofar as the collective action judgment is concerned, since this judgment is aimed at having precedent effect, this precedent must also have effect in other Member States when the collective action judgment is recognised. From the above it follows that the Member State where judgments are to be recognised will have to accept unknown legal consequences in the legal system of the State addressed.[14] The public order exception should—once it is invoked—limit the extent to which unknown legal consequences will have an effect on the legal system of the Member State addressed. The precedent effect of a collective action judgment should consequently have the same effect in other Member States as it has in the Netherlands.

If the individual victims cannot be seen as 'interested parties', and if as a consequence the judgment has no precedent effect in other Member States, the judgment—being an authentic deed—could serve as evidence of certain facts.[15] Since this book focuses on issues of private international law instead of issues concerning the law of evidence, I will not discuss this possibility.

In addition to the option of starting individual proceedings in another Member State, where the party could use the collective action, it is of course also possible that the individual party will start these individual proceedings in the Netherlands as well. In this case, it is the subsequent judgment of this individual procedure that will have to be recognised or enforced. Since the original parties (the victim and the perpetrator) will be involved in the request to recognise or enforce the judgment, parties will have complied with the requirement of Article 36(2) Brussels I-bis because they can be seen as 'interested parties'. Therefore, only the exceptions to

[11] The groups whose common interests are protected by the organisation must be mentioned in the organisation's articles of association. If it is the intention that the precedent effect also must have a cross-border effect, the non-Dutch victims must also be named as parties whose interests are to be protected.

[12] See Jenard Report, p. 43. See also Case C-145/86, Hoffmann v. Krieg [1988], ECR 645, para 10.

[13] See Case C-145/86, Hoffmann v. Krieg [1988], ECR 645, para 11. See also Arons 2012, pp. 329 et seq. (Chap. 11).

[14] Magnus et al. 2016, p. 815.

[15] See Strikwerda 2015, p. 294.

Article 45 Brussels I-bis can cause the recognition and enforcement of this 'individual collective action' judgment to be withheld.

In summary, looking at the recognition and enforcement of a collective action there are two possibilities: (i) either the actual collective action judgment (where the interest group is a party to the proceedings) will have to be recognised in order to be able to start the necessary individual action in another Member State, or (ii) the individual action judgment that was filed in the Netherlands after the collective action judgment will have to be recognised or enforced in another Member State.

11.3 Enforcement in a Collective Action Procedure

Should individual victims have started an individual action that followed the collective action judgment, they could apply to have this individual judgment made enforceable in their domicile as well. Should a party appeal against the decision on the application for a declaration of enforceability, the grounds for refusal in Article 45 Brussels I-bis could be invoked. Such an appeal differs from the request to enforce the collective action judgment itself. In mass disputes relating to financial services, a collective action is mostly used to request a declaratory judgment. As such judgments merely affirm the existence of certain rights, they are not susceptible to enforcement.[16] As a result, the grounds for refusing the recognition of judgments that will be discussed in the following section will relate only to the recognition of the collective action judgment and to the recognition *and* enforcement of the individual action that followed the collective action judgment.

11.4 Non-Recognition and Non-Enforcement in a Collective Action Procedure

To look into the possible recognition and/or enforcement of the collective action judgment and the subsequent individual judgments, it is necessary to set out if the grounds for refusal of recognition can be used on these judgments. As was explained in Chap. 10, only one ground for refusal can be used to counter the recognition of a judgment. Moreover, should it be possible to use Article 45(1)(b) Brussels I-bis to refuse the recognition and enforcement, it would not be possible (or necessary) to resort to the public policy exception of Article 45(1)(a) Brussels I-bis.[17] This exception will therefore be covered after Article 45(1)(b) Brussels

[16] They are of course susceptible to recognition in other Member States. See Rosner 2004, pp. 24–25.

[17] See Hoffmann v. Krieg C-145/86 (1988) ECR 645 para 21. Also see Bernardus Hendrikman and Maria Feyen v. Magenta Druck & Verlag GmbH, C-78/95 (1996) ECR I-4943 para 23.

I-bis. In order to look into the recognition and enforcement possibilities of the collective action, I will discuss both the issues concerning the collective action judgment and the issues concerning the individual judgment which is partially based on the collective action judgment.

11.4.1 Defaulting Defendant

First, when looking at the collective action judgment, a judgment given in default of appearance is unlikely to happen. As mentioned in Chap. 10, pursuant to Article 28 Brussels I-bis a judgment given in default of appearance should be prevented. Article 28(1) Brussels I-bis states that courts must, of their own motion, declare that they have no jurisdiction when a defendant does not enter an appearance and jurisdiction cannot be based on one of the grounds of the Brussels Regulation. Moreover, should the court have had no indication that the defendant was properly notified the court should stay its proceedings (Article 28(2) Brussels I-bis). In the event the court did not comply with Article 28 Brussels I-bis and continued its proceedings, Article 45(1)(b) Brussels I-bis will serve as a ground to refuse recognition/enforcement of the judgment. As a result, there is only a marginal chance that recognition of a collective action judgment would be refused, because the plaintiffs will not wish to risk having a collective action procedure stopped pursuant to Article 28 Brussels I-bis. Should the court, however, have ignored Article 28 Brussels I-bis, recognition and/or enforcement of a collective action judgment could very well be refused.

As mentioned in Sect. 10.3, Article 45(1)(b) Brussels I-bis prohibits recognition of a judgment under three cumulative conditions.[18] These are (i) default of appearance, (ii) the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, and (iii) the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so. Although the collective action procedure can be quite technical, the procedure to notify the defendant and prevent him from not entering an appearance has the same guarantees as in any Dutch procedure, especially when the procedure concerns parties from other Member States. With the procedural guarantees the Service Regulation 2007[19] offers,[20] and because the defendant is known to the plaintiff (be it the interest group, or the individual victim), it seems unlikely that the defendant

[18] See Briggs 2009, p. 693.

[19] EC Regulation No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

[20] The Service Regulation offers a wide variety of possible ways to service a defendant: from sending a notification directly, to sending a notification to the specific authorities of the Member State in which the defendant is domiciled.

would not be served correctly. The stakes for a defendant in a collective action can be quite substantial, hence the defendant will think twice about not appearing in the proceedings.

The same counts for the subsequent individual proceedings, in which a possible monetary claim is judged. Both the plaintiff and defendant are likely to make efforts to achieve the defendant's appearance. Moreover, the various provisions on the service of defendants are so wide that it is unlikely that the defendant will not be served with the document which instituted the proceedings, and thus the defendant will have sufficient time to enable him to arrange his defence.

Given the foregoing, it is also unlikely that both judgments (the collective action as well as the subsequent individual judgment) will not be recognised and enforced due to Article 45(1)(b) Brussels I-bis.

11.4.2 Public Policy

As the public policy exception has a broader reach than Article 45(1)(b) Brussels I-bis, it might be a ground on the basis of which the recognition and enforcement of either the collective action judgment or the subsequent individual judgment can be blocked, because the court will have to examine whether the effect of the judgment is contrary to the public policy/fundamental rules of the Member State in which recognition or enforcement is sought.[21] On the other hand, the public policy exception applies only in exceptional cases.[22] Returning to what the ECJ ruled in the Gambazzi case, the public policy exception can be resorted to when a judgment (or part of it) is a 'manifest and disproportionate infringement of the defendant's right to be heard.'[23] As explained in the previous section, both types of procedures offer the defendant the right to be heard. Thus, it does not seem that the public policy exception can prevent the recognition and enforcement of a collective action judgment or the subsequent individual procedure that took place in the Netherlands.

In this book, only the procedural public policy will be set out as a ground to block the recognition and enforcement of a collective redress judgment. Although the ECJ has only elaborated on the rights of the defendant and the public policy infringement, it is in theory also possible that the effect a judgment has in relation to the plaintiff can be contrary to public policy. This seems unlikely, especially given that the Brussels Regulation was written with disputes between only one plaintiff and only one or several defendants in mind. With a collective action, however, a large group of plaintiffs can be bound by the collective action judgment, without

[21] Magnus et al. 2016, pp. 927–928.

[22] See Commission of the European Communities, Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (1999) 348 final, p. 23 and Rosner 2004, p. 161.

[23] Case C-394/07, Gambazzi v. Daimler Chrysler Canada Inc [2009], ECR I-0000, para 48.

being heard. Hence, in theory, a collective action judgment could be withheld recognition if–due to the fact that the plaintiff has not been heard—the effect of the judgment is contrary to public policy rules in the recognising State. Nevertheless, the collective action does contain provisions to prevent that the group of plaintiffs in a mass dispute is not heard. One such provision is that a collective action can be started by an interest group only when this organisation actually represents the interests of the group and therefore the plaintiffs. The court must explicitly ascertain if these interests are represented, before looking into the actual claim. Moreover, individual plaintiffs have, pursuant to Article 3:305(5) DCC, the right to withdraw from the collective action. As a result, the judgment will have no precedential effect, should they start (an) individual procedure(s) concerning the same dispute. Hence, it is unlikely that the recognition of a collective action judgment can be blocked by resorting to the public policy exception.

Alternatively, one could also argue that the individual plaintiffs simply are not party to the collective action. Hence they have, by law, no right to be heard in the proceedings, since the procedure is aimed at offering effective and efficient legal protection. According to the ECJ, '[such] an error of law does not constitute a manifest breach of a rule of law which was essential in the legal order of the Member State in which recognition or enforcement is sought'.[24] As a consequence, the structure of the collective action cannot be a reason for resorting to the public policy exception to refuse recognition or enforcement.

Concerning the recognition and enforcement of the possible individual proceedings that follow the collective action judgment, the result is comparable to that of the KapMuG procedure. The individual actions that follow the collective action judgment differ from the individual action in a KapMuG perspective in that the latter is seen as a 'Nebenintervention' and the former are seen as separate procedures. One could say that the binding effect of the KapMuG procedure is stronger than of a collective action procedure. This, however, does not affect the recognition and enforcement of an individual action that follows the collective action judgment. As with the KapMuG procedure, it is unlikely that the defendant will not have a chance to be heard. Hence it is unlikely that recognition of an individual procedure will be contrary to the public policy of the recognising Member State.

11.4.3 Irreconcilable Judgment

In addition to the default in appearance and the public policy grounds of Article 45 Brussels I-bis, Article 45(1)(c) Brussels I-bis prohibits the recognition of judgments that are irreconcilable with a judgment given[25] in a dispute between the same

[24] See Case C-38/98, Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento [2000], ECR I-2973, para 34.

[25] Proceedings which are still pending do not count. See Magnus et al. 2016, p. 920.

parties in the Member State in which recognition is sought. The most important requirement in this provision, the requirement that the parties involved are the same, hampers the use of this ground for refusal in a collective action context. The party in the actual collective action, the interest group, is not the same as the parties that probably started proceedings in the Member State in which recognition is sought.[26] This latter procedure will probably take place between the individual victim and the perpetrator. Since the interest group has been created merely in order to file a collective action, it will not start proceedings in other Member States. As a result, Article 45(1)(c) Brussels I-bis cannot block the recognition of a collective action judgment in a Member State in which an individual plaintiff in a mass dispute has already resolved a dispute with the perpetrator of the mass dispute. As a result, should two individuals start separate proceedings in Member State A and only one individual receives a judgment before a collective action has ended in Member State A, it could very well be possible that the individual judgment received is irreconcilable with the later collective action judgment. Should the collective action be recognised in the other still pending individual action, there could be two totally different judgments in cases that are almost the same.

With respect to the individual procedure that will follow the collective action procedure, should this procedure be started in the Netherlands, and were the individual plaintiff to also start another procedure in his own domicile, it is probable that this parallel procedure will be stopped through use of the lis pendens rule. Hence, chances are slim that a judgment from an individual procedure in the Netherlands would be irreconcilable with a judgment from the plaintiff's domicile. Hence it is also unlikely that the recognition of the Dutch individual judgment would be blocked pursuant to Article 45(1)(c) Brussels I-bis.

In summary, for both proceedings in a collective action procedure, it seems unlikely that recognition and (in the case of the individual action) enforcement will be refused on the ground that they are irreconcilable (entail legal consequences that are mutually exclusive) with a judgment given in a dispute between the same parties in the Member State in which they are sought.

11.4.4 Conflict with Judgment Given in Another Member State

While Article 45(1)(c) Brussels I-bis goes into the irreconcilability of judgments from the Member State in which recognition is sought, Article 45(1)(d) Brussels I-bis states that a judgment shall not be recognised (and therefore also not enforced)

[26] The 'same parties' must meet the definition given in Article 29 Brussels I-bis. The broader definition in Article 30 Brussels I-bis must be excluded from Article 45(1)(c) Brussels I-bis. See Magnus et al. 2016, p. 919.

when it is (i) irreconcilable with an earlier judgment given[27] in (ii) *another* Member State or in a *third State* involving (iii) the same cause of action and (iv) between the same parties. In addition, (v) the earlier judgment must fulfil the conditions necessary for its recognition in the Member State addressed.

When recognition is sought in relation to the actual collective action judgment, requirement 'iv' will not be met, as the parties are not the same. Although the parties are not the same, the collective action judgment and the proceedings with which it would be irreconcilable would have the same cause of action.

As mentioned in Sect. 8.2, 'same cause of action' means the same facts and rule of law. To be complete, the same cause of action also means that the object of the proceedings must be the same, i.e., the end result the action has in view must be the same. Both of these criteria have to be satisfied.[28] Should the end result the actions have in view be diametrically opposed (for example, in one instance parties claim that they are not liable and in another instance are sued for damages) , the objects could still be seen as the same. This would, however, not lead to Article 45(1)(d) Brussels I-bis being applicable in the case of a collective action judgment, since the parties are still not the same.

In relation to the individual action that follows the collective action judgment and an additional judgment from the court of the Member State in which recognition or enforcement is sought, Article 45(1)(d) Brussels I-bis could apply. In this case, the parties to the proceedings and the cause of action are the same. Since the lis pendens rule does apply to the individual proceedings that follow the collective action judgment, and because these proceedings would be irreconcilable with an earlier judgment, it seems unlikely that the lis pendens rule would not prevent the individual proceedings in the Netherlands from commencing.

In conclusion, Article 45(1)(d) Brussels I-bis too cannot be used to refuse the recognition and enforcement of a collective action judgment and the individual action that follows. Hence, there remains a risk of irreconcilable judgments with respect to the collective action judgment.

11.4.5 Summary

In Sect. 11.4 I showed that it is not possible to refuse recognition of the collective action judgment, nor is it possible that the subsequent individual judgment would not be recognised and/or enforced on the grounds of Article 45 Brussels I-bis.

The collective action judgment is unlikely to be given in default of appearance ex Article 45(1)(b) Brussels I-bis. Such proceedings in relation to financial services bring with them the risk of reputational damage and therefore it is very unlikely that a defendant will not appear. Moreover, because of the interests involved, and due to

[27] Proceedings which are still pending do not count. See Magnus et al. 2016, p. 920.

[28] Briggs 2009, p. 315.

the strict service regulations, it is unlikely that a defendant (be it a Dutch or non-Dutch company) will be notified/served incorrectly. Because of the cumulative requirements of Article 45(1)(b) Brussels I-bis, a collective action judgment is unlikely not to be recognised. Moreover, since the defendant is heard in a collective action, the public policy exception cannot be used. In addition, should an individual start parallel proceedings, the parties would not be the same as those in the collective action proceedings. This will lead to the conclusion that a collective action judgment can be recognised in all cases.

The same is true with regard to Articles 45(1)(a) and 45(1)(b) Brussels I-bis, since the defendant will be notified in the same way and will be heard in the same way as in the collective action itself. In both situations, both parties are heard, and although the individual victim is bound only by the precedent of the collective active judgment for part of the procedure, he always has the option to relieve himself of this precedent effect by recourse to Article 3:305a(5) DCC.

The same is not true in relation to Articles 45(1)(c) and 45(1)(d) Brussels I-bis. Since the individual proceedings that follow the collective action will have the same parties and, in the case of Article 45(1)(d) Brussels I-bis, the same cause of action, recognition and enforcement could be refused. It seems unlikely, however, that these parallel proceedings would not be stopped by the lis pendens rule. As a result, it would probably not be necessary to invoke Articles 45(1)(c) and 45(1)(d) Brussels I-bis to refuse the recognition and enforcement of the individual judgments. These grounds for refusal of recognition cannot be used in relation to the collective action judgment if that judgment is irreconcilable with a judgment from an individual procedure in another Member State. The parties simply are not the same because of the involvement of the interest group. As a result, there is a chance of irreconcilable judgments in relation to collective action judgments and judgments following individual proceedings in other Member States.

11.5 Goals of Collective Redress

Below I address the question of what effect the application of the rules of recognition and enforcement in collective action proceedings has on the goals of collective redress.

Regarding the efficient legal protection the collective action is aimed to offer, pursuant to the rules on recognition, a collective action judgment must be recognised automatically. This in principle improves efficient legal protection. The various grounds for the refusal of recognition and enforcement—especially the rules on irreconcilable judgments (Articles 45(1)(c) and 45(1)(d) Brussels I-bis)—are such that the collective action procedure might not offer the efficient legal protection it is intended to provide, because if plaintiffs decide to start proceedings in the same case in another Member State, these rules do not prevent irreconcilable judgments. Hence, in such an event the irreconcilable judgments cause inefficiency, due to the fact that there is no conclusive resolution.

Without a separate procedure, this type of judgment can be used to shorten or simplify the necessary subsequent individual proceedings. It is therefore not necessary for the individual party to incur extra costs due to these private international law rules. This applies only partly to the effect of the rules of recognition and enforcement on the individual proceedings that followed the collective action judgment. It is theoretically possible—but unlikely—that the rules in Articles 45(1)(c) and 45(1)(d) Brussels I-bis could lead to refusal of recognition and enforcement of the individual judgment. Should recognition or enforcement of this judgment be refused, it would mean that the earlier parallel judgment would remain valid. The extra time and money required for this parallel procedure cannot be attributed to the application of the rules of recognition and enforcement, because they are the result of the plaintiff's choice in that procedure. In that respect, Articles 45(1)(c) and 45(1)(d) Brussels I-bis do not cost the parties more time and money. Hence the use of these articles cannot affect the efficiency of the legal protection the collective action will have to offer.

Since the collective action judgment must be recognised and therefore could be used in other Member States, it will enhance the effectiveness of the legal protection the collective action aims to offer. When this is related to the individual actions that follow the collective action judgment, the risk that such an individual judgment will not be recognised or enforced is such that there is a chance that the collective action cannot offer effective legal protection. Articles 45(1)(c) and 45(1)(d) Brussels I-bis provide that recognition and/or enforcement of the individual judgment in a collective action procedure could be refused. This, however, is a consequence of the decision made by the parties themselves, since they started the parallel proceedings. In this regard, the rules on recognition and enforcement do not affect the goal of effective legal protection.

Regarding the collective action judgment, the grounds in Articles 45(1)(c) and 45(1)(d) Brussels I-bis cannot be used. As a result, there is a real probability of irreconcilable judgments exists. In such an event, the balance which would be achieved if the mass dispute were to be resolved by a single court would remain. The resolution between the various parties in the mass dispute is likely to be different (not only because of the facts on which the resolution is based, but also because a different court might have a different opinion on how to resolve the dispute). This might lead to other parties appealing, because—if the other matter might have a better resolution—they are unsatisfied with the outcome of the procedure. In addition, the court of the Member State in which the collective action should be recognised (and will be recognised, because recognition cannot be blocked pursuant to Article 45(1)(c) and 45(1)(d) Brussels I-bis) will be confronted with the difficult situation of two irreconcilable judgments. This situation would inevitably result in more costs and no final resolution of the mass dispute, thereby reducing the efficacy and efficiency of the legal protection.

With regard to the administrative burden on the judiciary, it is unlikely that rules on recognition and enforcement will increase this burden, except when these rules cause courts to be confronted with extra proceedings. As concluded above, it is the parties in the parallel proceedings who themselves brought about this extra

proceeding, not these private international law rules. Lastly, the administrative burden of the judiciary will also increase in the case of irreconcilability between a collective action judgment and an individual procedure in another Member State.

In summary, the irreconcilability between a collective action judgment and an individual procedure in another Member State is the only part of the rules on recognition and enforcement that will have an effect on the goals of collective redress. These situations will cause parties to incur extra costs and invest more time in the proceedings, which will make the legal protection that the collective action offers less efficient. Moreover, courts will be confronted with an extra administrative burden.

References

Arons TMC (2012) Cross-border Enforcement of Listed Companies' Duties to Inform. Kluwer, Deventer

Briggs A (2009) Civil Jurisdiction and Judgments. Informa Law, London

Groenendijk CA (1981) Bundeling van belangen bij de burgerlijke rechter. W.E.J. Tjeenk Willink, Zwolle

Magnus U et al (2016) 'Brussels I Regulation'. Sellier, Munich

Rosner N (2004) Cross-border recognition and enforcement of foreign money judgments in civil and commercial matters. Thesis Groningen University

Strikwerda L (2015) Inleiding tot het Nederlandse Internationaal Privaatrecht. Kluwer, Deventer

Teuben K (2004) Rechtersregelingen in het burgerlijk (proces)recht. Kluwer, Deventer

Chapter 12
Recognition and Enforcement of a WCAM Judgment

Abstract Although under the Brussels Regulation it is not required to commence a procedure in order to have a judgment recognised and/or enforced in another Member States, the Regulation contains various grounds based on which the recognition and/or enforcement can be refused. These grounds relate to—among others—the correct service of the parties involved, the rules on public order in the Member States were recognition/enforcement is sought, and possible conflicts with other judgments or procedures in other states. A lot of parties are involved in a collective redress procedure and it depends on the type of mechanism whether and how the parties involved need to be served correctly. This chapter will set out whether a WCAM judgment can be recognised and or enforced in another Member State based on the rules in the Brussels Regulation.

Keywords Recognition · Enforcement · Judgment · Court settlement · Public order · Service of documents · Conflicting judgments

12.1 Introduction

In this chapter the use of the rules of recognition and enforcement in a WCAM procedure will be set out. Since the WCAM is a collective settlement procedure based on the option of opting out, the question arises whether the court decision can fall under the definition of a judgment ex Article 2 Brussels I-bis. This question will be addressed in Sect. 12.2. Additionally, since the court decision only binds various parties to the content of the settlement agreement, it is questionable whether it is even possible to enforce the court judgment. What should, for example, be enforced? After answering these questions, I will set out the grounds for refusal of recognition and possible enforcement of Article 45 Brussels I-bis.

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12.2 'Judgment' or Court Settlement

A WCAM judgment consists of two separate parts: a settlement agreement which is entered into between the interest group and the 'defending company' and the actual court decision that binds all the parties (including the victims of the mass dispute, who are not party to the settlement agreement). The settlement agreement alone is purely contractual and is only an object of the WCAM proceedings. Hence, by definition, it cannot be seen as a judgment.[1] It is the actual court decision that will have to be looked at when looking at the rules of recognition and enforcement. Given that the settlement agreement is the object of the court decision, the subsequent judgment might also be seen as a court settlement ex Article 2 jo. 59 Brussels I-bis,[2]—instead of being a judgment ex Article 2 Brussels I-bis.

The ECJ has ruled that a decision of a court can be seen as a judgment if it emanates from a judicial body of a Contracting State deciding through its own authority on the issues between the parties.[3] The court has to indicate that it has ruled on the content of the decision. Furthermore, 'a decision is a judgment of a court which itself determines a matter at issue between the parties'.[4] The ECJ has reiterated that settlements cannot be seen as judgments, even if the settlement is concluded by the court. The content of the settlement always depends on the willingness of the parties. Hence a court decision cannot be seen as a judgment when the court's only task was to approve an already arranged settlement.[5] Moreover, in the Denilauler case the ECJ stated:

> (…) it is clear that the Convention is fundamentally concerned with judicial decisions which, before the recognition and enforcement of them are sought in a state other than the state of origin, have been, or have been capable of being, the subject in that state of origin and under various procedures of an inquiry in adversary proceedings.[6]

The same was stated by the ECJ in the Gambazzi case.[7]

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[1] As was noted in the previous chapters, Article 2 Brussels I-bis describes a judgment as any judgment given by a court or tribunal of a Member State, whatever it may be called (including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court).

[2] A court decision can be seen as either a judgment ex Article 2 Brussels I-bis or as a court settlement ex Article 2 jo. 59 Brussels I-bis. There is no overlap between these two definitions. The ECJ stated in case C-414/92, Solo Kleinmotoren v. E. Boch that an enforceable settlement reached before a court of the State in which recognition is sought in order to settle legal proceedings which are in progress does not constitute a 'judgment'. See also Van Lith 2011, p. 111 and Wasserman 2010, under 36.

[3] C-414/92, Solo Kleinmotoren v. E. Boch, para 17.

[4] C-414/92, Solo Kleinmotoren v. E. Boch, para 21.

[5] C-414/92 Solo Kleinmotoren v. E. Boch, para 18. See also Jenard Report, p. 56, Magnus et al. 2016, pp. 99–100, Briggs 2009, p. 712 and Van Lith 2011, p. 109.

[6] C-125/79 Bernard Denilauler v. SNC Couchet Frères, para 13.

[7] C-294/07 Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company.

Considering ECJ case law, it all comes down to the influence a court has over an eventual judgment. In the collective settlement procedure, parties (including the individual victims of the mass dispute) have the right to defend themselves before the court (Articles 282[8] and 1014[9] DCCP). This means that such a procedure can be adversarial/contentious.[10] For example, in the Shell case, Dexia lodged a defence before the Amsterdam Court of Appeal. Moreover, in a collective settlement procedure, the Amsterdam Court of Appeal is required to ascertain whether the settlement satisfies the requirements the law sets out in Articles 7:907(2) and 7:907(3) DCC. If the settlement does not satisfy these requirements, the Court of Appeal can refuse to make the settlement binding and can, for example, force parties to revise the settlement agreement.[11] Another example of the influence the Court of Appeal has in a WCAM procedure can also be seen in the Shell case. In this case, the Amsterdam Court of Appeal ruled that the pension funds which were party to the settlement could not fall under the decision which made the settlement binding. Hence, the Court of Appeal may decide to exclude certain parties from the agreement, or at least from the decision, to also bind these parties through the eventual court decision.[12]

Based on the above-mentioned case law, a court decision can be seen as a judgment ex Article 2 Brussels I-bis, when the decision is based on proceedings that are adversarial, in which parties were heard and when the court reaches its decision on the basis of its own authority on the matter. The Amsterdam Court of Appeal will have appreciable influence over the content of the agreement, as before making the agreement binding for parties to the mass dispute that are not party to the settlement agreement it will have to test whether the agreement fulfils all of the legal requirements. Together with the fact that the request to make the settlement agreement binding, this shows that the court decision must be seen as a judgment ex Article 2 Brussels I-bis.

Van Lith also looked at 'consent judgments' as a category of a court decision.[13] Although such judgments have many similarities with a court settlement, consent judgments must be seen as judgments ex Article 2 Brussels I-bis.[14] And although they are seen merely as contracts that are acknowledged in open court and are ordered to be recorded, they nevertheless bind the parties as fully as other

[8] Which relates to lodging a defence in proceedings commenced by an application in general.

[9] Which relates to the possibility of an interest group lodging a defence in a WCAM procedure.

[10] C-125/79 Bernard Denilauler v. SNC Couchet Frères, para 13.

[11] See Article 7:907(4) DCC.

[12] Should the court of appeal decide that a certain party cannot be bound by the settlement agreement, the end result is that this party is not bound to the agreement by the binding effect of the court's decision. It does not mean, however, that the party is no longer a party to the settlement agreement. As this agreement is in principle a purely contractual matter, the court cannot alter the parties to the agreement directly.

[13] Van Lith 2011, p. 109.

[14] Magnus et al. 2016, pp. 99–100.

judgments.[15] The difference between a consent judgment and a court settlement apparently lies in the effect of res judicata, which consent judgments have and court settlements do not.[16] In my opinion, the WCAM judgment is much more than a consent judgment, because—as has been set out in this section—the court actively assesses the settlement agreement in relation to the various requirements stipulated in the law. Although the WCAM judgment does have the effect of res judicata, the role of the court is much more extensive than it is in consent judgments. As a result, it is more likely that a WCAM judgment must be seen as a judgment ex Article 32 Brussels I-bis.

Alternatively, should the decision to make the settlement binding not be seen as a judgment as mentioned in Article 2 Brussels I-bis (quod non), then it should be seen as a settlement as mentioned in Article 2 jo. 59 Brussels I-bis. An important requirement that such a court-approved settlement must meet in order to be seen as a settlement pursuant to Article 59 Brussels I-bis, however, is that the settlement must have been concluded during court proceedings. The settlement agreement in a collective settlement procedure has, however, been concluded before the request to actually declare it binding is filed. Moreover, court settlements are 'essentially contractual in that their terms depend first and foremost on the parties' intention'.[17] As a result, Article 59 Brussels I-bis cannot apply. In addition, although the English version of the Regulation mentions an approval by a court, formal approval of a court is not a requirement under Article 59 Brussels I-bis.[18] The Dutch, French and German versions of the Regulation mention only that the settlement has to be concluded before a court or during the proceedings. As most versions of the Regulation do not contain the approval of a court as a requirement, I will not take this requirement into account.[19]

The difference between an Article 2 Brussels I-bis judgment and an Article 59 Brussels I-bis settlement is that Article 2 Brussels I-bis judgments will be recognised ipso jure, whereas Article 59 Brussels I-bis settlements cannot and will not be recognised ipso jure, but can only be enforced.[20]

Taking into account the influence the Amsterdam Court of Appeal can have on the content of the settlement and the way the settlement is made binding, and the fact that the WCAM court decision cannot be seen as a court settlement ex Article 59 Brussels I-bis, a binding declaration must be seen as a judgment ex Article 2 Brussels I-bis.

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[15] Ibid.

[16] Van Lith refers to AG Gulmann's Opinion in C-414/92 Solo Kleinmotoren v. E. Boch under para 30. See Van Lith 2011, p. 109. See also Briggs 2009, p. 712.

[17] C-414/92 Solo Kleinmotoren v. E. Boch, para 21.

[18] See Van Lith 2011, p. 112.

[19] See also the Heidelberg Report on the Brussels Regulation in which the English version of Article 59 Brussels I-bis is found misleading. See Heidelberg Report § 551, p. 161.

[20] Halfmeier 2012, p. 179.

12.3 Enforcement of a WCAM Judgment

A WCAM judgment binds the parties in the mass dispute (interest group, perpetrator, and the victims) to the settlement agreement. The only part of the settlement agreement that is enforceable is the agreed compensation the perpetrator will have to pay the various individual victims. The individual victims will have a reason to enforce the WCAM judgment only when they have not yet been paid by the perpetrator (or by the third party that the settlement agreement has tasked with arranging payment of the compensation). In the next section, the grounds on which the recognition of the court decision and the enforcement of the compensatory part of the settlement agreement could be refused will be set out.

12.4 Non-Recognition and Non-Enforcement of a WCAM Judgment

Since the WCAM judgment must be seen as a judgment ex Article 2 Brussels I-bis, the grounds for non-recognition and non-enforcement can also be applied to the WCAM procedure. In the following subsections these various grounds and the way in which they can be applied in a WCAM procedure will be set out. Although the 'defaulting defendant' ground can be found in Article 45(1)(b) Brussels I-bis, where it comes after the public policy exception, this ground will be covered first, as the public policy exception can be used only when it has been determined that the defaulting defendant ground cannot be applied.

12.5 Defaulting Defendant

The first ground on the basis of which recognition and/or enforcement of a WCAM judgment could be refused can be present in the situation in which the defendant (i) was in default of appearance and (ii) was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, and (iii) failed to commence proceedings to challenge the judgment when it was possible for him to do so. The use of this ground of refusal depends on the definition of the term 'defendant'. As has been stated in Sect. 7.6, there are several possible 'defendants' in a WCAM procedure. As was set out in that section, neither the interest group nor the perpetrator can be seen as defendants. This leaves the individual victims in the mass dispute as the only possible defendants. Because these individual victims are not at risk of being ordered to do something, in my opinion they cannot be seen as defendants pursuant to Article 4 Brussels I-bis. Should the defendant referred to in Article 45(1)(b) Brussels I-bis be the same person as the 'defendant' referred to in

Article 4 Brussels I-bis, it would not be possible to refuse recognition of a WCAM judgment pursuant to Article 45(1)(b) Brussels I-bis, as there is no defendant that could not be served correctly.

When the Dutch text of the Brussels Regulation is used and the description of the term defendant is used in relation to Article 45(1)(b) Brussels I-bis, the defendant is the person who is summoned. This is also the interpretation of the term defendant that is used by the Amsterdam Court of Appeal. The Amsterdam Court of Appeal argues that the individual victims who will be bound by the settlement agreement after it has been made binding should be seen as defendants. When examining the usability of this provision, I will use the interpretation of the term defendant used by the Amsterdam Court of Appeal.

In addition to depending on the answer to the question of who the defendant that has not entered in appearance is, the usability of this provision also greatly depends on whether the claimant has knowledge of the defendant's identity in order to serve him correctly.[21] If the applicants do not know every victim/defendant in the proceedings, they cannot serve him/them and therefore cannot offer him/them the opportunity to actually lodge a defence.[22] In lodging a defence, a defendant would default in appearance, with the consequence that this specific defendant might file for the refusal of the recognition of the WCAM.

When the definition of a defendant is used in the way the Amsterdam Court of Appeal uses it, it is more difficult to prevent defaulting defendants. The applicants to the binding request are unlikely to know every defendant/victim in the mass dispute, which would prevent these parties from being served with the document which instituted the proceedings. In such an event, these defendants could object to the recognition and enforcement of a WCAM settlement pursuant to Article 45(1)(b) Brussels I-bis. Since there could be tens of thousands of victims/defendants in a WCAM procedure, the Dutch legislator has decided that it should also be possible to serve these victims through announcements and general summons in newspapers. It is questionable whether this way of serving the victims in a WCAM procedure is acceptable pursuant to the Brussels Regulation. The EU Service Regulation has as its starting point the direct service of defendants; at the very least they need to be informed about the document instituting the claim. Looking at Article 45(1)(b) Brussels I-bis, it is doubtful whether a summons in a newspaper will be accepted as formally serving a defendant and, consequently, whether a WCAM judgment is even recognisable. In my opinion, serving defendants through mass media should not be seen as actual service on a defendant. It is, however, the question if there is even a way in which parties to a mass dispute can be served without sending them

[21] Nevertheless, in case a procedure relates to parties that have an unknown domicile, a court—following the ECJ decisions in C-327/10, Hypoteční Banka v. Lindner [2011] and C-292/10, G. v. Cornelius de Visser [2012]—may only continue proceedings once it has determined that all possible measures have been taken to offer the defendant the possibility to lodge a defence. Hence, the Dutch court in a WCAM procedure should be absolutely sure that these measures have been taken.

[22] See for example also Ten Wolde et al. 2013.

personally the specific application or writ of summons, because using mass media to reach the victims in a mass dispute always leaves a margin of error in which there are certain parties that will not be served correctly. In such a situation, it will remain unclear how many parties were served incorrectly.

Looking at Article 28 Brussels I-bis, however, a situation in which a judgment is given in a dispute in which not all defendants are summoned should never occur, because since the applicants in the proceedings are unable to guarantee that every victim/defendant is notified correctly, the court should stay the proceedings (Article 28(2) Brussels I-bis). The Amsterdam Court of Appeal, however, neglected to apply this rule in the Converium judgment.[23]

In summary, when the term defendant is interpreted the same way as is done in Article 4 Brussels I-bis, the victims cannot be seen as defendants, which makes it impossible to serve defendants incorrectly and apply Article 45(1)(b) Brussels I-bis. If the term defendant is interpreted the same way as is done by the Amsterdam Court of Appeal, it is possible to refuse recognition and/or enforcement on the ground of Article 45(1)(b) Brussels I-bis, but it is highly unlikely that this ground will be used, because Article 28 Brussels I-bis should have prevented the victims/defendant being notified incorrectly. The Amsterdam Court of Appeal, however, has not apply this rule, probably because the WCAM uses a general summons via newspaper announcements.

12.5.1 Public Policy

If a WCAM judgment must be recognised or enforced and it is not in violation of Article 45(1)(b) Brussels I-bis, the public policy exception could provide an alternative ground for refusal. This exception has to be interpreted restrictively, since it forms an exception to one of the goals of the Brussels Regulation, namely the free movement of judgments.[24] For this ground it is required that recognition and/or enforcement are/is manifestly contrary to public policy.[25] The ECJ stated in Krombach v. Bamberski that the public policy exception could be used when a certain infringement 'would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.'[26] In the Gambazzi case the ECJ tried to give a more autonomous interpretation of the public policy exception. Should the WCAM judgment (or part of it) be a manifest and

[23] See Amsterdam Court of Appeal 12 November 2010, *JOR* 2011, 46.

[24] Case C-38/98, Régie Nationale des Usines Renault SA v. Maxicar SpA [2000], ECR, para 26, Case C-145/86, Hoffman v. Krieg, para 21 and Case C-78/95, Hendrikman v. Verlag, para 23.

[25] This means that the public policy exception specifically aims for the effect of recognition and/or enforcement and is not aimed at the content of the judgment itself. Reviewing the content of the judgment is also prohibited in Article 52 Brussels I.

[26] Case C-7/98, Dieter Krombach v. André Bamberski [2000] ECR I-1035, para 37.

disproportionate infringement of the defendant's right to be heard,[27] the recognition and/or enforcement can be refused.

Before the recognition and enforcement of a judgment can be withheld pursuant to the public policy ground, the other grounds for refusal have to be scrutinised, because the various grounds must not overlap.[28] In the WCAM context, Article 45(1)(a) Brussels I-bis can be used in situations in which defendants were served correctly, but did not, for example, have the opportunity to be heard. In normal two-party procedures it is unlikely that a person would not be heard if he had been served correctly, as the consequence that the party is not heard will probably be a consequence which is the responsibility of the defendant himself. With the WCAM procedure, however, parties can also be served through the use of newspaper announcements or other generally used media services. Should this method of service be acceptable pursuant to Article 45(1)(b) Brussels I-bis, it could very well be that the newspaper announcement of the hearing is not received by all 'defendants' and hence there would still be a real chance that defendants would not be aware of the hearing and thus have no opportunity to be heard. In such an event, it is unlikely that the WCAM judgment's recognition can be refused pursuant to Article 45(1)(b) Brussels I-bis, but the refusal might be based on the broader public policy ground of Article 45(1)(a) Brussels I-bis.

When, for example, the German procedural rules are taken as a basis for possible use of the public policy ground, the right to be heard is seen as a requirement giving the affected person an opportunity to express himself before a decision is made.[29] The affected person must have the opportunity to influence the proceedings, otherwise, according to Halfmeier the judgment would be in violation of German procedural public policy.[30] The only two ways for victims/defendants to influence the outcome or the effect of the procedure on themselves are to either file a statement of defence, for which it is required to have knowledge about the procedure (which will probably be achieved if the victims/defendants have been served correctly), or to use the opt-out in situations in which they have acquired knowledge about the WCAM judgment and do not wish to be bound by that judgment. Filing a statement of defence does affect the outcome of the proceedings. When looking at the WCAM procedure, it is, however, questionable whether the use of the opt-out also constitutes having influence on the outcome of the proceedings, as the outcome remains the same and only the persons that are bound by the procedure change. In that respect, the right to be heard is a personal right of every defendant. No one should be bound by a judgment without having had the possibility of expressing his

[27] Case C-394/07, Gambazzi v. Daimler Chrysler Canada Inc [2009], ECR I-0000, para 48.

[28] Case C-145/86, Hoffman v. Krieg [1988], ECR 645, para 21 and Case C-78/95, Bernardus Hendrikman and Maria Feyen v. Magenta Druck & Verlag GmbH [1996], ECR I-4943, para 23.

[29] Halfmeier 2012, p. 181. See also the referred jurisdictional analysis in Halfmeier's article. For other examples of the public policy of Member States in relation to collective redress, see Fairgrieve 2012, pp. 178–186. See also Kramer 2014, pp. 267–270.

[30] Halfmeier 2012, p. 181 and the jurisdiction on the basis of which Halfmeier arrives at this conclusion.

views on the matter. This is why the right to be heard cannot block the recognition and enforcement of a WCAM judgment, since parties have the right to choose not to be bound by the WCAM judgment. The fact that these parties are not heard and hence could not influence the content of the judgment does not matter; what matters is the fact that they are not necessarily bound by the judgment. Parties have the right to opt out of the judgment for at least three months after the known defendants have been notified and it has been attempted to reach the unknown defendants by placing an announcement in several newspapers and/or other media (Article 7:908(2) DCC). If a 'defendant' has no knowledge of the fact that he has suffered damage, the judgment will have no effect if he opted out of the judgment after he received knowledge of the damage (Article 7:908(3) DCC). Hence the law is based on the assumption that a defendant has knowledge of the settlement and the pending WCAM procedure, when this defendant is aware of the fact that he suffered damage.

In my opinion, however, it is possible that a victim of a mass dispute is aware of the fact that he suffered damage, but at the same time has no knowledge of the WCAM judgment. In such an event, it is possible that this person is bound by a judgment of which he has no knowledge. In that case this defendant could, pursuant to Article 45(1)(a) Brussels I-bis, request the court to refuse recognition of the WCAM judgment and prevent it from being bound by the collective settlement.

A commonly heard link with a violation of the Article 45(1)(a) Brussels I-bis public policy in relation to opt-out mass disputes is an infringement of Article 6 ECHR and the right to a fair trial.[31] Halfmeier cites as an example the case of Lithgow v. United Kingdom,[32] in which the Strasbourg court decided that the right to an individual procedure may be limited or restricted if such restriction serves a legitimate goal and is not disproportional.[33] The reason why individual procedures had been limited in this matter was because a flood of individual procedures could simply not be handled.[34] As the shareholders in this case could influence the proceedings indirectly, the consequences were not disproportional. Based on this case, the Strasbourg court decided that opt-out procedures could be seen as fair trial proceedings.[35]

Although there is a sort of autonomous definition of public policy, the exact use of this ground for refusal depends on the rules of the Member State in which a judgment has to be recognised and/or enforced. Since the victims in a cross-border WCAM procedure are seen by the Amsterdam Court of Appeal as the defendants, it would mean that there could be many interpretations of the public policy exception.

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[31] See Spindler 2001 and Alvarez de Pfeifle 2009. See also Fairgrieve 2012, pp. 183–184.

[32] ECtHR 24 June 1986, Series A no. 102, p. 71.

[33] Halfmeier 2012, p. 182.

[34] Halfmeier 2012, p. 182.

[35] In Halfmeier's article, reference is also made to another case of the Strasbourg court in which the court used a comparable approach. See Halfmeier 2012, p. 182 and Wendenburg et al. v. Federal Republic of Germany, ECtHR 6 February 2003, decision no. 71630/01, ECHR 2003-II, 347.

As with all aspects of cross-border mass litigation in the EU, there is not much experience to go on. In addition to the above-mentioned interpretations of the public policy, insight can be gained from the recognition and/or enforcement of class action judgments from the US. For example, in the Vivendi class action[36] and the Porsche class action,[37] German courts indicated that they would not recognise the subsequent judgments.[38] As a result, jurisdiction was not assumed by the US court in relation to the German plaintiffs in the case. In these cases the German disposition principle was an important aspect on which the assumption that the judgment would be in violation of German public policy was based. The disposition principle, which can be seen as the procedural part of the principle of party autonomy, guarantees that parties are free to decide whether to bring a claim before a court.[39] When parties are bound by a WCAM judgment, they are deprived of their right to decide themselves whether they wish to bring a claim. It can be said that the victims in a mass dispute have the right to opt out of a WCAM judgment, which puts them in a situation in which they can again decide to bring a claim themselves.[40] This, however, requires the victims to act before they can bring their action, whereas the principle of party autonomy/disposition principle is based on the premise that parties are free to decide to bring a claim directly. As a result, even with the possibility to opt out of a WCAM judgment, a WCAM procedure can—in theory—be in violation of the German disposition principle and thus German public policy.

In addition to the German interpretation of the disposition principle, it has also been argued that some Member States' public policy do not allow anti-suit injunctions.[41] A WCAM judgment can, at least partly, be seen as an anti-suit injunction, since pursuant to the binding settlement agreement, proceedings may not be started against the perpetrator. Although a WCAM judgment also has the consequence that the victims will be paid damages and the judgment can only partly be seen as an anti-suit injunction, Member States could very well refuse the

[36] US District Court, Southern District of New York 21 May 2007, 241 F.R.D. 213.

[37] US District Court, Southern District of New York 30 December 2010, 2010 WL 5463846 (S.D.N.Y.).

[38] Please note that, although it was indicated that US class action judgments would not be recognised in Germany, there have not been any actual judgments in which the recognition of such class action judgments was denied. See Halfmeier and Wimalasena 2012a, p. 649. See also for an analysis of the recognition and enforcement of US class action judgments in the EU, Pinna 2008.

[39] See Halfmeier 2012, p. 183.

[40] Halfmeier, for example, is of the opinion that in certain mass disputes, victims are unlikely to bring a claim due to the small size of the claim and the costs entailed in filing a claim. In such an event the opt-out would indeed make it unlikely that the disposition principle is violated, since it is unlikely that the victim would actually bring the claim. However, this is not the case in substantive mass disputes in which the damages suffered and the subsequent claim are larger than in the so-called 'strooischade' or 'Streuschaden' cases Halfmeier is referring to. See Halfmeier 2012, p. 183.

[41] Magnus et al. 2016, pp. 897–898.

recognition of such a judgment because it is contrary to a Member State's public policy.

Summarising, there can be several situations on the basis of which a court of a Member State could refuse to recognise a WCAM judgment when that judgment is contrary to that Member State's public policy. The structure of the WCAM, in which there can be a group of victims that has not been served correctly (due to the fact the serving a person through a newspaper announcement cannot be seen as a due service) gives rise to three possible scenarios: a defendant/victim is not heard correctly; a defendant is brought into a procedure that he did not decide to be part of; or a defendant is not allowed to start a procedure against the perpetrator.

12.5.2 Irreconcilable Judgment

Since the victims in a WCAM procedure are seen as defendants (or at least as interested parties), they are party to the proceedings with the perpetrator. Should a victim or the perpetrator have started a parallel individual or collective procedure in another Member State and should one of the parties try to recognise and/or enforce the WCAM judgment in this State, the ground for refusal in Article 45(1)(c) Brussels I-bis could be used.

Should individual parties start separate proceedings outside the Netherlands, the parties to these proceedings would be the same—at least in relation to the victims and the perpetrator. The judgments that would result from these proceedings would be irreconcilable, since the judgments would entail legal consequences that are mutually exclusive; both judgments would probably relate to the perpetrator's payment of damages, which—because of the res judicata effect—would cause the victim to lose his right to file a claim elsewhere. As a result, should there be such an irreconcilable judgment in the Member State in which recognition and/or enforcement of the WCAM judgment is sought, the recognition and/or enforcement could be refused pursuant to Article 45(1)(c) Brussels I-bis.

12.5.3 Conflict with Judgment Given in Another Member State

As was concluded in Sect. 8.2, the cause of action and the object of the WCAM procedure are not the same as in a regular compensatory claim. The legal relationship on which the claim is based differs between the WCAM and regular case: the WCAM claim is based on the settlement agreement, whereas a regular individual claim is based on an individual legal relationship between the victim and the perpetrator. The object is also different, since the WCAM procedure is aimed at binding the settlement whereas the individual procedure is aimed at compensation.

Article 45(1)(d) Brussels I-bis requires that the cause of action between the alleged irreconcilable judgments are the same. Since this cannot be the case, it is unlikely that this ground for refusal can be used.

12.5.4 Summary

A WCAM judgment must be seen as a judgment ex Article 2 Brussels I-bis and not as a court settlement ex Article 59 Brussels I-bis, because—among other reasons—the Amsterdam Court of Appeal can influence the content of the settlement agreement and the way the settlement is made binding. Hence the grounds for refusal of Article 45 Brussels I-bis apply.

Regarding Article 45(1)(b) Brussels I-bis, when the term defendant is interpreted the same way as is done in Article 4 Brussels I-bis, the victims cannot be seen as defendants, which makes it impossible to serve defendants incorrectly and apply Article 45(1)(b) Brussels I-bis. If the term defendant is interpreted the same way as is done by the Amsterdam Court of Appeal, it is possible to refuse recognition and/or enforcement on the ground of Article 45(1)(b) Brussels I-bis, but it is highly unlikely that this ground will be used, because Article 28 Brussels I-bis should have prevented the victims/defendant being notified incorrectly. The Amsterdam Court of Appeal, however, has not applied this rule, probably because the WCAM uses a general summons via newspaper announcements.

The second possible ground to refuse the recognition and/or enforcement is the public policy ground. Regarding this ground, several situations are possible on which a court of a Member State could base a refusal to recognise a WCAM judgment that is contrary to that Member State's public policy. Given the structure of the WCAM, in which there can be a group of victims that has not been served correctly (because serving a person through a newspaper announcement cannot be seen as a service), three scenarios are possible: a defendant/victim is not heard correctly; a defendant is brought into a procedure that he did not decide to be part of; and the defendant is not allowed to start a procedure against the perpetrator.

With regard to Article 45(1)(c) Brussels I-bis, which requires other judgments to be based on proceedings between the same parties, this ground can be used in order to refuse the recognition of the WCAM judgment, since such a judgment can entail consequences which are mutually exclusive in relation to possible individual proceedings between the perpetrator and one of the victims of the mass dispute. The ground set out in Article 45(1)(d) Brussels I-bis can, however, not be used. Before this ground can be used to refuse the recognition and/or enforcement, it not only requires parties to be the same but also requires the dispute to have the same cause of action. As has been set out in relation to the lis pendens rule, which also has this requirement, the WCAM procedure cannot have the same cause of action as an ordinary two-party procedure. As a result, Article 45(1)(d) Brussels I-bis is unlikely to be used in relation to the WCAM procedure.

12.6 Goals of Collective Redress

As explained above, there is some uncertainty as to whether a WCAM judgment is recognisable in other Member States. It is unclear whether a WCAM judgment can be used in order to finalise a mass dispute for all related victims in the various Member States. A WCAM judgment's recognition and/or enforcement could be refused pursuant to Articles 45(1)(a) (depending on the public policy of the specific Member State), 45(1)(b) (in relation to those victims who are informed of the hearing through an announcement in a newspaper) and 45(1)(c) (if individual parties have started separate proceedings and the WCAM judgment is to be recognised in that specific Member State) Brussels I-bis. As a result, the effectiveness of a WCAM judgment and the effectiveness of the legal protection the WCAM has to offer is questionable. If parties could prevent the WCAM judgment being recognised in other Member States, the WCAM could no longer be used to resolve a mass dispute by a single court and in a single procedure. If recognition and/or enforcement is refused pursuant to Article 45(1)(c) Brussels I-bis, the refusal can be attributed to the fact that an individual has started a parallel procedure. Hence any effect of the refusal should be linked not to the rules of the Brussels Regulation, but to the choice made by the individual victim. On the other hand, WCAM case law (only two known cross-border WCAM cases) shows that parties have never appealed against the recognisability and enforceability of a WCAM judgment. Hence, appealing against a WCAM judgment is possible, but parties have not yet required the usable grounds for refusal. This is probably because the parties that do not wish to be bound by the WCAM judgment could simply opt out of the judgment. Nevertheless, the grounds in Article 45 Brussels I-bis can be used to impair the effective legal protection the WCAM is intended to provide.

If the recognition and/or enforcement is refused, the consequence would probably be that parties (if Articles 45(1)(a) and 45(1)(b) Brussels I-bis are invoked) are forced to start proceedings in another Member State (probably the one in which recognition and/or enforcement is denied). This would automatically mean that parties will incur more costs and that it will take more time to resolve the mass dispute. As a result, should the WCAM judgment's recognition and/or enforcement be refused, the efficient legal protection the WCAM is intended to ensure cannot be achieved. In that event, courts of other Member States would automatically be forced to look into the same mass dispute that should have been resolved through use of the WCAM procedure. Consequently, the administrative burden of the judiciary is greater than when the mass dispute is resolved through use of the WCAM.

Summarising, the rules on recognition and enforcement could prevent a mass dispute from being resolved by use of the WCAM in a single procedure, making it less likely that the WCAM can offer effective legal protection.

References

Alvarez de Pfeifle ME (2009) Der ordre public-Vorbehalt als Versagungsgrund der Anerkennung und Vollstreckbarerklärung internationaler Schiedssprüche. Peter Lang, Frankfurt am Main

Briggs A (2009) Civil Jurisdiction and Judgments. Informa Law, London

Fairgrieve D (2012) 'The impact of the Brussels I-bis enforcement and recognition rules'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford

Halfmeier A (2012) 'Recognition of a WCAM settlement in Germany'. NIPR 2

Halfmeier A, Wimalasena P (2012a) 'Rechtsstaatliche Anforderungen an Opt-out-Sammelverfahren: Anerkennung ausländischer Titel und rechtspolitischer Gestaltungsspielraum'. JuristenZeitung 13

Kramer XE (2014) 'Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries'. Pacific McGeorge Global Business & Development Law Journal 2

Magnus U et al (2016) 'Brussels I Regulation'. Sellier, Munich

Pinna A (2008) 'Recognition and res judicata of US class action judgments in European legal systems'. Erasmus Law Review, volume 1, issue 2

Spindler JC (2001) Anerkennung und Vollstreckung ausländischer Prozessvergleiche unter besonderer Berücksichtigung der US-amerikanischen Class Actions Settlements. Thesis, Konstanzer Schriften zur Rechtswissenschaft, Hartung-Gorre Verlag, Konstanz

Ten Wolde MH et al (2013) 'De wet collectieve afwikkeling massaschade: wat is zij waard in het buitenland?' NTBR

Van Lith H (2011) The Dutch collective settlements act and private international law. Maklu, Apeldoorn

Wasserman R (2010) 'Transnational Class Actions and Interjurisdictional preclusion'. University of Pittsburg Legal Studies Research Paper No. 2010-04

Chapter 13
Goals of the Brussels Regulation Regarding Recognition and Enforcement

Abstract In order to check whether the recognition and enforcement rules in the Brussels I-bis Regulation should and could be used in a collective redress context, the goals of the Brussels Regulation are analysed. What is the aim of the Brussels Regulation with respect to recognition and enforcement, and do these goals for example exclude the recognition and enforcement rules in collective redress proceedings? These issues will be covered in this chapter.

Keywords Goals Brussels Regulation · Legal certainty · Most appropriate court · Free movement of judgments · Rights of the defence

13.1 Interim Conclusions Regarding Recognition and Enforcement

As explained in the preceding chapters, the structure of the three collective redress mechanisms also has an effect on the possible recognition and enforcement of the subsequent judgment. In a KapMuG procedure, the judgment the individual parties receive is a normal judgment between two parties. As result, recognition and/or enforcement is refused only when one of the grounds in Article 45(1) Brussels I-bis applies. This is unlikely, due to the various safeguards such as the lis pendens rule.

With respect to the collective action procedure, the recognition and enforcement of both the collective action judgment and the subsequent individual judgments has been analysed. The individual judgments are—like the KapMuG judgments—ordinary requests for recognition, which makes it unlikely that issues relating to the structure of the collective redress mechanism would arise. Regarding the collective action judgment, it is unlikely that the interest group will be a party in the other Member State in which it wishes to have the collective action judgment recognised. It is more likely that the individual victims would want to have the collective action judgment recognised in another Member State, to try and obtain a favourable judgment in an individual procedure in that Member State. In theory, it is also unlikely that the request of the victims (who are interested parties and hence may

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request that the collective action judgment be recognised) for recognition will be refused. Being interested parties to the collective action procedure, the victims are entitled to request such recognition.

In the case of the WCAM procedure, the structure of the procedure and the addition of the interest group has more impact on the recognition and enforcement process. The victims, who together with the perpetrator are the parties that will request the recognition or enforcement of the WCAM judgment, have to be notified correctly in order for the WCAM judgment to be recognisable and enforceable. Since all victims involved in the mass dispute are—in theory—bound by the WCAM judgment, a potentially large group will have to be notified. Due to the sheer number of victims, it is possible that not all victims will be notified correctly. Pursuant to Article 45(1)(b) Brussels I-bis, this could lead to refusal of the recognition of the judgment. Because the individual victims are not a party to the WCAM proceedings, the WCAM judgment might be contrary to a Member State's public policy because they have not been heard in the WCAM proceedings. This could also be a ground for refusal of the recognition and enforcement of a WCAM judgment.

From the foregoing it can be concluded that there are various situations which make the recognition and enforcement of collective redress judgments very different from what is the case with normal judgments. Although it is crucial to determine whether one of the main goals of the Brussels Regulation—namely the free movement of judgments—is achieved, it is also important to ascertain whether the use of the three types of collective redress mechanisms and the possible recognition and enforcement of the subsequent judgments are in line with the Regulation's other goals. In the following sections, the various goals that relate to the recognition and enforcement of judgments will therefore be analysed in relation to the three types of collective redress mechanisms.

13.2 Goals of the Brussels Regulation

When analysing the goals of private international law in relation to the recognition and enforcement of foreign judgments, the first and most important goal that will have to be looked at is the goal of free movement of judgments. This is one of the main goals that seem to be the fundamental basis of the Brussels Regulation. Other important goals are the rights of the defence (which is contained in the current grounds for refusal of recognition in Articles 45(1)(a) and 45(1)(b) Brussels I-bis) and legal certainty (which aims at preventing irreconcilable judgments as laid down in Articles 45(1)(c) and 45(1)(d) Brussels I-bis). During the recognition and enforcement process it is prohibited to review judgments as to their substance and to review the jurisdiction of the court of origin. The prohibitions prevent courts from looking into what is or might be the most appropriate court and therefore it seems that the goal with the lowest priority during the recognition and enforcement phase is that of securing the most appropriate court. This goal plays a larger role in

the jurisdiction phase. As a result, below I will discuss only the goals of free movement of judgments, rights of the defence and legal certainty in relation to the use of the rules on recognition and enforcement.

Recognition and enforcement of the individual *KapMuG* judgments shall only be refused when there are already earlier judgments from different courts in the same case (Articles 45(1)(c) and 45(1)(d) Brussels I-bis). Since such situations will be prevented by the lis pendens rule or the rule on related actions, the goal of free movement of judgments is complied with in KapMuG cases. As it also seems unlikely that parties to a KapMuG procedure will not be notified/served properly, there is a high probability that the rights of the defence will be upheld. The Service Regulation forms the basis for parties to be notified properly. Moreover, since there are usually only one or a few defendants (compared to the thousands of victims) and because of the financial interests in a cross-border mass dispute, it seems unlikely that public policy will be infringed.

Even though the lis pendens rule and the rule on related actions should prevent irreconcilable judgments in the first place, it remains possible that courts will rule inconsistently. Hence Articles 45(1)(c) and 45(1)(d) Brussels I-bis could still be used as grounds for refusing recognition and enforcement. Although the lis pendens rule and the rule on related actions can be circumvented, the above-mentioned grounds for refusal of recognition and enforcement will prevent irreconcilable judgments and thus guarantee legal certainty. Moreover, the KapMuG procedure is such that a refusal of recognition or enforcement is to be expected when there is a parallel judgment in another Member State. Hence the refusal of the recognition or enforcement of a judgment should not come as a surprise (otherwise this would impair the legal certainty that the rules on private international law should guarantee).

As already mentioned, the goal that the dispute must be resolved by an appropriate court does not play a role in the recognition and enforcement phase. This goal aims at protecting weaker parties and guaranteeing sound administration of justice. A sub-principle that could be related to this phase is the ideal that disputes should be resolved in their entirety before a single appropriate court. Fragmentation of proceedings should be prevented. This, however, is already achieved through automatic recognition and the grounds for refusal of recognition and enforcement. For this reason, this last goal of the Brussels Regulation can therefore not play an important role in this phase of private international law.

With respect to the *collective action procedure*, it seems that the recognition and enforcement of collective action judgments and the subsequent judgments arising from the individual procedures will be refused only when an individual victim has started a parallel procedure in another Member State. Since such situations will be prevented by the lis pendens rule, the goal of free movement of judgments is complied with in collective action cases.

As it also seems unlikely that parties to a collective action procedure will not be notified/served properly, it is very probable that the rights of the defence will be upheld. The Service Regulation forms the basis for parties to be notified properly. Moreover, since there is mostly only one or a few defendants (compared to the

thousands of victims) and because of the financial interests in a cross-border mass dispute, it seems unlikely that public policy will be infringed.

Even though the lis pendens rule should prevent irreconcilable judgments in the first place, it remains possible that courts will rule irreconcilable and inconsistently. Hence Articles 45(1)(c) and 45(1)(d) Brussels I-bis could still be invoked as grounds for refusing recognition and enforcement. Although the lis pendens rule can be circumvented, the above-mentioned grounds for refusal of recognition and enforcement will prevent irreconcilable judgments and thus guarantee legal certainty in relation to the individual procedures that will follow a collective action. Regarding the collective action judgment, there remains a real possibility of irreconcilable judgments, because the rules of Articles 45(1)(c) and 45(1)(d) Brussels I-bis cannot be used in relation to this collective action judgment since the parties to possible parallel individual proceedings will not be the same. This will decrease the legal certainty the Brussels Regulation is aimed for, since the current rules cannot prevent irreconcilable judgments.

As already mentioned, the goal that the dispute must be resolved by an appropriate court does not play a role in the recognition and enforcement phase. This goal aims at protecting weaker parties and guaranteeing a sound administration of justice. A sub-principle that could be related to this phase is the ideal that disputes should be resolved in their entirety before a single appropriate court. Fragmentation of proceedings should be prevented. This, however, is already achieved through automatic recognition and the grounds for refusal of recognition and enforcement. Thus this last goal of the Brussels Regulation cannot play an important role in this phase of private international law.

Summarising, the legal certainty the Brussels Regulation is intended to provide is the most important goal that cannot be complied with in the event of parallel proceedings. Given that the goal of free movement of judgments cannot be met when the WCAM procedure is used in cross-border mass disputes, it can be concluded that the Brussels Regulation was not drafted with collective settlements with an opt-out character in mind. The group that is bound by a WCAM judgment is so large that freedom of judgments could mean that other goals and/or principles of the Brussels Regulation are violated. As a result, the grounds for refusing to recognise and/or enforce a WCAM judgment—which are intended to prevent violation of these underlying principles—can be used on numerous occasions in order to block the use of the WCAM judgment in other Member States.

Because one of the options of serving parties when using a WCAM is to place announcements, it is possible that a party will not be served properly and, after the WCAM settlement agreement has been made binding, is also not served properly with the decision delivered. This would mean that the rights of the defence have not been sufficiently complied with. Accordingly, the recognition and/or enforcement of a WCAM judgment can be denied in such events pursuant to Article 45(1)(b) Brussels I-bis. Should this manner of serving be allowed or seen as proper, it could still occur that the victim is unable to have his rights represented in the court hearing in which the settlement agreement will be declared binding. This would also constitute an infringement of the rights of the defence. Accordingly, Article 45(1)(a)

Brussels I-bis could be invoked to deny the recognition and/or enforcement of the WCAM judgment.

If a victim has no knowledge yet of the fact that he has suffered damage in, for example, a securities mass dispute, and this person—without knowledge of the binding WCAM settlement agreement—starts proceedings against the perpetrator in his own domicile, it is possible—depending on, for example, the public policy of the victim's domicile—that the perpetrator will request recognition of the WCAM judgment and thus of the settlement agreement, but the victim will argue that recognition should be refused because it is contrary to the Member State's public policy. Although each victim that has no knowledge of the fact that he suffered damage or is bound by a settlement agreement can opt out of the agreement with which he disagrees, the rules in the Brussels Regulation provide another ground for preventing the WCAM judgment being used in a Member State in relation to a certain victim.

In the event of an irreconcilable judgment in the Member State in which, for example, recognition is being sought, the grounds for refusal of the recognition and/or enforcement could also prevent irreconcilable judgments, as Article 45(1)(c) can be resorted to prevent the recognition and/or enforcement of the WCAM judgment. However, Article 45(1)(d) Brussels cannot be used in relation to a WCAM procedure. As a result, there is still a possibility of irreconcilable judgments, and hence the goal of offering legal certainty by preventing or counteracting irreconcilable judgments is only partly complied with.

As for the goal of resolving a dispute before an appropriate court, it seems that because the recognition and enforceability of a WCAM judgment can be denied on numerous occasions, there is a real possibility that if this scenario occurs, a mass dispute cannot be resolved by a single court through use of the WCAM procedure.

Summarising, if a WCAM procedure were to be used in a cross-border mass dispute, not all of the goals of the Brussels Regulation will be complied with. Free movement of judgments is not complied with, as there are numerous grounds on the basis of which recognition can be denied. Legal certainty is complied with partially, since there still is a possibility of irreconcilable judgments, and because of the possibility that a WCAM judgment cannot be used in other Member States there also is a chance that the mass dispute will not be resolved before a single court, raising the question of whether the mass dispute will indeed be resolved by an appropriate court.

Part IV
Making Cross-Border Collective Redress Possible

Chapter 14
Summary

Abstract This chapter contains a summary of the entire book, which is presented as a summary of the three main fields: types of collective redress mechanisms, rules on jurisdiction, rules on recognition and enforcement, principles of collective redress and goals of the Brussels Regulation.

Keywords Typologies · Collective redress · Jurisdiction · Recognition and enforcement · Brussels Regulation

Introduction to Part IV. (Making Cross-Border Collective Redress Possible)

The following chapters contain a summary of the earlier parts of the book. Next to this summary some recommendations are given for amending the Brussels Regulation in order to facilitate cross-border mass disputes. Next, an overview will be given of some relevant developments in relation to collective redress. This last chapter in this part will conclude by suggesting avenues for future research.

14.1 Typologies of Collective Redress Mechanisms

In the first chapters, a brief introduction was given of the three types of civil law collective redress mechanisms used in the EU in relation to a financial services or securities mass dispute: the model case procedure, the collective action and the collective settlement. To answer the first subsidiary question, examples of these types of procedures were used, making it possible to analyse the application of the relevant private international law rules.

The *KapMuG*[1] is the so-called model case procedure. It is initiated by plaintiffs that file an individual claim at a German Regional Court first. When sufficient individual claims have been filed, the various parties can request a KapMuG procedure. Once the request for a KapMuG procedure has been granted, all individual

[1] See Chap. 2.

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proceedings are suspended. A KapMuG procedure is held before the 'Oberlandesgericht'. This court will use one of the individual cases as a model case. The remaining individual parties will be summoned to the procedure of the model case, where they can participate in the proceedings and even file petitions, as long as they are not contrary to the statements and actions of the main plaintiff in the model case procedure.

The Oberlandesgericht renders a declaratory ruling on the factual and/or legal issues. This model case judgment will have a final binding effect in relation to all the suspended actions. The individual proceedings will be resolved on the basis of the model case judgment. Using the model case judgment allows a large number of individual matters to be resolved relatively quickly, as the courts that are seised with the various individual matters are not required to look into the factual and legal issues that have been decided upon in the model case procedure.

The *Dutch collective action*[2] is a so-called group action. This means that an interest group (either a foundation or an association) will file a claim in order to protect the common interests of a group of people. This group of people has to be described in the articles of association. In addition, the interest group will have to try to negotiate with the perpetrator and should sufficiently guarantee the interest of the victims on whose behalf the action is filed: if not, the interest group will have no legal standing. Since pursuant to Article 3:305a(3) DCC an interest group cannot claim monetary damages for the persons whose interests it represents, it can only request a declaratory judgment in which the court determines that the perpetrator has acted unlawfully. The collective action judgment can be used in proceedings between individual victims and the defendant, since the legal issues (e.g. did the defendant act in violation with the law) that are resolved in the collective action procedure are no longer part of the legal debate in the individual procedures. Hence, the individual victims are able to file an individual action to claim monetary damages with the help of the collective action judgment. The collective action thus has two stages: the collective action itself and the subsequent individual procedures.

In a *WCAM procedure*,[3] an interest group that represents a group of victims in a mass dispute can conclude a settlement agreement with a perpetrator, on the basis of which the perpetrator will pay monetary damages to the various victims in the mass dispute. After this settlement agreement has been concluded, the perpetrator and the interest group can request the Amsterdam Court of Appeal to declare the settlement agreement binding for all the victims in the mass dispute. All the victims will be bound by the settlement agreement. However, they have the right to opt out of the settlement agreement by sending a simple notification to the entity designated in the settlement agreement.

As can be concluded from the above, the three types of mechanisms differ substantially. From a procedural point of view the KapMuG procedure can be seen as a collection of procedures, but the collective action and WCAM procedures are

[2] See Chap. 3.

[3] See Chap. 4.

procedures with one or several interest group(s). In addition, whereas the KapMuG procedure is started by individual procedures that have been resolved on the basis of a single model case procedure, the collective action is a group action that needs to be followed by procedures started by the individual victims, and the WCAM procedure is an opt-out procedure that binds these same individual victims without the requirement of a separate procedure. As will be explained in the next section, these procedural differences also affect the use of the rules concerning jurisdiction and the recognition and enforcement of judgments.

14.2 Application of the Rules on Jurisdiction

In order to answer the second subsidiary question, the various differences between the three examples of collective redress mechanisms have to be taken into account. Because jurisdiction is assigned in relation to the parties to a dispute, the fact that in the WCAM procedure, for example, the actual victims are not a procedural party will affect which court can assume jurisdiction.

14.2.1 KapMuG Procedure[4]

Because the KapMuG procedure can be initiated only by filing an individual claim before a German court, a German court must be able to assume jurisdiction in relation to these individual proceedings before a KapMuG procedure can be initiated. In relation to the grounds of jurisdiction in the Brussels Regulation, several points can be made. A distinction will have to be made between grounds where the defendant has an important role (submission rule and the choice of forum agreement) and grounds in which the defendant does not. If a court cannot base its jurisdiction on Articles 4, 7, 18 Brussels I-bis or a choice of forum agreement, it is always possible for the defendant and the plaintiffs either to use the submission rule and simply have the defendant enter an appearance in all of the proceedings, or have the defendant and the various plaintiffs enter a choice of forum agreement on the basis of which jurisdiction is conferred to the German court. This, however, means that the defendant will have the power not to agree with conferring jurisdiction to a German court, which would make it impossible to use the KapMuG procedure because of lack of jurisdiction.

In relation to a contractual mass dispute, it is important to realise that it is likely that parties have already concluded a choice of forum agreement, since a choice of forum clause has probably already been inserted into the applicable general terms

[4] See Chap. 5.

and conditions of a bank. As such a clause is likely to confer jurisdiction to the bank's domicile, the court of the bank's domicile would be the best court to resolve a mass dispute, since this court would be able to assume jurisdiction in relation to all victims of the mass dispute.

Alternatively, a court can also base its jurisdiction on certain situations on which the defendant has no influence (Articles 4, 7 and 18 Brussels I-bis). If any of the regular grounds of jurisdiction have to be used, in relation to the contractual mass dispute it is important to realise that the grounds of jurisdiction with respect to consumers differ from the grounds that can be used with respect to non-consumers. With respect to consumers, the courts of both the defendant and the consumers can assume jurisdiction; with respect to non-consumers, both the court of the defendant's domicile and the place of performance of the obligation in question can assume jurisdiction. As a result, if the defendant is not domiciled in Germany, the German court can only assume jurisdiction in relation to some of the plaintiffs.

It is not possible to distinguish between consumers and non-consumers in the securities mass dispute. The only grounds that remain to assume jurisdiction in such a mass dispute are Article 4 (the domicile of the defendant) and Article 7(2) Brussels I-bis (the place where the harmful event occurred, which is either the Erfolgsort or the Handlungsort). With respect to both Article 4 and Article 7(2) (in the case of the Handlungsort) Brussels I-bis, the court will be able to assume jurisdiction for all the plaintiffs. If the damage was not caused by an act that occurred in Germany and the defendant is not domiciled in Germany, the German court would be able to assume jurisdiction only in relation to the plaintiffs that suffered damage in Germany. This would make it impossible for the mass dispute to be wholly resolved before the German court.

The best grounds of jurisdiction on which to base a court's jurisdiction in relation to a KapMuG procedure are, however, the grounds that base jurisdiction on the defendant's domicile. Should the defendant be domiciled in Germany, then the German court could assume jurisdiction in relation to all of the plaintiffs. In the financial product case, the court can assume jurisdiction pursuant to Articles 17 and 18 Brussels I-bis for the consumers and on Article 4 Brussels I-bis for the non-consumers. In the securities dispute, it is likely that the damage-causing announcement has been made in the company's domicile. Since the Handlungsort would in that case be in Germany, the German court can assume jurisdiction pursuant to Article 7(2) Brussels I-bis. These grounds of jurisdiction would make the legal protection that is being offered through use of the KapMuG relatively[5] efficient.

[5] Taking into account the fact that cross-border procedures are more costly than national procedures.

14.2.2 Dutch Collective Action[6]

Because the collective action is actually a two-stage procedure, the use of the grounds of jurisdiction will have to be determined in relation to both the collective action and the subsequent individual procedures. With regard to the individual procedures, since these are ordinary two-party proceedings, the way the grounds of jurisdiction apply to the individual KapMuG procedures can also be used in relation to the individual proceedings that follow the collective action judgment. As a result, only when the defendant's domicile is in the Netherlands (Articles 4 and 18 Brussels I-bis) or if the Handlungsort is in the Netherlands (Article 7(2) Brussels I-bis) would the Dutch court be able to assume jurisdiction in relation to all parties in the specific mass dispute. Otherwise, it would not be possible to resolve the entire mass dispute before a single court (see Sect. 6.7).

With respect to the collective action itself, the way the grounds of jurisdiction can be applied in ordinary two-party conflict can only partly be applied. Clearly, the defendant also has the option of entering an appearance in the collective action procedure, hence conferring jurisdiction to that specific court. The defendant also has the option of agreeing to confer jurisdiction to a certain court by using the choice of forum agreement. To that extent, the collective action does not differ from the application of the grounds of jurisdiction in a KapMuG case.

If the parties do not wish to or are unable to use these grounds of jurisdiction, it is necessary to look into the possible use of the other grounds. Since the interest group cannot be seen as a consumer, the rules in consumer-related matters do not apply. In addition, since the interest group cannot be seen as a party to a contract which the perpetrator and the individual victims have concluded (in this book, an agreement that relates to a financial product or service is used as an example), a court cannot assume jurisdiction pursuant to Article 7(1) Brussels I-bis either. The ground of jurisdiction in Article 7(2) Brussels I-bis cannot be applied the same as in two-party disputes either. In order to use this ground of jurisdiction, it is necessary to either ascertain the place where the damage occurred (the so-called Erfolgsort) as the place of the event giving rise to it (the so-called Handlungsort). The representative organisation, however, has not suffered any damage itself. As a result, there can be no "place where the damage occurred", but only a place of the event giving rise to the damage. Consequently, only Articles 4 (as the representative organisation that represents various individual claimants does have a domicile) and 7(2) Brussels I-bis—however, only in relation to the Handlungsort—can be used to base a court's jurisdiction on in collective action matters.

[6] See Chap. 6.

14.2.3 WCAM Procedure[7]

Looking at the applicability of the grounds of jurisdiction in relation to the WCAM, it must be concluded that not all are usable. This is because the victims are seen as interested parties or as defendants, but are not in person a party to the proceedings.

Both the submission rule as the choice of forum agreement can be used to confer jurisdiction to the Dutch court. The use of these grounds, however, requires much coordination in order for a court to be able to assume jurisdiction in relation to all of the known victims. In securities mass disputes, the various victims seen as interested parties/defendants pursuant to Article 7(2) Brussels I-bis can be used to confer jurisdiction to either the court of the Handlungsort or the Erfolgsort. It is uncertain whether Article 4 jo. 8(1) Brussels I-bis can be invoked to confer jurisdiction, because the victims in a mass dispute cannot be seen as defendants pursuant to Article 4 Brussels I-bis. The Amsterdam Court of Appeal has nevertheless used this ground to assume jurisdiction. The grounds on consumer-related matters cannot be invoked to assume jurisdiction, since the formal parties to the WCAM cannot be seen as consumers. The same holds for Article 7(1) Brussels I-bis, since the formal parties to the WCAM procedure are not party to an agreement that has been concluded between the perpetrator and the victims of the mass dispute.

14.2.4 Lis Pendens Rule[8]

Although not a ground of jurisdiction, the lis pendens rule and the rule on related action do influence the ability of a court to assume jurisdiction. The grounds of jurisdiction set out above are limited in the case of parallel proceedings.

Whereas Article 29 Brussels I-bis is intended to prevent *conflicting/irreconcilable* judgments, Article 30 Brussels I-bis is intended to prevent *inconsistent* judgments that have different conclusions but are legally compatible. The lis pendens rule will prevent conflicting judgments only when two formal criteria are met: both proceedings have to focus on the same parties and the same cause of action.[9] Due to these strict requirements, it is unlikely that jurisdiction concerning both the WCAM procedure and the collective action in relation to parallel procedures can be affected. Hence, there is a risk of conflicting judgments in relation to the WCAM and collective action.

The Brussels Regulation, does, however, offer a possibility for courts to either stay or consolidate parallel WCAM proceedings or collective actions, through Article 28. This provision is, however, not compulsory. Moreover, the possibility of consolidating depends on the wishes of one of the parties at the second action that is seised, as one of the parties has to apply for the consolidation.

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[7] See Chap. 7.

[8] See Chap. 8.

[9] The same facts and rule of law have to be aimed at achieving the same result.

14.3 Application of the Rules of Recognition and Enforcement of Foreign Judgments

As with the grounds of jurisdiction, the procedural differences between the three types of collective redress mechanisms also affect the recognition and enforcement of the judgment that follows the procedure. The various rules on recognition and enforcement, specifically the grounds to refuse the recognition and enforcement, were examined in relation to the three types of collective redress mechanisms.

14.3.1 KapMuG Procedure[10]

It is the individual judgments in the various individual proceedings leading to the KapMuG procedure that are suitable for recognition and enforcement, not the KapMuG judgment. As a result, the rules on recognition and enforcement will work the same as they would in any other ordinary two-party procedure. Judgments are automatically recognised in other Member States and also automatically enforceable. Any party objecting to the recognition and/or enforcement of a judgment has four grounds at its disposal in order to prevent the recognition and enforcement. The first two grounds of Article 45 Brussels I-bis, i.e. the public policy ground and the ground in relation to the servicing of the defendant, are unlikely to be used in relation to a KapMuG procedure. Because the recognition and enforcement relate to the individual procedures, the procedures for service are heavily regulated and because the overall stakes in mass disputes are high (as there are numerous plaintiffs), chances are small that a defendant will not be served correctly or will not enter an appearance. As for the two other grounds on which recognition and enforcement of a judgment can be refused, these both relate to possible irreconcilable judgments. Due to the fact that the lis pendens rule prevents possible parallel proceedings, it is unlikely that there would be any irreconcilable judgments in relation to the individual proceedings.

Given the above, should the mass dispute be resolved through the KapMuG procedure, it is justifiable to conclude that the subsequent individual judgments will be recognisable and enforceable in other Member States.

[10] See Chap. 10.

14.3.2 Collective Action[11]

The applicability of the grounds for refusal of recognition and enforcement of foreign judgments in relation to a collective action procedure must be examined in relation to the collective action judgment and the subsequent individual judgments. In both instances, it is assumed that the defendant has been summoned/served correctly. The rules of the Service Regulation apply and by comparison with ordinary two-party disputes, the addition of a collective action procedure that will precede the individual procedure does not increase the risk of serving a defendant incorrectly. Hence, although Article 45(1)(b) Brussels I-bis is usable in relation to both the collective action and the individual procedure, it is unlikely that it will actually be used.

In relation to the collective action, the public policy ground could be invoked to refuse the recognition and/or enforcement of a collective action judgment, as the precedent effect that follows from the collective action judgment could be contrary to a Member State's public policy. On the other hand, the collective action provides various procedural guarantees that make it easier for individual victims not to be bound by the precedent. For example, the Dutch court must examine whether the interest group sufficiently guarantees the interests of the various victims it represents. In addition, individual victims can opt out of the binding effect easily. Depending on a Member State's public policy, there is only a small chance that a collective action judgment will be contrary to a Member State's public policy. It is also unlikely that an individual procedure will not be recognised and/or enforced because it is contrary to a Member State's public policy. As was the case for the KapMuG procedures, it is expected that the defendant will, for example, be summoned/served the same way as in any other ordinary two-party dispute.

Concerning both Articles 45(1)(c) and 45(1)(d) Brussels I-bis, it is unlikely that these will be grounds for refusing the recognition and/or enforcement of the collective action judgment and/or the individual judgments, since the rules on lis pendens and related actions will prevent parallel proceedings regarding the individual proceedings and the collective action, because the involvement of the interest group will avoid the situation in which the parties in the collective action and in the individual proceedings will be seen as the same parties.

14.3.3 WCAM Procedure[12]

A WCAM judgment must be seen as a judgment ex Article 2 Brussels I-bis and not as a court settlement ex Article 59 Brussels I-bis, because—among other things—the Amsterdam Court of Appeal can influence the content of the settlement

[11] See Chap. 11.

[12] See Chap. 12.

agreement and the way the settlement is made binding. Hence the grounds for refusal of Article 45 Brussels I-bis apply.

Regarding Article 45(1)(b) Brussels I-bis, when the term defendant is interpreted the same way as is done in Article 4 Brussels I-bis, the victims cannot be seen as defendants, making it impossible to serve defendants incorrectly and apply Article 45(1)(b) Brussels I-bis. If the term 'defendant' is interpreted the way as is done by the Amsterdam Court of Appeal, it is possible to refuse recognition and/or enforcement on the ground of Article 45(1)(b) Brussels I-bis. This clause is unlikely to be invoked, however, as Article 28 Brussels I-bis should have prevented the victims/defendant from being notified incorrectly. The Amsterdam Court of Appeal has not applied this rule, however, probably because the WCAM uses a general summons through use of newspaper articles.

The second possible ground for refusing recognition and/or enforcement is the public policy ground. Regarding this ground, there can be several situations that a court of a Member State could invoke to refuse the recognition of a WCAM judgment that is contrary to the Member State's public policy. The structure of the WCAM, in which there can be a group of victims that has not been served correctly (because serving a person through a newspaper publication cannot be seen as a service), means that a defendant/victim is not heard correctly, or is brought into a procedure without deciding to be part of the procedure, or is not allowed to start a procedure against the perpetrator. With regard to Article 45(1)(c) Brussels I-bis, which requires other judgments to be based on proceedings between the same parties, this ground can be used in order to refuse recognition of the WCAM judgment, since such a judgment can entail consequences which are mutually exclusive in relation to possible individual proceedings between the perpetrator and one of the victims of the mass dispute.

The ground set out in Article 45(1)(d) Brussels I-bis cannot be used, however. This ground not only requires parties to be the same before it can be invoked to refuse the recognition and/or enforcement, but also requires the dispute to have the same cause of action. As was set out in relation to the lis pendens rule, which also has this requirement, the WCAM procedure cannot have the same cause of action as an ordinary two-party procedure. As a result, Article 45(1)(d) Brussels I-bis is unlikely to be used in relation to the WCAM procedure.

14.4 Principles of Collective Redress and the Brussels Regulation

Not all grounds of jurisdiction are usable in relation to the three collective redress mechanisms, nor can all judgments arising from these proceedings be recognised or enforced. With respect to the principles of collective redress and the Brussels Regulation, this book has not covered the practical implications of the use of these mechanisms in relation to the analysed private international law rules, but rather

into the principal implications: what are the collective redress mechanisms intended to achieve? why have these mechanisms been created? and can these goals still be achieved in a cross-border situation? In addition, the fourth subsidiary question entails examining the goals of the Brussels Regulation and answering the question of whether the Brussels Regulation is intended to deal with cross-border collective redress proceedings. This answer can be used to improve our understanding of the use of collective redress mechanisms in a cross-border context and might give an insight into how the collective redress mechanisms and the private international law rules could be improved.

14.4.1 Principles of Collective Redress

With respect to the *KapMuG* procedure, when the defendant is domiciled in Germany, the legal protection which the KapMuG is being used for is effective, for three reasons. Firstly, because the German court can assume jurisdiction in relation to all the plaintiffs and the legal protection that is being offered is relatively efficient, plaintiffs will have an incentive to use the KapMuG procedure instead of starting individual proceedings. Secondly, because the German court can assume jurisdiction for all the plaintiffs, the legal protection being offered is effective. Thirdly, the administrative burden for the judiciary will be reduced. Although parties will have to file individual claims at different courts, the model case procedure will prevent these separate cases from having to be resolved integrally. Hence the workload of the various courts will be reduced. This is true also when the Handlungsort is in Germany, as in such an event the German court can also assume jurisdiction in relation to all of the plaintiffs/defendants.

Should the defendant be domiciled outside of Germany, however, there would be no single court that could assume jurisdiction in order to resolve the entire mass dispute. Consequently, various parties would have to file a claim at various different courts, making it difficult to resolve the mass dispute efficiently and effectively because the various parties will probably compare their cases in order to obtain the best outcome. So, for example, when Article 7(1) Brussels I-bis is used as a basis for jurisdiction, it is likely that the variety of the places where the obligations of the financial product have to be performed will mean that various courts will be able to assume jurisdiction in relation to the non-consumers. The same holds for consumers. If the defendant is not domiciled in Germany, the court will have to start individual procedures in the country of the defendant's domicile or the country of the court's domicile, with the result that ultimately, the advantages offered by the KapMuG will be unavailable except to the group of German victims, who have access to the KapMuG procedure. The necessary individual procedures that the victims will have to start because of the unavailability of the KapMuG will reduce the efficient legal protection that is a goal of the KapMuG. The German model case procedure can offer effective legal protection only to victims who are entitled by law to use the KapMuG: victims not domiciled in Germany are denied this

protection. Moreover, because several courts are confronted with vast numbers of individual procedures which they have to resolve integrally, the administrative burden for the various judiciaries will rise.

By contrast with the effect of the grounds of jurisdiction on the goals of collective redress, the effects of the rules on recognition and enforcement on these goals are minimal. The grounds for refusal in Article 45 Brussels I-bis will not impede the recognition and/or enforcement of the individual KapMuG judgments. Hence, if a mass dispute is resolved through use of the KapMuG, the rules on recognition and enforcement will not prevent the effective and efficient legal protection the KapMuG is intended to achieve. Moreover, the administrative burden of the judiciary will not increase. From this it may be concluded that a model case procedure like the KapMuG is usable by a certain court when the mass dispute relates to a company that is domiciled in the Member State of the specific court (in the case of the KapMuG, Germany), or when the Handlungsort is located in the court's territorial jurisdiction.

When using the *Dutch collective action*, the use of an interest group as a party rules out the use of many of the grounds of jurisdiction in the Brussels Regulation. Only the general provision of Article 4 Brussels I-bis and the special ground of jurisdiction of Article 7(2) Brussels I-bis can be used to confer jurisdiction to a Dutch court. These grounds of jurisdiction—if usable—do provide the efficient and effective legal protection a collective action aims to offer, as they make it possible for a mass dispute to be resolved by a single court. Moreover, when these grounds of jurisdiction are used, the administrative burden of the judiciary does not increase.

Should parties agree, either through submission or through a choice of forum agreement, to confer jurisdiction to the Dutch court, they are required to confer jurisdiction to the Dutch court in both the collective action and the individual procedures, in order to achieve effective legal protection. Because a collective action judgment is recognisable in another Member State, the fact that courts other than the Dutch court could assume jurisdiction in one of the individual cases does not mean that effective legal protection can no longer be offered. Because other courts will be forced to resolve a part of the mass dispute, the overall administrative burden of the judiciary will increase. In addition, since courts from other Member States will become involved in resolving a mass dispute, the parties will incur more costs—for example, when an individual victim wises to base his case on the Dutch collective action judgment. That judgment would have to be translated before it can be used in the other Member State.

The various grounds for the refusal of recognition and enforcement—especially the rules on irreconcilable judgments (Articles 45(1)(c) and 45(1)(d) Brussels I-bis)—result in the collective action procedure possibly being unable to offer the efficient legal protection it aims to achieve, because should plaintiffs decide to start proceedings in the same case in another Member State, these rules do not prevent irreconcilable judgments. Hence, in such an event the irreconcilable judgments cause inefficiency because there is no conclusive resolution. In the absence of a separate procedure, this type of judgment can be used to shorten or simplify the necessary

subsequent individual proceedings. It is therefore not necessary for the individual party to incur extra costs arising from these private international law rules.

The same does not entirely apply to the effect of the rules of recognition and enforcement on the individual proceedings that followed the collective action judgment. Although unlikely, the rules in Articles 45(1)(c) and 45(1)(d) Brussels I-bis could lead to refusal of recognition and enforcement of the individual judgment. Were this to occur, the earlier parallel judgment would remain valid. The extra time and money this parallel procedure costs are not caused by the rules of recognition and enforcement, because it was the plaintiff's decision to start the procedure. In that respect, Articles 45(1)(c) and 45(1)(d) Brussels I-bis do not cost the parties more time and money. As a result, these articles cannot have an effect on the efficiency of the legal protection the collective action is intended to provide.

With regard to the administrative burden on the judiciary, the rules on recognition and enforcement are likely to affect this goal only when these rules will cause courts to be confronted with extra proceedings. As concluded above, it is the parties in the parallel proceedings themselves that have caused this extra proceeding, not these private international law rules. This enforcement procedure will cause parties to incur extra costs and invest more time in the proceedings, which reduces the efficiency of the legal protection offered by the collective action. Moreover, courts will be confronted with an extra administrative burden.

Not many grounds of jurisdiction can be used to assume jurisdiction in a *WCAM case*. The only ones that may be used are the submission rule, the choice of forum agreement (either as part of the relationship between the perpetrator and the victim or as part of the settlement agreement) and Article 4 jo. 8(1) pursuant to the interpretation of the Amsterdam Court of Appeal. Both the submission rule and the choice of forum agreement require much coordination in order for a court to assume jurisdiction in relation to all of the known victims. Moreover, these grounds cannot be used in order to assume jurisdiction in relation to the unknown victims. As a result, these grounds cannot guarantee effective and efficient legal protection. Because the court will have to check whether it has jurisdiction in relation to the various individual victims, the administrative burden is very high and thus the goal of low administrative burden cannot be complied with either. Only the use of Article 4 jo. 8(1) Brussels I-bis is in compliance with the goals of collective redress, as the costs and the time involved are not astronomical and the administrative burden of the judiciary is low. These grounds of jurisdiction make it possible to assume jurisdiction in relation to all of the victims, allowing the resolution of the entire mass dispute.

The opt-out character of the WCAM procedure results in the binding of victims that are not directly involved with the court proceedings. In a cross-border mass dispute, not every victim will be domiciled in the Netherlands. In such cases, private international law goals such as the principle of proximity are not complied with. The effect of the use of the grounds of jurisdiction in cross-border WCAM procedures on the goals of private international law will be covered in the next section.

14.4.2 Goals of the Brussels Regulation

With respect to the goals of the Brussels Regulation and the *KapMuG procedure*, the first goal—which relates to the free movement of judgments—is complied with, since the grounds for refusal of recognition and enforcement of an individual KapMuG judgment are unlikely to apply. As for the grounds of jurisdiction, as has been set out above, only when—in relation to the KapMuG—sa German court can base its jurisdiction either on Article 4 in conjunction with Article 18 Brussels I-bis in the contractual mass dispute or on Article 7(2) Brussels I-bis and the Handlungsort, can the court resolve the mass dispute for all parties involved and thus conform with the goals of collective redress. Looking at these two bases for jurisdiction, it must be concluded that these grounds of jurisdiction also comply with the goals of the Brussels Regulation. These grounds of jurisdiction provide for legal certainty, as the court will base its jurisdiction on a clear ground.

In relation to the goal of resolving the dispute before the most appropriate court, the above grounds of jurisdiction are in compliance with this goal as well. The court of the defendant's domicile is an appropriate court, so not the most appropriate court as this court will have first-hand knowledge it can draw on in order to resolve the dispute. From this it can be concluded that the grounds of jurisdiction that comply with the goals of collective redress are also in compliance with the goals of the Brussels Regulation. Since the 'victims' in a KapMuG procedure are all parties to this procedure, a court's jurisdiction will have to be based with respect to all the 'victims', with the result that the KapMuG procedure has many similarities with a standard two-party procedure. This being so, the model case procedure is an ideal collective redress mechanism to be used by the court of the perpetrator's domicile (which, for the sake of this summary, is also seen as the court of the Handlungsort in non-contractual mass disputes), since in such an event both the goals of collective redress and the goals of the Brussels Regulation are complied with.

Regarding the *collective action procedure*, it is possible for this organisation to enter into a choice of forum agreement or to try and confer jurisdiction to a court through the submission rule. An interest group cannot be seen as a weaker party and the fact that it has no access to the protective grounds of jurisdiction is thus in compliance with the goals of the Brussels Regulation. In addition, the court that can assume jurisdiction have a practical advantage, because of the proximity of the court to the domicile of the perpetrator. As a result, the grounds of jurisdiction that can be used in a collective action procedure that comply with the goals of collective redress can also be seen as the grounds that will lead to the dispute being brought before an appropriate court.

As discussed in Sect. 1.7.4, the goal of guaranteeing legal certainty can be divided into various sub-goals or principles. These sub-principles demand that (i) there is clarity about the rules of jurisdiction, (ii) it has to be avoided that jurisdiction is

multiplied as regards one and the same legal relationship, and (iii) national courts should be able readily to decide whether they are competent to hear a case.[13]

In relation to the goals of the Brussels Regulation, the first and most important goal that will have to be examined is the goal of free movement of judgments. As with the KapMuG, the automatic recognition of foreign judgments and the abolition of exequatur make this goal the fundamental basis of the Brussels Regulation. Next to this goal come the goals of the right of the defence (which is formed in the current grounds for refusal of recognition in Articles 45(1)(a) and 45(1)(b) Brussels I-bis) and legal certainty (which aims at preventing irreconcilable judgments as laid down in Articles 45(1)(c) and 45(1)(d) Brussels I-bis). Since during the recognition and enforcement process it is prohibited to review judgments as to their substance and to review the jurisdiction of the court of origin, it seems that because these prohibitions prevent courts from looking into what is or might be the most appropriate court, the goal of the most appropriate court has the lowest priority in the recognition and enforcement phase. This goal plays a larger role in the jurisdiction phase. As a result, only the goals of free movement of judgments, the rights of the defence and legal certainty are discussed below in relation to the use of the rules on recognition and enforcement.

Recognition and enforcement of the individual collective action judgments shall be refused only when there are earlier judgments from different courts in the same case (Articles 45(1)(c) and 45(1)(d) Brussels I-bis). Since such situations will be prevented by the lis pendens rule or the rule on related actions, the goal of free movement of judgments is complied with in collective action cases.

As it also seems unlikely that parties to a collective action procedure will not be notified or served properly, it is very probable that the rights of the defence are upheld. The Service Regulation forms the basis for parties to be notified properly. Moreover, since there are usually only one or a few defendants (compared to the thousands of victims) and because of the financial interests in a cross-border mass dispute, it seems unlikely that public policy is infringed.

Even though the lis pendens rule and the rule on related actions should prevent irreconcilable judgments in the first place, it remains possible that courts will rule inconsistently. Hence Articles 45(1)(c) and 45(1)(d) Brussels I-bis could still be used as grounds to refuse recognition and enforcement. Although the lis pendens rule and the rule on related actions can be circumvented, the above-mentioned grounds for refusal of recognition and enforcement will prevent irreconcilable judgments and thus guarantee legal certainty. Moreover, because of the collective action procedure a refusal of recognition or enforcement is to be expected when there is a parallel judgment in another Member State. Hence there it is very likely that the recognition or enforcement of a judgment will be refused.

As already mentioned, the goal that the dispute must be resolved by an appropriate court does not play a role in the recognition and enforcement phase. This goal

[13] See Pontier and Burg 2004, p. 94. Since courts do not have to go into the substance of the matter in the case of a mass dispute, this sub-principle is not covered here.

aims at protecting weaker parties and guaranteeing sound administration of justice. A sub-principle that could be related to this phase is the ideal that disputes should be resolved in their entirety before a single appropriate court. Fragmentation of proceedings should be prevented. This, however, is already achieved through automatic recognition and the grounds for refusal of recognition and enforcement. Thus this last goal of the Brussels Regulation cannot play an important role in this phase of private international law.

The goal of providing legal certainty is also complied with. The cases in which a judgment shall be recognisable or enforceable are clear, as it is not very likely that a judgment will not be recognisable or enforceable if an individual victim has started parallel proceedings in another Member State.

Lastly, with respect to the *WCAM procedure*, the grounds of jurisdiction in the Brussels Regulation are not clear about the position of interested parties that are not at risk of being ordered to act. This confirms that the Brussels Regulation was not devised with collective proceedings and especially collective settlements like the WCAM in mind. In that respect, the WCAM does not provide legal certainty for both the perpetrator and the interest group, but neither does it provide legal certainty for all of the individual victims either. As a result, the most striking effect in relation the WCAM and the grounds of jurisdiction is the lack of clarity about the rules of jurisdiction.

It is possible for an interest group to enter into a choice of forum agreement or to try to confer jurisdiction to a court through the submission rule. An interest group cannot be seen as a weaker party and the fact that it has no access to the protective grounds of jurisdiction is thus in compliance with the goals of the Brussels Regulation. In addition, a court that can assume jurisdiction has a practical advantage because of its proximity to the domicile of the perpetrator. As a result, the grounds of jurisdiction that can be used in a collective action procedure that comply with the goals of collective redress can also be seen as the grounds that will lead to the dispute being resolved by an appropriate court.

14.5 Applicability of Brussels Regulation and Recommendations

Since the Brussels Regulation applies to the three types of collective redress mechanisms, the various rules regarding jurisdiction and recognition and enforcement are applicable in relation to these types of collective redress mechanisms. Although these rules can apply to the three types of collective redress mechanisms, it does not mean that they always will be applied. As was set out in the previous subsections, the usability of the rules of the Brussels Regulation in mass disputes depends highly on the circumstances of the case. The goals relating to collective redress mechanisms and the Brussels Regulation mean that the combination complies with these goals/principles only if all of the victims involved can resolve the

dispute by using the collective redress mechanism and if the various guarantees embodies in the Brussels Regulation are maintained. If the defendant in a mass dispute is domiciled in a Member State which can utilise one of the three types of collective redress mechanisms, the mass dispute can be resolved by using that mechanism for all the involved victims. In most situations in which the only that can assume jurisdiction is one that is not in the defendant's domicile, this means that specific court cannot utilise a collective redress mechanism to resolve the dispute for only a certain group of victims, not for all the victims. As a basic assumption of collective redress mechanisms is that the mechanism should be used to resolve a mass dispute entirely, it must be concluded that the rules in the Brussels Regulation that relate to jurisdiction can only be used in certain situations.

The same holds to some extent for the rules relating to the recognition and enforcement of judgments. Although it seems that the three types of collective redress mechanisms do not violate most of the safeguards relating to the recognition and enforcement of judgments, in some matter the collective settlement proceedings might violate a Member State's public policy. It seems that a public policy violation is unlikely only in situations where all victims are known and have been summoned correctly.

Given the above, it seems that the rules in the Brussels Regulation are usable only in certain specific situations. In a regular two-party dispute, the Brussels Regulation offers many grounds of jurisdiction and the recognition and enforcement of judgments is only rarely withheld. To ascertain why this is not the case when collective redress mechanisms are used I looked at the principles underlying the collective redress mechanisms and of the Brussels Regulation, as it is these that make the three types of collective redress mechanisms usable only in certain cross-border situations. I concluded that collective redress mechanisms are aimed more at economic benefits, such as offering more efficient and effective legal protection while also decreasing the administrative burden of the judiciary. The Brussels Regulation on the other hand is aimed at guaranteeing certain legal rights, such as offering legal certainty in proceedings, guaranteeing the rights of the defendant and facilitating that a procedure is resolved before an appropriate court. The goals/principles of collective redress and the Brussels Regulation should not be mutually exclusive; it must be possible both to offer the rights the Brussels Regulation is aiming for and to improve the free movement of judgments while also offering effective and efficient legal protection and reducing the administrative burden of the judiciary. Why then is it not possible to use the rules in the Brussels Regulation in the same way as in any other procedure?

One reason is because the Brussels Regulation has been made with a focus on individual parties that are party to a procedure in which they face only one opponent. This assumption is apparent not only in the grounds of jurisdiction but also in the principles of the Brussels Regulation, which are aimed at these individual parties. This makes the Brussels Regulation unsuitable for collective redress proceedings. The focus of the Brussels Regulation is not the only reason for the difficulties of using the Brussels Regulation in collective proceedings. Another reason is the large variety in collective redress mechanisms and the lack of

coordination. The Brussels Regulation was also made to facilitate the free movement of judgments, but such movement is only possible when the Member States have mutual trust in the administration of justice. Since every Member State has created its own collective redress mechanisms, there is a lack in mutual trust in the administration of justice. In order to make it possible to use private-law oriented collective redress mechanisms to resolve cross-border mass disputes, it is necessary to coordinate the various mechanisms in the Member States and to modify the Brussels Regulation. Hence the rules of the Brussels Regulation are only applicable in certain situations with respect to collective redress mechanisms, and these situations coincidentally make the Regulation applicable, as the Brussels Regulation is aimed at individual proceedings rather than at collective proceedings.

A possible solution to the fact that the rules in the Brussels Regulation cannot be applied the same in collective proceedings as in regular two-party proceedings must be found in amending the Brussels Regulation and in coordinating the variety of collective redress proceedings in the EU. The amendment of the Brussels Regulation is necessary in order to make it possible to have a ground of jurisdiction that is more in line with the goals/principles of collective redress and of the Brussels Regulation itself. One could conclude that only in certain circumstances a single court can assume jurisdiction in relation to all the victims involved. This would be the court of the defendant's domicile or the Member State where the Handlungsort took place. However, the majority of the group of victims do not necessarily have their domicile in the defendant's domicile. As a result, in order to resolve a mass dispute entirely, most victims would only be able to start a collective redress procedure in an unknown jurisdiction (e.g. the jurisdiction of the defendant's domicile), with all the disadvantages that were set out in the previous chapters. In order to provide a ground of jurisdiction which is more in line with the combined goals/principles of collective redress and the Brussels Regulation, a new ground of jurisdiction should be added to the Brussels Regulation. Instead of using the defendant's domicile or the place of the Handlungsort as connecting factor, the Brussels Regulation should alternatively also have a ground of jurisdiction that uses the domicile of the victims (like with for example tortious mass disputes and the way the ECJ ruled in the Kolassa case that the Erfolgsort in cases concerning misleading prospectuses is in the domicile of the shareholder, but then also in contractual matters) in a mass dispute as the connecting factor. As with the grounds of jurisdiction in consumer matters, the victims in cross-border mass disputes can also be seen as weaker parties: for example, with insufficient funding to obtain redress. Whether a victim in a mass dispute can actually be seen as a weaker party will have to be determined per case.

In order to make it easier for this group of weaker parties to request the most appropriate court to resolve the mass dispute, the victims should be able to choose where to start a collective redress procedure: in the place of the defendant's domicile, the place where the Handlungsort took place (in the case of tort matters) or in the place where the victims are domiciled (in both tortious and contractual matters). This, however, raises the question of whether the court of every victim's domicile should be able to assume jurisdiction. This would evidently give rise to an

undesirable situation in which there is more risk of parallel proceedings and irreconcilable judgments. In order to prevent this, it might be possible to confer jurisdiction only to the court in the country where the largest group of victims is domiciled. With such a ground of jurisdiction, a large group of victims would still be able to benefit from collective redress mechanisms in cross-border mass disputes. However, such a ground of jurisdiction also has some disadvantages. Who, for example, would determine what is the largest group of victims? And which court would be able to assume jurisdiction in the event that there are several groups of victims that are similar in size? In relation to the Dutch collective settlement procedure, the Amsterdam Court of Appeal already needs to determine whether the interest group is sufficiently representative, hence it is conceivable that the court that has to determine whether it can assume jurisdiction will have to decide whether the largest group of victims is domiciled in the Member State in which the court is located. The court will have to base its decision on the data the plaintiffs provide. In order to make it possible for this specific court to resolve a mass dispute for the entire group of victims by using a collective redress mechanism, the court of the domicile of the largest group of victims must also be able to assume jurisdiction in relation to all the other victims in a mass dispute.[14]

Such a new ground of jurisdiction would not, however, be facilitative in situations in which there are several similarly-sized victim groups or in situations in which the majority of victims wish to have the mass dispute resolved by a court that cannot base its jurisdiction on any of the grounds. A possible solution, in which jurisdiction in relation to interest groups would also be incorporated, would be that not only the court of the Member State where the largest group of victims is domiciled would be able to assume jurisdiction, but also the court of the domicile of the interest group that represents the largest group of victims. This would provide a possibility for plaintiffs to opt for the jurisdiction that allows for the most efficient and effective resolution of a cross-border mass dispute.

The disadvantages of having to use a ground of jurisdiction based on which Member State is domicile of the largest group of victims are comparable with those in the situation in which the court of the defendant's domicile can assume jurisdiction. For example, it remains a fact that there will always be a group of victims who will be forced to resolve a mass dispute in a jurisdiction other than the jurisdiction of their domicile. Although such a ground of jurisdiction would not comply with certain principles of the Brussels Regulation, I believe it is a reasonable addition to the current grounds of jurisdiction. The benefit is that courts can assume jurisdiction in mass disputes and thus resolve these disputes efficiently and effectively, with manageable administrative burden to the judiciary. With respect to the goals of the Brussels Regulation itself, either the court of the largest group of victims or the court where the largest group of victims want to resolve the mass dispute can be seen as an appropriate court. It depends on the specific collective

[14] The difference in the EU Insolvency Regulation between a primary and a secondary procedure might be used as inspiration for such grounds of jurisdiction.

redress mechanism whether the goal/principle of rights of the defence is upheld, but if a court can assume jurisdiction in relation to all victims of a mass dispute, irreconcilable judgments will be unlikely.

With respect to the recognition and enforcement of judgments, it is more difficult to incorporate a solution in the Brussels Regulation that will ensure that collective redress judgments can be recognised and enforced in the EU without compromising the principles of collective redress and the Brussels Regulation. Such a solution must be sought within the framework of coordinating the various collective redress mechanisms in the EU. The principle of free movement of judgments rests on the idea that the various legal mechanisms used by the Member States are comparable and that there is a mutual trust between Member States regarding these proceedings. It was initially argued that because collective redress mechanisms in the EU differ appreciably between the Member States, the abolition of exequatur would not apply to collective proceedings. Hence, the first step in facilitating the recognition and enforcement of collective redress judgments would be to harmonise the various collective redress mechanisms. As such a harmonisation cannot be achieved by amending the Brussels Regulation, I will cover this possible recommendation in the section regarding alternative solutions and future research.

Reference

Pontier JA, Burg E (2004) EU principles on jurisdiction and recognition and enforcement of judgments in civil and commercial matters according to the case law of the European Court of Justice. TMC Asser Press, The Hague

Chapter 15
Relevant Developments and Possible Future Research

Abstract Given the rise in cross-border mass disputes, the various rules (national and European) have been in constant development. National legislators have been developing the various collective redress mechanisms and the EU legislator has been developing the rules on private international law, as well as the EU rules on collective redress. In this chapter, a short overview is given of some recent developments.

Keywords EU consultation · EU recommendation · IBA guidelines · Future research

15.1 Introduction

The recommendations made in answer to the various issues described in the previous chapter in relation to the private international and collective redress, are mainly focused on amendments to the Brussels Regulation. In order to fully facilitate collective redress procedures through use of private international law, it is necessary to also look outside the field of private international law. Although this book focused only on private international law and collective redress, in this chapter I will give an overview of the relevant developments that might influence the field of private international law and collective redress and will map possible fields for future research into areas of law that also might influence the use of private international law in cross-border mass disputes.

As explained in previous chapters, Brussels I-bis came into effect on 10 January 2015. The review of the Brussels Regulation that led to this recast did contain a minor reference to collective redress: the abolition of the exequatur would not apply to collective proceedings.[1] As can be seen in Brussels I-bis, this exception to the abolition of the exequatur has been removed, making the Brussels Regulation the two-party dispute regulation it has been since the Brussels Convention. Probable reasons why the reference to collective procedures was removed from the proposal

[1] COM (2010) 748 final [14.12.2010], pp. 6–7.

T. Bosters, *Collective Redress and Private International Law in the EU*,
DOI 10.1007/978-94-6265-186-9_15

for Brussels I-bis are a lack of political consensus and the difficulty of the subject. Another reason might be that at the time of the decision process regarding the final version of Brussels I-bis the consultation 'Towards a coherent approach of collective redress' was pending, and the European Commission Communication 'Towards a European Horizontal Framework for Collective Redress' was due to be published later. These two recent publications will be discussed later in this chapter.

In addition to these European developments, in recent years, various international organisations have produced guidelines which could be used to resolve a cross-border mass dispute. The American Law Institute (ALI),[2] the International Law Association (ILA)[3] and the International Bar Association (IBA)[4] have issued guidelines and/or principles to accommodate for collective or aggregate litigation. In addition, the Hague Convention on Private International Law has been examining ways to regulate the various issues with respect to the recognition and enforcement of judgments that originate from collective redress mechanisms.[5] The most extensive work was done by the IBA, which drafted guidelines for the recognition and enforcement of collective redress judgments. These relevant developments will be covered in this chapter.

This chapter will conclude by setting out possible future fields of study through which cross-border mass disputes might be improved.

15.2 Consultation 'Towards a Coherent Approach to Collective Redress'

In February 2011 the Commission launched a public consultation on a coherent European approach to collective redress.[6] The rising popularity of collective redress mechanisms had not gone unnoticed. In 2005 the Commission adopted a Green Paper on anti-trust damages actions[7] and a White Paper was adopted in 2008.[8] The Commission also published a Green Paper on consumer collective redress in 2008.[9] These plans were, however, inconclusive and the 2011 consultation aimed at reviving the discussion on collective redress in the EU.

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[2] The American Law Institute, Principles of the Law of Aggregate Litigation [7.5.2008].

[3] The International Law Association, Report of the Seventy-Third Conference [August 2008], pp. 534 et seq. For an extensive overview of the ILA Rio Resolution see Kessedjian 2012, pp. 233–244.

[4] The International Bar Association, Guidelines for recognising and enforcing foreign judgments for collective redress [16.10.2008].

[5] See the Working Group report of February 2014 (available on www.hcch.net [last accessed 30 January 2017]).

[6] SEC (2011) 173 final [4.2.2011].

[7] COM (2005) 672 [19.12.2005].

[8] COM (2008) 165 [2.4.2008].

[9] COM (2008) 794 [27.11.2008].

Due to the diversity of existing national collective redress mechanisms, the Commission feared that the lack of a consistent approach might undermine the enjoyment of rights by citizens and businesses.[10] In this public consultation, the Commission referred to the very issues the Commission raised when it suggested exempting collective proceedings from the abolition of exequatur. The consultation was aimed at achieving common principles which any possible EU initiatives on collective redress in any sector would respect.[11] Through a set of 34 questions, the Commission hoped to receive useful input to come to these principles.[12] Only some of these questions relate to possible private international law issues.

In July 2011, the Committee on Legal Affairs of the European Parliament issued a draft report on the above consultation.[13] Regarding private international law issues, the Committee concluded that:

> (…) a horizontal instrument should itself lay down rules to prevent a rush to the courts ('forum shopping') and believes that forum shopping cannot be excluded by establishing that the courts where the majority of victims of the infringement of Union law are domiciled or where the major part of the damage occurred are to have jurisdiction, as these flexible rules would leave open the possibility of abusive litigation;[the Committee] considers therefore that the courts with jurisdiction in the place where the defendant is domiciled should have jurisdiction;
>
> [The Committee] also favours a horizontal instrument that provides for unified rules on the applicable law and calls for further examination of how the conflict of law rules can be amended; believes that one solution could be to apply the law of the place where the majority of the victims are domiciled, bearing in mind that individual victims should remain free not to pursue the opt-in collective action but instead to seek redress individually in accordance with the general rules of private international law laid down in the Brussels I, Rome I and Rome II regulations.[14]

In its short explanatory memorandum, the rapporteur of the committee argues that the principle that jurisdiction should follow the weaker party is no longer absolute in collective redress procedures.[15] Moreover, rules on applicable law could also be aligned with the rules on jurisdiction.[16]

In January 2012 the final report was presented, in which was argued that the current Brussels Regulation should be taken as a starting point for determining which court will have jurisdiction.[17] In addition to some minor modifications, the

[10] SEC (2011) 173 final [4.2.2011], p. 4.

[11] SEC (2011) 173 final [4.2.2011], p. 5.

[12] These questions included various questions: about the principles sought and also about the mechanisms for financing collective redress, safeguarding against abusive litigation and ensuring effective enforcement.

[13] 011/2089(INI) [15.7.2011].

[14] 011/2089(INI) [15.7.2011], p. 7.

[15] 011/2089(INI) [15.7.2011], pp. 12–13.

[16] The influence of the rules of applicable law on cross-border mass disputes will not covered in this book.

[17] 011/2089(INI) [12.1.2012], para 26.

report includes the opinions on collective redress of the various committees consulted.

The EC responded to the adopted text by stating that:

> The Commission Work Programme for 2012 envisages an initiative entitled 'An EU framework for collective redress'. This initiative is placed under the heading 'Justice, Consumer Affairs and competition Policy', due to the horizontal and cross-cutting nature of the initiative. The character of the initiative (legislative/non-legislative) is to be determined in the light of previous Commission work on collective redress at the EU level and of the Parliament's resolution.[18]

The text also states that 'the horizontal framework itself [is] to lay down jurisdiction rules; conflict of law rules [are] to be examined'.[19] Following the consultation, the European Commission embarked on creating its horizontal framework for collective redress. This resulted in the recommendation of 2013, which will be set out in the next section.

15.3 Recommendation 'Towards a European Horizontal Framework for Collective Redress'

As noted briefly in the introduction to this book, the European Commission published both a recommendation[20] and a communication[21] on a horizontal framework for collective redress on 11 June 2013. The recommendation recommends Member States to have national collective redress systems based on a number of common European principles.[22] These principles are specific and have a broader range than the goals/aims for which collective redress mechanisms are created. With respect to cross-border mass disputes, the recommendation states:

> 17. The Member States should ensure that where a dispute concerns natural or legal persons from several Member States, a single collective action in a single forum is not prevented by national rules on admissibility or standing of the foreign groups of claimants or the representative entities originating from other national legal systems.
>
> 18. Any representative entity that has been officially designated in advance by a Member State to have standing to bring representative actions should be permitted to seise the court in the Member State having jurisdiction to consider the mass harm situation.[23]

[18] European Commission document SP (2012) 260 [01.06.2012], para 7.
[19] European Commission document SP (2012) 260 [01.06.2012], para 6.
[20] European Commission document C (2013) 3539 [11.06.2013].
[21] European Commission document COM (2013) 0401 [11.06.2013].
[22] European Commission document COM (2013) 0401 [11.06.2013], pp. 3–4.
[23] European Commission document C (2013) 3539 [11.06.2013], p. 7.

The recommendation gives no solutions based on these principles, for regulating cross-border mass disputes. It merely states a possible basic assumption that Member States could use to adopt collective redress legislation.

The Communication reports the main views expressed in the above-mentioned public consultation and reflects the Commission's standpoint on some central issues regarding collective redress. Although the communication refers to the consultation and a horizontal framework in general, it also briefly refers to the relation between private international law and collective redress.[24] The communication states that:

> With regard to jurisdictional rules, many stakeholders asked for collective proceedings to be specifically addressed at European level. Views differ, however, as to the desirable connecting factor between the court and the case. A *first group* of stakeholders advocate a new rule giving jurisdiction in mass claim situations to the court where the majority of parties who claim to have been injured are domiciled and/or an extension of the jurisdiction for consumer contracts to representative entities bringing a collective claim. A *second category* argues that jurisdiction at the place of the defendant's domicile is best suited since it is easily identifiable and ensures legal certainty. A *third category* suggests creating a special judicial panel for cross-border collective actions with the Court of Justice of the European Union. In this respect, the Commission considers that the existing rules of Regulation (EC) No 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters ('the Brussels Regulation'), should be fully exploited. In the light of further experience involving cross-border cases, the report foreseen on the application of the Brussels Regulation should include the subject of effective enforcement in cross-border collective actions.[25]

As I have argued (in Chap. 14), resolving a mass dispute before the court of the defendant's domicile is indeed a solid solution, as it would make it possible to resolve the mass dispute for all parties involved. The goals which collective redress mechanisms are intended to achieve will be complied with if the court of the defendant's domicile has jurisdiction. If such a court does have jurisdiction, the goals of the Brussels Regulation will, however, not be complied with completely, since the weaker parties will not have the protection they will usually have in an ordinary two-party conflict, since the victims are often not an actual party in the procedure, thus invalidating the specific grounds (for example, for consumers). The other situation, when it is the court of the domicile of the largest group of victims that has jurisdiction, could partly comply with the goals of the Brussels Regulation. It could very well be that this group of victims is a weaker party, which means that they would be protected, since the court of their domicile would have jurisdiction. On the other hand, the Brussels Regulation principle of forum sequitor rei will be departed from. In addition, if the court of the domicile of the largest group of plaintiffs has jurisdiction, it is unclear whether this court will also have jurisdiction over victims domiciled in another Member State and/or whether the judgment of this specific court should be recognisable for other victims in the same mass dispute.

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[24] See for example European Commission document COM (2013) 0401 [11.06.2013], p. 9.

[25] European Commission document COM (2013) 0401 [11.06.2013], pp. 13–14 [italics added by author].

15.4 IBA Guidelines

Through its recommendation on a horizontal framework for collective redress the Commission has not yet formulated any concrete ideas on how to regulate private international law in relation to collective redress, but the IBA has issued a set of guidelines—albeit, stating that these are not intended as legal provisions. Instead, they are 'intended to describe minimum internationally accepted standards for the procedural and substantive rights to be afforded by a court issuing a collective redress judgment to the persons it purports to bind.'[26] The authors of the guidelines also state that the guidelines can be used by a second court to determine whether it would be 'fair, just and reasonable for a foreign judgment for collective redress to have preclusive effect in the jurisdiction in which absent claimants might seek to re-litigate the issue which were the subject of the collective redress judgment.'[27] It is not merely the guidelines that make this document interesting, but rather the goal of the guidelines themselves. As was stated in the recommendations in the previous chapter, in a situation in which all of the collective redress mechanisms are based on the same principles, it becomes less likely that a collective redress mechanism will not be recognised.

The IBA guidelines recommend that courts assume jurisdiction over foreign victims if the court has subject matter jurisdiction over the claim and it is reasonable for the court to expect that its judgment will be given preclusive effect by the jurisdiction in which the foreign victims would ordinarily seek redress. Alternatively, however, the guidelines also state that in cases where there are multiple fora which are otherwise appropriate jurisdictions for a collective redress action, jurisdiction should be assumed by the forum that is in the best position to process claims from an administrative standpoint, to have access to evidence and witnesses, and to facilitate adequate representation of the plaintiffs. Hence, these guidelines too aim at guaranteeing certain rights for certain parties, but also take into account efficiency and effectiveness considerations. The guidelines even explicitly take into account the administrative burden of the judiciary. In addition to giving various guidelines in relation to jurisdiction, the IBA guidelines set out various safeguards that ensure judgments are not recognised if certain procedural rights are taken into account.

15.5 Insolvency Regulation

One of the fields of law that has intentionally not been covered in this book is the field of insolvency law, specifically the EU Insolvency Regulation. The European Commission published a proposal for an amended Insolvency Regulation in

[26] IBA Guidelines 2008, p. 7.

[27] IBA Guidelines 2008, p. 7.

December 2012.[28] Insolvency procedures and collective redress procedures are closely connected, as in both the end result will bind a large group. Hence, certain rules in the Insolvency Regulation might be used as inspiration when regulating private international law in connection with collective redress.

The Insolvency Regulation uses the 'centre of main interests' or 'COMI' as the connecting factor to confer jurisdiction to a certain court. The COMI of an insolvent company is presumed to be in the Member State in which the company has its statutory seat. With respect to collective redress procedures, this will differ, for example in relation to the current Article 4 Brussels I-bis. Hence, the Insolvency Regulation cannot offer a possible better ground of jurisdiction.

The Insolvency Regulation does, however, contain a mechanism for coordinating various proceedings in the same matter. If an insolvent company has branches in various Member States, the main insolvency procedure must be started in the Member State where the COMI is located. Debtors could, however, also start secondary proceedings in the Member State in which the branch is located. This secondary procedure applies only to that specific branch and the assets that are located in that certain Member State. Both the liquidator in the Member State in which the main insolvency procedure has started and the liquidator(s) in the other Member State(s) are required to notify each other of the status of the various proceedings. As a result, there is a certain coordinating effect incorporated between the main and secondary insolvency procedures. Although it requires further study, such a coordination mechanism could serve as an alternative for the recommendation described in Sect. 14.5. This idea will be elaborated on in the next section.

Another mechanism that could be used in relation to collective redress is the insolvency register. If a company has been declared insolvent (bankrupt or any of the other forms of insolvency), its status will be registered in the insolvency register. As this register is freely accessible, anyone can determine whether a company is insolvent and, for example, whether it is still possible to attach certain assets. With respect to collective redress, a collective redress register would offer a valuable source of information for interested parties considering starting proceedings against a certain company—for example, for a mass dispute. Using the register, these interested parties could determine whether other parties have already started a collective procedure and whether they wish to join this procedure. Such a register might facilitate the prevention of parallel proceedings. The previously mentioned Commission Recommendation also contains a recommendation for Member States to come up with a collective redress register. I, however, would suggest that such a register be created for the entire European Union, giving parties to such a mass dispute insights into where comparable procedures have already been started.

[28] Commission proposal to amend the Insolvency Regulation 1346/2000, (COM) 2012, 744 final.

15.6 Alternative Solutions and Possible Future Research

As was mentioned in the summary and the recommendations of this book, it is not enough merely to come up with amendments to the Brussels Regulation in order to optimally facilitate collective redress of a cross-border mass dispute. An optimal redress procedure also requires possible amendments to collective redress mechanisms themselves, for example. Although this book focused on private international law, in this section I will suggest future avenues of research in order to improve cross-border mass disputes.

The best way towards regulating private international law rules in the EU in relation to collective redress would seem to be to try to rationalise the national collective redress landscape by making the various collective redress mechanisms more connected with each other and thus more comparable. A single set of private international law rules would be sufficient. Although the European Commission has started to try and streamline collective redress mechanisms in the EU by issuing a set of recommendations, it seems that much more will be required in order to arrive at a single type of collective redress mechanism. The UK, for example, has already stated that it will not implement the principles in the European Commission Recommendation.[29]

Based on the conclusions in the previous chapters, the most important problem with collective redress focuses on the problem of parallel proceedings/irreconcilable judgments and lack of jurisdiction. In relation to the KapMuG, there is no real lack of jurisdiction, since the German court can base its jurisdiction on either Articles 4, 18 or 7(2) Brussels I-bis. If these grounds cannot be used, several courts can assume jurisdiction, which could produce irreconcilable judgments. This cannot be prevented by recourse to the lis pendens rule, and the consequent judgments would be recognisable in every Member State. The same holds for the individual procedures that follow a collective action.

A possible alternative solution that merits consideration would be to regulate the coordination of the various proceedings in relation to a single mass dispute. The European Commission could draw inspiration from the US mechanism of multi-district litigation (MDL). The US has a so-called MDL Panel comprised of various judges who have been designated by the Chief Justice of the US. The MDL Panel is authorised to transfer civil action that involved common questions of fact to a common district for consolidation if it determines that doing so would support the convenience of the parties and witnesses and promote efficient resolution of the action.[30] Based on the Manual for Complex Litigation,[31] the MDL Panel will have

[29] The UK government stated that the Recommendation had gone too far and that it would not support an opt-in model for a collective action. See the UK government's consideration of 4 September 2013 on http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xiii/8311.htm (last accessed 30 January 2017).

[30] Stefanelli 2012, p. 160. See also United States Code s1407(a).

[31] Federal Judicial Center, *Manual for complex litigation* 2004.

to consider—among other things—which jurisdiction holds the most pending cases, where the cases have progressed the furthest, the site of the occurrence of common facts, the place where costs and inconvenience will be most minimised and the experience and caseloads of potential judges.[32] Such a European MDL Panel should assist courts in trying to consolidate possible parallel proceedings and attempting to prevent violations of the goals of collective redress and of the Brussels Regulation. Instead of looking at the court seised first, this panel could look at the position of weaker parties and the question of whether these parties would benefit more from the dispute being resolved before the court of their domicile or before a court that can resolve the dispute more effectively and efficiently.

In relation to the WCAM, such a European MDL Panel would also be helpful in deciding whether, for example, the Dutch court could assume jurisdiction in relation to parties that have no link with Dutch jurisdiction. In the Converium matter, the MDL Panel could have examined whether it would be better to have the dispute resolved before the Dutch court through use of the WCAM or to have the dispute solved in Switzerland (the country of the perpetrator's domicile and the domicile of a large group of victims) or in the UK (domicile of a large group of victims). As a result, not only the goals of the Brussels Regulation, but also the goals of collective redress could be borne in mind.

Mandatory consultation of an MDL Panel is preferable to a rule conferring exclusive jurisdiction to a certain court, because in any collective redress mechanism it would be impossible to have a court that can resolve a mass dispute in compliance with, for example, the goal of resolving a dispute before an appropriate court. There will always be weaker parties that should be protected by the court of the weaker party's domicile.

In relation to the various goals of collective redress, an MDL Panel does have drawbacks. In the event that several courts would be able to assume jurisdiction, extensive coordination is required in order to prevent the aforementioned irreconcilable and inconsistent judgments. This would mean that proceedings could take longer, and—depending on the form of coordination—that there is a small chance of the mass dispute not being resolved by one and the same solution. In addition, such coordination automatically increases the administrative burden of the judiciary.

Another drawback could be that the MDL Panel decides that a certain court that cannot assume jurisdiction in relation to a large group of victims but that is seen as the best court to resolve the mass dispute is designated as the court that should be the consolidation court. That court should subsequently assume jurisdiction pursuant to some sort of forum convenience rule. Just as in the Brussels Convention, the forum non conveniens rule is not allowed in the Brussels Regulation. The ECJ has ruled that a court of a Member State cannot deny jurisdiction on the ground that

[32] Manual for complex litigation 2004, Section 20.131. See also Stefanelli 2012, p. 160.

the proceedings have more connecting factors to any other Member State.[33] This was reaffirmed in the more recent Group Josi case of 2000.[34] In order to formalise an MDL type of system in cross-border mass disputes, several rules need modification, as will be explained below.

First, Article 30 Brussels I-bis should be copied, making such a rule mandatory in relation to mass disputes. In addition, this Article should be changed so that it is no longer important which court is seised first or later, but that an MDL Panel will look at the possibilities of consolidating the specific mass dispute. In addition, criteria should be drafted for the MDL Panel to use when deciding which court is most appropriate to rule on the mass dispute and in relation to which victims. Pending this decision, all cases in the EU with the same parties and the same cause of action should be stayed.

An MDL-like solution, could still—to a certain extent—provide effective and efficient legal protection for the parties involved. The problem with cross-border mass disputes is that they automatically cause legal protection to be less efficient than mass disputes that are confined to a single Member State. In addition, since the work of an MDL Panel is in essence the work of the judiciary, the administrative burden of the judiciary increases. By comparison with non-coordinated parallel proceedings, the burden is smaller. The time and costs required of non-coordinated parallel proceedings can be higher than in the case of coordinated parallel proceedings. The MDL Panel will take these goals in mind when deciding whether consolidation or coordination is best. The same applies to the goals of the Brussels Regulation. As a result, the introduction of an MDL Panel and the necessary regulatory changes can facilitate cross-border collective redress, without compromising the goals of collective redress and the Brussels Regulation. The current proposals for a centralised European patent court might be used as an inspiration for further research in the idea of a coordinating panel in relation to cross-border collective redress.

As mentioned earlier in this chapter, with respect to the rules relating to the recognition and enforcement of judgments, one of the basic assumptions is that there must be mutual trust in the administration of justice in these Member States. Mutual trust makes it possible to automatically recognise judgments from other Member States without the need for any procedure, except in cases of dispute. Although the various collective redress mechanisms can be divided into several typologies, there remain differences between the various Member States. In order to prevent these differences from leading to the refusal of the recognition and/or enforcement of collective redress judgments, the EU could coordinate the various national collective redress mechanisms. By using an EU Directive, it should be made possible for Member States to decide which mechanism they prefer to use to

[33] Andrew Owusu v. Nugent B. Jackson (Case C-281/02) [2005] ECR I-1383 and Magnus et al. 2016, p. 109. See also Gaudemet-Tallon 2002, p. 58.

[34] Group Josi Reinsurance Company SA v. Universal General Insurance Company, (Case C312/98) [2000] ECR I-5925, I-5952.

resolve mass disputes. Secondly, the EU Directive should guarantee that certain rights are taken into account when a collective redress mechanism is used. Through the EU Directive, the various national collective redress mechanisms all provide for certain basic rights, which should ensure the mutual trust which is necessary in the event of a judgment needing to be recognised or enforced.

References

Gaudemet-Tallon H (2002) Compétence et execution des judgments en Europe - Règlement no. 44/2001. Conventions de Bruxelles et de Lugano, Paris

Kessedjian C (2012) 'The ILA Rio resolution on Transnational Group Actions'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford

Magnus U et al (2016) 'Brussels I Regulation'. Sellier, Munich

Stefanelli J (2012) 'Parallel Litigation and cross-border collective actions'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford

Bibliography

Books

- Alvarez de Pfeifle ME (2009) Der ordre public-Vorbehalt als Versagungsgrund der Anerkennung und Vollstreckbarerklärung internationaler Schiedssprüche. Peter Lang, Frankfurt am Main
- Arons TMC (2012) Cross-border Enforcement of Listed Companies' Duties to Inform. Kluwer, Deventer
- Asser WDH et al (2006) Uitgebalanceerd. Boom, The Hague
- Briggs A (2009) Civil jurisdiction and judgments. Informa Law, London
- Danov M (2011) Jurisdiction and judgments in relation to EU competition law claims. Hart Publishing, Oxford
- Frenk N (1994) Kollektieve akties in het privaatrecht. Kluwer, Deventer
- Gaudemet-Tallon H (2002) Compétence et execution des judgments en Europe - Règlement no. 44/2001, Conventions de Bruxelles et de Lugano. Paris
- Geimer R (2005) Internationales Zivilprozeβrecht. Verlag Dr. Otto Schmidt, Cologne
- Groenendijk CA (1981) Bundeling van belangen bij de burgerlijke rechter. W.E. J. Tjeenk Willink, Zwolle
- Halfmeier A et al (2010) Kollektiver Rechtsschutz im Kapitalmarktrecht. Frankfurt School Verlag GmbH, Frankfurt am Main
- Hess B et al (2008) Report on the Application of Regulation Brussels I in the Member States
- Hodges C (2008) The Reform of Class and Representative Actions in European Legal Systems. Hart Publishing, Oxford
- Hodges C (2012) Consumer ADR in Europe. Hart Publishing, Oxford
- Karlsgodt PG (2012) World class actions. Oxford University Press, New York
- Kuypers PHLM (2008) Forumkeuze in het Nederlandse internationaal privaatrecht. Kluwer, Deventer
- Kuypers PHLM (2008) Forumkeuze in het Nederlandse internationaal Privaatrecht. Thesis Leiden University
- Magnus U et al (2016) 'Brussels I Regulation'. Sellier, Munich
- Nuyts A et al (2013) Cross-border class actions, the European way. Sellier, Munich

T. Bosters, *Collective Redress and Private International Law in the EU*,
DOI 10.1007/978-94-6265-186-9

- Pertegás M et al (2004) Enforcement of International Contracts in the European Union. Intersentia, Oxford
- Pontier JA, Burg E (2004) EU principles on jurisdiction and recognition and enforcement of judgments in civil and commercial matters according to the case law of the European Court of Justice. TMC Asser Press, The Hague
- Rauscher T (2006) Europaïsches Zivilprozeßrecht Kommentar I. Verlag C.H. Beck, Munich
- Rauscher T et al (2008) Münchener Kommentar zur Zivilprozessordnung. Verlag C.H. Beck, Munich
- Reuschle F et al (2008) Kölner kommentar zum Kapmug. Verlag C.H. Beck, Munich
- Rosner N (2004) Cross-border recognition and enforcement of foreign money judgments in civil and commercial matters. Thesis Groningen University
- Spindler JC (2001) Anerkennung und Vollstreckung ausländischer Prozessvergleiche unter besonderer Berücksichtigung der US-amerikanischen Class Actions Settlements. Konstanzer Schriften zur Rechtswissenschaft. Hartung-Gorre Verlag, Konstanz
- Strikwerda L (2010) De overeenkomst in het IPR. Maklu, Apeldoorn
- Strikwerda L (2015) Inleiding tot het Nederlandse Internationaal Privaatrecht. Kluwer, Deventer
- Teuben K (2004) Rechtersregelingen in het burgerlijk (proces)recht. Kluwer, Deventer
- Tzankova IN (2005) Strooischade: een verkennend onderzoek naar een nieuw rechtsfenomeen. SDU, The Hague
- Tzankova IN (2007) Toegang tot het recht bij massaschade. Thesis Tilburg University
- Van Houtte H (2009) The law of cross-border securities transactions. Sweet & Maxwell, London
- Van Lith H (2011) The Dutch Collective Settlements Act and private international law. Maklu, Antwerp
- Van Schaick AC (2011) 'Eerste aanleg', Asser Procesrecht. Kluwer, Deventer
- Vorwerk V et al (2007) KapMuG. Verlag C.H. Beck, Munich
- Yeazell SC (1987) From Medieval Group Litigation to the Modern Class Action. Yale University Press, New Haven/London

Reports

- The American Law Institute, Principles of the Law of Aggregate Litigation [7.5.2008]
- The International Law Association, Report of the Seventy-Third Conference [August 2008]
- The International Bar Association, Guidelines for recognising and enforcing foreign judgments for collective redress [16.10.2008]
- Federal Judicial Center, Manual for complex litigation 2004

- Report of the British Institute on International Comparative Law on The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process
- EC Directorate-General for Health and Consumers (DG SANCO), Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, Berlin: Civic Consulting 2008

Articles/Book Chapters

- Arons TMC et al (2014) '20 jaar collectieve actie in het Nederlands BW'. OR 68
- Arons TMC et al (2014) 'Voorontwerp wet afwikkeling massaschade in een collectieve actie. Het sluitstuk van de collectieve actie'. OR 137
- Baetge D (2007) 'Class actions, Group Litigation and other Forms of Collective Litigation'. In: Globalisation of Class Actions project. Stanford University
- Boom WH (2009) 'Collective Settlement of Mass Claims in the Netherlands'. In: Casper M et al (eds) Auf dem Weg zu einer europäischen Sammelklage? Sellier, Munich
- Bosters MWF (2011) 'De erkenning en tenuitvoerlegging van de WCAM in de EU'. In: Geschriften vanwege de vereniging Corporate Litigation 2010–2011. Kluwer, Deventer
- Bosters MWF (2014) 'Voorontwerp collectieve schadevergoedingsactie'. AV&S 16
- Buxbaum H (2007) 'Multinational class actions under federal securities law: managing jurisdictional conflict'. Columbia Journal of Transnational Law 1
- Choi SJ et al (2009) 'Transnational litigation and global securities class-action lawsuits'. Wisconsin Law Review 2
- Cornegoor JMKP (2009) 'Collectieve acties en belangenorganisatie in hun verschijningsvormen'. In: 't Hart FMA (ed) Collectieve acties in de financiële sector. NIBE-SVV, Amsterdam
- Croiset van Uchelen ARJ (2007) 'De verbindendverklaring volgens de WCAM als procesvorm'. AV&S 34
- Croiset van Uchelen ARJ et al (2009) 'Shell-shocked?' Tijdschrift voor de ondernemingsrechtpraktijk 7
- Croiset van Uchelen ARJ (2008) 'Handhaven of bijschaven? De effectiviteit van de WCAM'. WPNR 6722
- Van Dam-Lely JH et al (2013) 'Collectieve acties in het algemeen en de WCAM in het bijzonder'. Tijdschrift voor Consumentrecht 1
- Danov M (2010) 'The Brussels I Regulation; Cross-border collective redress proceedings and judgments'. Journal of Private International Law 2
- De Boer TM (2012) 'Enkele gedachten over de grondslagen van het internationaal bevoegdheidsrecht'. In: Ibili F et al (eds) IPR in de spiegel van Paul Vlas. Kluwer, Deventer
- De Jong BJ (2011) 'Herziening van de WCAM en het collectief actierecht'. Ondernemingsrecht 60
- De Jong BJ (2012) 'Voorstel Wet tot wijziging van de Wet collectieve afwikkeling massaschade'. Ondernemingsrecht 22

- De Jong BJ (2010) 'Een Claimcode voor stichtingen die collectieve acties initiëren'. Ondernemingsrecht 46
- Duivenboorde BB (2013) 'The Future of collective redress in Europe'. Tijdschrift voor Consumentenrecht en Handelspraktijken 6
- Fairgrieve D (2012) 'The impact of the Brussels I-bis enforcement and recognition rules. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford
- Fairgrieve D, Howells G (2012) 'Collective redress procedures: European debates'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford
- Fees E, Halfmeier A (2010) The German Capital Markets Model Case Act (KapMuG) - a European role model for increasing the efficiency of capital markets.
- Frenk N et al (2009) 'Het voortontwerp prejudiciële vragen aan de Hoge Raad'. RM Themis 4
- Grušić U (2011) 'Jurisdiction in complex contracts under the Brussels I-bis Regulation'. Journal of Private International Law 2
- Halfmeier A (20120) 'Recognition of a WCAM settlement in Germany'. NIPR 2
- Halfmeier A, Wimalasena P (2012) 'Rechtsstaatliche Anforderungen an Opt-out-Sammelverfahren: Anerkennung ausländischer Titel und rechtspolitischer Gestaltungsspielraum'. JuristenZeitung 13
- Hensler D (2009) 'The Globalization of Class Actions: An Overview'. Annals 2009
- Hensler D (2011) 'How economic globalisation is helping to construct a private transnational legal order'. In: Muller S et al The law of the future and the future of law. Torkel Opsahl Academic EPublisher, Oslo
- Hess B (2005) 'Musterverfahren im Kapitalmarktrecht'. Zeitschrift für Wirtschaftsrecht 26
- Hess B (2010) 'Cross-border Collective Litigation and the Regulation Brussels I'. IPRax 2
- Hodges C (2009) 'From Class Actions to Collective Redress: A Revolution in Approach to Compensation'. Civil Justice Quarterly 1
- Hodges C (2014) 'Collective redress: A Breakthrough or a Damp Squib?' Journal of Consumer Policy 1
- Kessedjian C (2012) 'The ILA Rio resolution on Transnational Group Actions'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press Oxford
- Klaassen CJM (2013) 'De rol van de (gewijzigde) WCAM bij de collectieve afwikkeling van massaschade 'en nog wat van die dingen' '. Ars Aequi 2013/9, pp. 627–639
- Kok AJ et al (2011) 'Converium: een stap vooruit bij collectieve afwikkeling van internationale massaschade in Nederland?' Tijdschrift voor de ondernemingsrechtpraktijk 1

- Kok AJ et al (2012) 'Converium; de eindbeschikking'. Tijdschrift voor de ondernemingsrechtpraktijk 2
- Kramberger Skerl J (2011) 'European Public Policy'. Journal of Private International Law
- Kramer XE (2011) 'Cross-border enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure'. Journal of Procedural Law 2
- Kramer XE (2013) 'Enforcing Mass Settlements in the European Judicial Areas: EU Policy and the Strange Case of Dutch Collective Settlements (WCAM)'. In: Hodges C et al (eds) Resolving Mass Disputes: ADR and Settlement of Mass Claims. Edward Elgar, Cheltenham, Northampton
- Kramer XE (2014) 'Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries'. Pacific McGeorge Global Business & Development Law Journal 2
- Kuipers JJ (2013) 'Schemes of arrangement and voluntary collective redress: a gap in the Brussels Regulation'. Journal of Private International Law 2
- Lagarde P (1986) 'Le principe de proximité dans le droit international privé contemporain'. Recueil de Cours 196
- Layton A (2012) 'Collective redress: policy objectives and practical problems'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford
- Lein E (2012) 'Cross-border collective redress and jurisdiction under Brussels I: a mismatch'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford
- Lemstra JH et al (2010) 'Consultatiedocument 'Zelfregulering claimstichtingen''. Tijdschrift voor Financieel Recht 6
- Lunsingh Scheurleer DF (2013) 'Enkele gedachten omtrent wenselijk procesrecht in collectieve acties en schikkingen'. In: Lunsingh Scheurleer et al Collectieve acties in het algemeen en de WCAM in het bijzonder. Boom Juridische Uitgevers, The Hague
- Marić S (2007) 'De Wet collectieve afwikkeling massaschade als alternatief voor Amerikaanse class action-procedures voor het afwikkelen van massaschades bij beleggers'. Vennootschap & Onderneming 9
- Meijer RS (2007) 'Massaschade'. AA 10
- Michaels R (2013) 'European class actions and applicable law'. In: Nuyts A et al (eds) Cross-border class actions - The European way. Sellier European Law Publishers, Munich
- Muir Watt H (2010) 'Brussels I and Aggregate Litigation or the Case of Redesigning the Common Judicial Area in Order to Respond to Changing Dynamics, Functions and Structures in Contemporary Adjudication and Litigation. IPRax 2
- Muir Watt H (2012) 'The trouble with cross-border collective redress: issues and difficulties'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford

- Nagareda RA (2009) 'Aggregate Litigation across the Atlantic and the Future of American Exceptionalism'. Vanderbilt Law Review 1
- Nuyts A (2013) 'Consolidation of collective claims under Brussels I'. In: Nuyts A et al (eds) Cross-border class actions - the European way. Sellier European Law Publishers, Munich
- Nuyts A et al (2013) 'Market Regulation, Judicial Cooperation and Collective redress'. In: Nuyts A et al Cross-border Class Actions, the European Way. Sellier European Law Publishers, Munich
- Pinna A (2008) 'Recognition and res judicata of US class action judgments in European legal systems'. Erasmus Law Review 2
- Polak MV (2006) 'Iedereen en overal? Internationaal privaatrecht rond Massaclaims'. NJB 41
- Poot MF (2006) 'Internationale afwikkeling van massaschades met de wet collectieve afwikkeling massaschade'. In: Holtzer H et al Geschriften vanwege de vereniging Corporate Litigation 2005–2006. Kluwer, Deventer
- Reding J et al (2009) 'Approval of Class Action Settlement by the Amsterdam Court of Appeal Closes Chapter on One 'F-Cubed' Securities Litigation, But the Future of Such Actions Remains Uncertain'. PaulHastings StayCurrent
- Saam D (2008) 'Collective enforcement of law within the German Legal System and the pending Telekom Case before the Higher Regional Court (Oberlandesgericht) of Frankfurt am Main – the need to reclassify the German Musterverfahren in this context'. Legal Latitudes 2
- Schaumburg E (2006) Die Verbandsklage im Verbraucherschutz- und Wettbewerbsrecht. Nomos, Baden-Baden
- Silberman L (2012) 'Morrison v National Australia Bank: Implications for Global Securities Class Actions'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford
- Stadler A (2009) 'A test case in Germany: 16,000 private investors vs. Deutsche Telekom'. ERA Forum 10
- Stadler A (2012) 'Conflicts of laws in multinational collective actions - a judicial nightmare? In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford
- Stadler A (2013) 'The Commission's Recommendation on common principles of collective redress and private international law issues'. NIPR 4
- Stefanelli J (2012) 'Parallel litigation and cross-border collective actions under the Brussels I-bis framework: lessons from abroad'. In: Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford
- Strong SI (2013) 'Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities'. School of Law, University of Missouri Legal Studies Research Paper Series, Research Paper 18
- Stürner M (2007) 'Model Case Proceedings in the Capital Markets - Tentative Steps Towards Group Litigation in Germany'. Civil Justice Quarterly 250

- Tang S (2011) 'Consumer collective redress'. Journal of Private International Law 1
- Ten Wolde MH et al (2013) 'De wet collectieve afwikkeling massaschade: wat is zij waard in het buitenland?' NTBR 2
- Tillema I (2014) 'De representatieve vordering: dekt de Europese vlag de Nederlandse lading'. NTBR 24
- Tzankova IN (2010) 'Kwaliteitsbewaking van belangenbehartiging bij collectieve acties en massaschade: 'Who will guard the guardians?' In: Holzer H et al Geschriften vanwege de Vereniging Corporate Litigation 2009–2010. Kluwer, Deventer
- Tzankova IN (2012) 'Funding of mass disputes: lessons from the Netherlands'. Journal of Law, Economics & Policy 3
- Tzankova IN et al (2009) 'Effectieve en efficiënte afwikkeling van massaschade: terug naar de kern van het collectieve actierecht'. In: 't Hart FMA et al Collectieve acties in de financiële sector. NIBE-SVV, Amsterdam
- Tzankova IN et al (2012) 'Class actions and class settlements going global: the Netherlands'. In Fairgrieve D, Lein E (eds) Extraterritoriality and collective redress. Oxford University Press, Oxford
- Tzankova IN et al (2012) 'De evaluatie van de WCAM: de kernthema's uitgelicht'. TCR 2
- Tzankova IN and Gramatikov M (2011) 'A critical note on two EU principles: A proceduralist view on the Draft CFR, 2011'. In: Micklitz HW et al (eds) The foundations of European private law. Hart Publishing, Oxford
- Tzankova IN, Lunsingh Scheurleer DF (2007) 'The Netherlands'. In: Hensler D et al (eds) Globalisation of class actions project. Stanford University
- Van Abeelen DMJ (2012) 'Het sluitstuk van de afwikkeling van massaschade: waar blijven de Himalayabeklimmers?' Tijdschrift voor vennootschaps- en rechtspersonenrecht 4
- Van der Heijden MJC (2013) 'De Shell-Nigeria-zaak: de eerste Nederlandse foreign direct liability-zaak voor de civiele rechter'. Tijdschrift voor vennootschaps- en rechtspersonenrecht 3
- Van der Velden BWG et al (2014) 'Grenzen van collectieve afdoening in zicht'. Tijdschrift Ondernemingsrechtpraktijk 5
- Veenstra KJ (2003) 'Artikel 5 EEX en afgebroken onderhandelingen'. NTBR
- Vriesendorp RD (2010) 'Faillissement en massaschade, twee kanten van dezelfde medaille'. In: Numann E Massificatie in het privaatrecht: opstellen ter gelegenheid van het 200-jarig bestaan van het genootschap Iustitia & Amicitia. Kluwer, Deventer
- Van Doorn CJM (2013) 'De afwikkeling van massaschade: optimale belangenbehartiging door belangenorganisaties'. WPNR
- Van Regteren Altena PN (2005) 'De collectieve afwikkeling van de DES-zaak in Nederland'. In: Van Mierlo AIM et al, Het wetsvoorstel collectieve afwikkeling massaschade. Boom Juridische uitgevers, The Hague

- Van Yperen CAJ (2012) Converium deel II: zesde verbindendverklaring van een collectieve schadeovereenkomst met toepassing van de Wcam'. Vennootschap & Onderneming 3
- Wasserman R (2010) 'Transnational Class Actions and Interjurisdictional preclusion'. University of Pittsburg Legal Studies Research paper 04
- Yeazell SC (1977) 'Group litigation and social context: toward a history of class action'. Columbia Law Review

Case Law

European Court of Human Rights

- ECtHR 24 June 1986, Series A no. 102
- Wendenburg et al. v. Federal Republic of Germany, ECtHR 6 February 2003, decision no. 71630/01, ECHR 2003-II, 347

European Court of Justice

- C-25/75, Segoura v. Bonakdarian [1976], ECR I-1851
- C-21/76, Bier v. Mines de Potasse [1976], ECR 1735
- C-125/79, Denilauler v. Couchet Frères [1980], ECR 1554
- C-56/79, Zelger v. Salinitri [1980], ECR 89
- C-125/79, Denilauler [1980], ECR 1553
- C-150/80, Elefanten Schuh GmbH v. Pierre Jacqmain [1981], ECR 1571, 1700
- C-38/81, Effer v. Kantner [1982]
- C-34/82, Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging, [1983], ECR 987, 1002
- C-201/82, Gerling v. Tesoro dello Stato [1983], ECR 2503
- C-71/83, Tilly Russ v. Nova [1984], ECR I-2417
- C-48/84, Hannelore Spitzley v. Sommer Exploitation SA [1985], ECR 787, 800.
- C-119/84, Capelloni et Aquilini v. Pelkmans [1985], ECR 3147
- C-241/83, Rösler v. Rottwinkel [1985]
- C-220/84, Autoteile v. Malhé [1985], ECR I-2273
- C-313/85, Iveco/Van Hool [1986], ECR 3337
- C-144/86, Gubisch Maschinenfabrik KG v. Palumbo [1987], ECR 4861
- C-189/87, Kalfelis v. Bankhaus Schröder Münchmeyer Henst & Cie. [1988], ECR 5565
- C-45/86, Horst Ludwig Martin Hoffmann v. Adelheid Krieg [1988], ECR 645
- C-351/89, Overseas Union Insurance Ltd v. New Hampshire Insurance Co. [1991], ECR I-3317

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- C-26/91, Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA [1992], ECR I-3967
- C-214/89, Powell Duffryn/Petereit [1992], ECR I-1745.
- C-89/91, Shearson Lehman Hutton v. TVB [1993], ECR I-139
- C-125/92, Mulox v. Geels [1993], ECR I-4075
- C-406/92, The owners of the cargo lately laden on board the ship 'Tatry' v. The owners of the ship 'Maciej Rataj' [1994], ECR I-5439, para 2.
- C-129/92, Owens Bank Ltd. v. Fulvio Bracco Industria Chemica SPA [1994], ECR I-117 Opinion AG
- C-414/92, Solo Kleinmotoren GmbH v. Emilio Boch [1994], ECR I-2237 + Opinion AG
- C-364/93, Marinari v. Lloyd's Bank [1995], ECR I-2719
- C-68/93, Shevill v. Presse Alliance [1995], ECR I-415
- C-78/95, Bernardus Hendrikman and Maria Feyen v. Magenta Druck & Verlag GmbH [1996], ECR I-4943
- C-106/95, MSG/Les Gravières [1997], ECR. I-911
- C-269/95, Benincasa v. Dentalkit [1997], ECR I-3788
- C-295/95, Farrel v. Long [1997], ECR I-1683
- C-351/96, Drouot Assurances v CMI [1998], ECR I-3075
- C-51/97, Réunion européenne SA v. Spliethoff's Bevrachtingskantoor BV and Master of the vessel Alblasgracht 002 [1998], ECR I-6511, I-6541
- C-267/97, Coursier v. Fortis [1999], ECR I-2543
- C-159/97, Castelletti v. Trumpy [1999], ECR I-1597
- C-387/98, Coreck Maritime v. Handelsveem [2000], ECR I-9337
- C-412/98, Group Josi Reinsurance Company SA v. Universal General Insurance Company [2000], ECR I-5925
- C-38/98, Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento [2000], ECR I-2973
- C-7/98, Dieter Krombach v. André Bamberski [2000], ECR I-1035
- C-344/00, Tacconi v. Wagner [2002], ECR I-7357
- C-256/00, Besix v. Kretzschmar [2002], ECR I-1699
- C-167/00, Verein für Konsumenteninformation v. Karl Heinz Henkel [2002], ECR I-8111
- C-96/00, Gabriel [2002], ECR I-6367
- C-159/02, Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA [2004], ECR I-3565.
- C-39/2002, Maersk Oil & Gas v. Firma M. de Haan [2004] Opinion AG
- C-27/02, Petra Engler v. Janus Versand GmbH [2005], ECR I-481 + Opinion AG
- C-281/02, Andrew Owusu v. Nugent B. Jackson [2005], ECR I-1383
- C-116/02, Gasser v. MISAT [2003], ECR I-14693
- C-539/03, Roche Nederland v. Primus [2006], ECR I-6569, para 26.
- C-180/06, Ilsinger v. Schlank & Schick GmbH [2009], ECR I-0000, 14 May 2009, [50]
- C-189/08, Zuid Chemie v. Phillipo's [2009], ECR I-06917
- C-394/07, Gambazzi v. Daimler Chrysler Canada Inc [2009], ECR I-0000

- C-420/07, Apostolides v. Orams [2009], ECR I-0000
- Case C-462/06 Glaxosmithkline and Laboratoires Glaxosmithklinepara v. Jean-Pierre Rouard, ECLI:EU:C:2008:299
- C-111/09, Česká podnikatelská pojišťovna as, Vienna Insurance Group v. Bilas [2010]
- C-327/10, Hypoteční Banka v. Lindner [2011]
- C-292/10, G. v. Cornelius de Visser [2012]
- C 543/10, Refcomp v. Axa [2013]
- C-419/11, Česká spořitelna v. Feichter [2013], ECLI:EU:C:2013:165
- C-147/12, Östergötlands Fastigheter AB v. Frank Koot and Evergreen Investments B.V. [2013], ECLI:EU:C:2013:490
- C-548/12, Marc Brogsitter/Fabrication de Montres Normandes [2014], ECLI: EU:C:2014:148
- C-375/13, Kolassa v. Barclays Bank Plc [2015], ECLI:EU:C:2015:37

Germany

- BGH, Beschluss vom 21. Oktober 2014 - XI ZB 12/12

The Netherlands

- Court of Haarlem, 5 February 2002, JOR 2002, 102.
- Court of 's-Gravenhage, 14 September 2011, ECLI:NL:RBSGR:2011:BU3535
- Amsterdam Court of Appeal 1 June 2006, LJN AX 6440
- Amsterdam Court of Appeal 29 April 2009, LJN BI2717
- Amsterdam Court of Appeal 29 May 2009, NJ 2009, 506
- Amsterdam Court of Appeal 15 July 2009, LJN: BJ2691
- Amsterdam Court of Appeal 12 November 2010, NJ 2010, 683 or JOR 2011, 46
- Amsterdam Court of Appeal 17 January 2012, LJN: BV1026
- Amsterdam Court of Appeal, 4 November 2014, ECLI:NL:GHAMS:2014:4560
- HR 1 July 1983, NJ 1984, 360
- HR 14 June 2002, NJ 2003, 689
- HR 23 December 2005, NJ 2006, 289
- HR 13 October 2006, RvdW 2006, 942
- HR 25 January 2007, LJN AZ7033
- HR 28 March 2008, LJN BC2837
- HR 5 June 2009, LJN BH2815 (Dexia Bank), LJN BH2811 (Levob), LJN BH2822 (Aegon)
- HR 26 June 2009, NJ 2010, 127
- HR 27 November 2009, LJN: BH 2162
- HR 26 February 2010, LJN: BK5756

United Kingdom

- Court of Appeal 12 October 1999, W.L.R. 2000, 603, 615–616 (The Ikarian Reefer No. 2)
- Research in Motion (UK) Ltd v. Visto Corp [2008], EWCA Civ 153, 2008 2 All ER (Comm) 650

United States

- Royal Dutch/Shell Transport Sec. Litig., 280 F. Supp. 2d 509, 539 (D. N.J. 2005).
- Royal Dutch/Shell, 380 F. Supp. 2d
- Royal Dutch/Shell Transport Sec. Litig., 04-374, 2007 WL 3406599 at *2 (D. N.J. Nov. 13 2007)
- 6 March 2008, United States District Court for the Southern District of New York, 04 Civ. 7897 (DLC)
- US Supreme Court, 24 June 2010, 561 U. S. (2010) [Morrison v. National Australia Bank]
- US District Court, Southern District of New York 21 May 2007, 241 F.R.D. 213
- US District Court, Southern District of New York 30 December 2010, 2010 WL 5463846 (S.D.N.Y.)

Curriculum Vitae

Thijs Bosters obtained his bachelor degree in Dutch law at Tilburg University in 2007. At the same university he finished his Master in Dutch Private Law in 2008.

In 2009, Thijs started as a research fellow at the Tilburg Institute for Law Technology, and Society at Tilburg University. He worked as a Ph.D. Candidate at the Private Law Department and the Tilburg Institute for Interdisciplinary Studies of Civil Law, and Conflict Resolution System from January 2010 till December 2011. In October 2011 he was able to make use of the excellent library and research facilities of the Max Planck Institute for Comparative and International Private Law in Hamburg.

Between 2012 and 2017, Thijs worked at NautaDutilh as an attorney-at-law in the Litigation and Arbitration department, while continuing writing his dissertation. On 26 June 2015, Thijs obtained his Doctorate at Tilburg University with a thesis on collective redress and the private international law issues in the European Union. As of 2017, Thijs joined the Dutch Supreme Court as a law clerk.

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