Collective action procedures are already well developed in Dutch law, which allows claims on behalf of a number of injured parties to be commenced in one action by an association or foundation with full legal capacity established for this purpose. Whether and to what extent a party suffered damage must currently be answered on an individual basis in separate civil proceedings; the association cannot claim collective damages on behalf of the individuals. However, a legislative proposal is pending which, if adopted, would make it possible to file a claim for damages in a Dutch collective action.

A procedure that facilitates the collective settlement of mass damages claims has been operating successfully in the Netherlands for some years.

What forms of collective actions are permitted in this jurisdiction and under what authority?

Collective claim
Where numerous parties ("Injured Parties") have an alleged claim for compensation of damage suffered as a result of one or more similar acts by another party ("Responsible Party"), under Article 3:305a of the Dutch Civil Code ("DCC"), an association or foundation (a "Representative Organisation") can represent the interests of these Injured Parties and initiate one single claim against the Responsible Party before the Dutch court. In practice, several Representative Organisations may bring separate claims against the Responsible Party for the same event, provided that each organisation meets the criteria of Article 3:305a DCC. Dutch law currently does not provide for a class action certification system.

Currently, under Dutch law, the Representative Organisation cannot claim collective damages on behalf of the Injured Parties. This means that the question of whether and to what extent a party suffered damage must be answered on an individual basis. Instead, the Representative Organisation will ask the Dutch court for a declaratory judgment regarding the liability of the Responsible Party. If the liability of the Responsible Party is established in a judgment between the Responsible Party and the Representative Organisation, each Injured Party can then separately bring its own claim for compensation on that basis.

The judgment between the Responsible Party and the Representative Organisation and the subsequent judgments between the Responsible Party and each Injured Party are not collective proceedings. Instead, each Injured Party must separately prove the damage they suffered as a result of the act of the Responsible Party.
Party and the individual Injured Parties may both be appealed to the Court of Appeal and the Dutch Supreme Court.

On 16 November 2016, the Dutch legislator submitted a legislative proposal to the Lower House of the Dutch Parliament to allow, inter alia, for collective damages claims in class actions. On 29 January 2019, the Lower House of the Dutch Parliament approved this legislative proposal, including a number of amendments thereto (“Legislative Proposal”). The Legislative Proposal is now before the Upper House of the Dutch Parliament. The Upper House of the Dutch Parliament is expected to discuss the Legislative Proposal in the near future.

Collective settlement

The Dutch Act on Collective Settlement of Mass Damages Claims (Wet Collectieve Afwikkeling Massaschade) (“WCAM”) facilitates the collective settlement of mass damages claims in a procedure that is very similar to the United States “damages class action” procedure. Under WCAM, the interests of a group of Injured Parties can be represented by a Representative Organisation, which may be the same entity that initiated the collective action set out above. Should the Representative Organisation subsequently agree to a settlement with the Responsible Party regarding the compensation payable to the Injured Parties represented by it, they can file a joint petition with the Amsterdam Court of Appeal to declare the settlement agreement collectively binding. Provided that the requirements under WCAM for a settlement agreement are met, the Amsterdam Court of Appeal will declare the settlement agreement collectively binding. Notification of the judgment and of the possibility to opt out of the settlement agreement within a certain period of time (which must be at least three months), is then sent to the Injured Parties. Injured Parties who do not opt out are bound by the settlement.

WCAM was most recently amended on 1 July 2013. The amendments facilitate – amongst others – mass damages claims in insolvency proceedings. Liquidators can now pool claims in a WCAM settlement which, if declared binding, means that the liquidators no longer have to verify each claim individually.

The Amsterdam Court of Appeal is exclusively competent to deal with the petition to declare a settlement agreement collectively binding. Its decision may only be appealed to the Dutch Supreme Court on the joint request of the Responsible Party and the relevant Representative Organisation. A preliminary ruling may also be requested from the Dutch Supreme Court. In the settlement agreement, the Responsible Party does not necessarily have to accept liability for the damage suffered (unless its liability has already been established in a prior collective claim, as described above).

Who may bring them?

Article 3:305a DCC provides that only Representative Organisations may bring collective actions. A Representative Organisation is an association (vereniging) or foundation (stichting) established under Dutch law, which is permitted to represent the interests of the Injured Parties in accordance with the criteria set out in Article 3:305a DCC.

Recent amendments to WCAM have introduced quality requirements for such Representative Organisations. On this basis, a Representative Organisation may be declared inadmissible in its claim if the interests of the persons that it is meant to represent are “insufficiently safeguarded”. In addition, in 2011, an independent commission published a “Claim Code” containing a set of governance requirements for Representative Organisations. Even though the Claim Code is non-binding, Dutch lower courts have applied its requirements to assess whether a Representative Organisation sufficiently safeguards the interest of the Injured Parties.

The Legislative Proposal also specifies these requirements and introduces additional requirements for Representative Organisations, including transparency and governance requirements. In addition, the Legislative Proposal introduces a jurisdictional rule for the admissibility of Representative Organisations, which provides that a collective claim can be brought before the Dutch courts if there is a sufficiently close connection with the Netherlands. A close connection is assumed when (i) most of the Injured Parties represented by the organisation reside in the Netherlands, (ii) the Responsible Party resides in the Netherlands or (iii) the event(s) to which the claim relates occurred in the Netherlands. The requirements under the Legislative Proposal may, however, change depending on the acceptance by the Upper House of the Dutch Parliament of the Legislative Proposal.

Opt in or opt out?

Currently, each individual party has to commence its own separate action to benefit from the court decision in the proceedings brought against the Responsible Party by the Representative Organisation. Individual parties may even commence separate proceedings in relation to the extent of the Responsible Party’s liability, despite the decision in the collective action.
An opt out (for Injured Parties domiciled in the Netherlands) and opt in (for foreign Injured Parties) system has also been proposed for the collective settlement (WCAM) procedure once the settlement has been declared collectively binding. Currently the Injured Parties can only opt out.

Under the Legislative Proposal, Injured Parties would be able to opt out of the collective action initiated by a Representative Organisation that meets the requirement of sufficiently safeguarding the interests of those Injured Parties, provided they did so at the beginning of the proceedings. Additionally, the Legislative Proposal includes an opt in system (in principle) for Injured Parties who are not resident in the Netherlands. However, parties would be able to request the court to order that the opt out mechanism also applies to foreign Injured Parties in the interest of e.g. finality.

**Limitations?**

Damages may not be claimed in court by Representative Organisations. Other than that, there are no limitations as to the type of claims that can be brought or settled collectively, provided that the Injured Parties’ claims result from one or more similar acts by the Responsible Party.

As mentioned, the Legislative Proposal would allow collective damages claims in class actions. Under the current proposed system, there are no restrictions as to the type of damages or Injured Party on whose behalf a class action may be brought.

**How are such actions funded?**

Under the ethical rules applicable to Dutch lawyers, a Dutch lawyer is not allowed to represent clients on the basis of “no win no fee” or “no cure no pay”. Therefore, they cannot be paid exclusively based on the potential proceeds of a collective claim or collective settlement. Pursuant to Dutch case law, however, a Representative Organisation can claim compensation for the “reasonable costs it has incurred for the purpose of establishing liability and the amount of damage”.

The Netherlands has also seen an increasing number of claims in “regular” legal proceedings initiated by so-called “litigation vehicles”, financed by third-party funders. Typically, the litigation vehicles’ endeavours are financed by (anonymous) third-party funders that speculate on the outcome of the legal proceedings or a possible settlement with the defendant(s). This type of third-party funding is currently unregulated in the Netherlands.

The Legislative Proposal imposes further financial requirements on the Representative Organisations filing class actions. For example, the board members of the Representative Organisation are not allowed to have a profit motive and the organisation will be required to publish information on its funding.

**Is pre-trial disclosure available?**

Dutch law is not familiar with US-style discovery of documents. In the Netherlands, there is a limited obligation to produce exhibits. In brief, a party with a legitimate interest in disclosure may request that specifically identified documents are produced (such as an email from A to B dated Y with subject Z). Also, the Dutch court may order a party to produce books, records and other documents it is legally obliged to keep. Although rules have not yet been formally codified, the Dutch Supreme Court has indicated that it may be possible to obtain the securing of evidence pre-judgment – that is, ex parte orders of the court to ensure that evidence is preserved until a court has formally ordered its disclosure. Previously, this was only possible in intellectual property cases. The use of this new instrument should lead to more procedural certainty and is expected to render the current system of enforcement of orders for document production more effective. Furthermore,
it is possible under Dutch law for any party with a potential claim to file a petition with the Dutch court for a preliminary hearing of witnesses or experts. This is a well-established right under Dutch law and the court will therefore usually allow such a petition.

**Likely future scope and development?**

Collective actions are becoming increasingly popular in the Netherlands. However, an important current limitation to the collective action on the basis of Section 3:305a DCC is that compensation for damages has to be claimed on an individual basis in separate proceedings. This will change if the Legislative Proposal is adopted by the Upper House of the Dutch Parliament. However, the Legislative Proposal is currently under review in the Upper House of Dutch Parliament and it is yet to be determined when it may enter into effect.