

## Becoming a Global Litigation Hub is the Wrong Choice for the Netherlands

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The Netherlands is showing signs of becoming a global litigation hub, taking on claims with little or no connection to the country or its citizens. Ongoing political, legal and financial developments risk giving rise to a “perfect storm” of opt-out litigation, contingency fees, excessive jurisdictional reach, and third parties seeking out and promoting litigation as a profit-making enterprise. To avoid the abuse and excess associated with mass litigation in the United States, the Netherlands should reject these developments, avoid creating new categories of “class action” and introduce formal regulation of third party funders and claims vehicles.

The Netherlands is one of only very few countries in Europe with an opt-out collective settlement system (WCAM), in which no prior consent is required from injured parties to be bound by a collective legal action. Efforts to extend this system to include collective damages actions have increased in the Dutch Parliament, and have led to a public consultation on proposed amendments to the Dutch Civil Code.<sup>1</sup>

Despite acknowledging the risks of abusive litigation in its consultation materials, the proposed amendments would introduce a system which is itself open to abuse, and which conflicts significantly with the model of collective redress advocated by the European Commission in its 2013 Recommendation on collective redress models.<sup>2</sup> Among the key issues in the proposals is a new procedure whereby a representative association could bring a collective damages action without a prior mandate from individuals who have suffered the actual harm. Instead, representative associations could litigate a claim through to the end and only then would actual claimants be invited to “opt-in”. This would lead to great uncertainty for defendants as they would potentially not know until the end of the procedure whether they are litigating against a significant class, or whether - at the end of the procedure - any claimants at all would actually opt-in. The proposed amendments suggest that the Court could make a final damages award – which would not be subject to any appeal – after which claimants could choose between opting-in or commencing entirely new litigation on the same issues.

Organisations wishing to bring collective damages actions under the proposed amendments to the Civil Code would not be subject to adequate suitability criteria. Further, there is inadequate guidance on key gateway questions on the admissibility of a claim, and what the thresholds for

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<sup>1</sup> Published July 2014

<sup>2</sup> European Commission Recommendation on the common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 11 July 2013.

certification of collective claims should be (in terms of their similarity and suitability for collective resolution).

While some acknowledgement has been given in the consultation to the need to limit jurisdictional over-reach by the Dutch Courts, the provisions described in the consultation are inadequate, particularly in light of the previous history of Dutch courts taking a very expansive view of their jurisdiction. Decisions by the Amsterdam Court of Appeals and other courts, in particular the Court of the Hague, have opened the door to worldwide collective settlements in the *Shell & Converium* cases. The Dutch courts' willingness to adjudicate over such settlements is at odds with the current trend for the U.S. courts to take a less expansive approach to including foreign claimants in a class action, and risks turning the Netherlands into a magnet for mass disputes. In light of this history, there is a risk that the proposed amendments to the Dutch Civil Code could open the door to Dutch courts being an attractive jurisdiction for claimants seeking adjudication of global mass damages claims, despite a potentially limited nexus with the Netherlands.

On hand to fuel the transformation of the Netherlands into a more hostile legal environment for businesses are litigation funders who seek to acquire and “bundle” together other parties' claims for damages or, in conjunction with law firms, establish representative associations or claims foundations to act as the driving forces behind collective actions. The current lack of regulation of these litigation funders is helping them flourish, and at the same time, increasing the risk of litigation abuse. Safeguards are needed as a matter of urgency to prevent litigation funders abusing the court process for their own gain at the expense of defendants, and even their own clients. No real safeguards appear in the proposed amendments to the Civil Code, despite such safeguards being advocated by the European Commission in its Recommendation.

In addition, the Dutch Bar Association has begun a 5-year experiment with “no-cure-no-pay” (no win, no fee) fees for lawyers. These fees will initially be permitted only in individual cases relating to personal injury and damage caused by death, and will be subject to a cap on the share that a lawyer may receive of its client's recovery. Nonetheless, these are U.S.-style contingency fees by another name and the fact that the experiment is taking place, and that the Ministry of Justice will evaluate the case for introducing such fees more widely, is indicative of the direction in which the Dutch legal system is heading.

A recent study comparing liability costs across the world showed that liability costs in the Netherlands as a proportion of GDP are for the time being lower than in other major European jurisdictions (such as France, Germany and the UK) and far lower than in the United States.<sup>3</sup> This is good for businesses and for the economy as a whole, and calls into question why the Netherlands needs to introduce the very features that have contributed to the excessive and abusive litigation culture of the United States. Third party litigation funding has the same potential to encourage litigious behaviour as contingency fees, as has been witnessed in Australia,<sup>4</sup> and is potentially more dangerous given that litigation funders, unlike lawyers, are not subject to professional conduct rules.

In light of all the above, the U.S. Chamber Institute for Legal Reform (ILR) was encouraged by the memoranda published in 2013 by the Ministry of Justice opposing the expansion of the collective action system and supporting the maintenance of a well-functioning and efficient WCAM collective settlement procedure. ILR hopes that this is the course that will be pursued, coupled with formal regulation of third party litigation funding and claims foundations, rather than the promotion of the Netherlands as a venue for mass disputes at the expense of its commerce-friendly reputation.

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The US Chamber Institute for Legal Reform (ILR) is the most effective and comprehensive campaign committed to improving the lawsuit climate in America and around the globe.

ILR's mission is to restore balance, ensure justice, and maintain integrity within the civil legal system. We do this by creating broad awareness of the impact of litigation on society and by championing common sense legal reforms at the state, federal, and global levels.

ILR's approach is pragmatic, focused on achieving real change in real time while laying the groundwork for long-term legal reform. ILR's hallmarks are the execution of cutting-edge strategies and a track record of visible success.

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<sup>3</sup> David McKnight and Paul Hinton (NERA Economic Consulting) for the U.S. Chamber Institute of Legal Reform, "*International Comparisons of Litigation Costs: Canada, Europe, Japan and the United States*", June 2013.

<sup>4</sup> See: King & Wood Mallesons, "*Class Actions in Australia: The Year in Review 2012*", available at: <http://www.mallesons.com/Documents/ClassActionsinAustralia-TheYearinReview2012.pdf>.