# Chapter 14
# A Dutch Perspective on Civil Litigation and its Harmonisation

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**Abstract** This chapter addresses the challenges of the globalisation of civil litigation from a Dutch perspective. It is submitted that for national governments it is inevitable to deliberate on harmonisation. Countries face similar problems and challenges in national civil justice and in the increasing number of cross-border disputes. If governments do not think about harmonisation, others will, in particular the European Commission. National legislators respond in different ways to European intervention depending on whether or not they already have a solution for the specific problem, are working on a solution at that moment or have recently done so. Simultaneous legislative activities create specific challenges, such as in the area of collective redress where both the national legislator and the EU are active at the moment. When faced with the choice between a sectoral approach or a general approach, the Dutch legislator usually prefers a general approach. Furthermore, the Dutch approach to cutting the costs and burden of litigation for citizens and for governments and mass claims are addressed, for which harmonisation at the European level may be considered. In a globalising world the interaction between national and international activity is not just a choice, it is a fact of life. Governments should find their own strategy and vision to deal with it.

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## Contents



## 14.1 Introduction

This contribution focuses on a Dutch government's perspective on the challenges of the globalisation of civil litigation. As my personal responsibilities in the past years have concentrated on national and European aspects of civil litigation, the European element will also be a focus. I shall discuss why thinking about harmonisation of civil litigation is inevitable for any European government and what strategies governments can develop to deal with activity in this field from 'Brussels.' Two specific challenges—cutting the costs and burden of civil litigation for citizens and for governments and dealing with mass claims—will be discussed separately.

## 14.2 Why Thinking About Harmonisation is Inevitable

National laws on civil procedure tend to be closely linked to national culture and history—although certain groups of systems can be identified.[1] Therefore, they vary immensely and harmonisation is difficult. This should not stop us from thinking about the relation between our national rules on civil procedure and the rest of the world. On the contrary, in this era an active government strategy on the interaction between national and international activity is inevitable for numerous reasons, of which I mention only three.

1) *Same problems in national civil justice and same challenges*
The problems we face in our national civil justice systems are rather similar for all of us. Cutting the costs and burden of litigation for citizens and for governments, the need for an efficient way to obtain an enforceable title in cases of unpaid debts,

[1] See, inter alia, Gottwald 2005, 23–35; Storme 1994, 87–99.

the increasing number of mass claims which require collective solutions and the insufficient rates of actual enforcement of judgments are just a few of the common challenges for courts and for governments in all countries. To this we can add the effects of the financial crisis which have forced all European governments to make huge cuts in their budgets for the coming years. Budgets for courts and litigation will not be exempt from this in most States.[2] We can and must learn from each other's solutions and practices in order to best address these challenges.

2) *Increasing number of cross-border disputes*
Moreover, an increasingly globalised world brings with it an increasing number of cross-border disputes. And these cross-border disputes tend to involve a higher number of people, that is, more mass claims. Clearly, in cross-border disputes the need for internationally agreed rules comes more naturally. The powers of national courts stop at the national border unless agreed otherwise at an international level. For this type of international agreement mutual trust is normally required together with a certain level of harmonisation of the national civil procedural rules for international cases. States will only accept a foreign court's decision within its territory if certain crucial requirements of civil procedure have been met. Common rules on respect for the defendant's rights in the procedure leading to the judgment is an example of this.[3] This is at the core of the judicial cooperation within the European Union and its idea of mutual trust. The same idea can be found in the work within the Hague Conference on Private International Law ever since the Conference came into existence.

3) *If we do not think about harmonisation as Member States, others* (*i.e. the European Commission*) *will*
Every Member State of the European Union is part of a multilayered system of powers, politics and levels of initiatives in which each player has to play its own role. In civil matters, including civil litigation, the European Commission has the exclusive right of initiative for new proposals. The European Commission is therefore a key player that has to maintain this key position by coming up with relevant proposals and by being indispensable to the functioning of the Union. This means that the European Commission has an interest in trying to be ahead of the Member States in the issues they take on board and in creating a link with the single internal market. Once a problem has been solved by Member States at a national level, there is much less need for European intervention. Therefore, it is in

[2] In the Netherlands, these budget cuts have led to far-reaching proposals and a draft bill to make court fees more cost-effective, at least at an overall level, resulting in court fees sometimes ten times as high as before. The proposals have been criticised by many as regards their effects on access to justice in the Netherlands. Whether the bill will be adopted by the Dutch Parliament remains to be seen. Whatever happens to the bill, it clearly stresses the need for more efficient means for citizens to solve their legal problems.

[3] Cf. Art. 6 of the European Convention on Human Rights whose rule on fair trial has led to a much greater awareness of this rule as a fundamental right of each party involved in civil litigation.

the interest of the European Commission to create and maintain a need for supra-national, European action rather than national action in order to meet the subsidiarity requirement. This need for European action can be found both where cross-border issues are involved and where certain Member States completely lack efficient rules and European intervention is said to be necessary in order to create a so-called level playing field. These general principles also apply to civil procedural law.

Therefore, any smart government ought to take a huge interest in the possible interaction between European and national measures.

## 14.3 European Activity in Civil Procedural Law and How to Deal with it

### *14.3.1 European Activity*

Over the last ten years we have seen increased activity on the part of the European Union in the field of civil procedural law. This increased activity can be seen in three different areas.

The first area is the classic area of international cooperation. A very successful example of a European instrument facilitating cross-border dispute resolution by uniform rules on international jurisdiction and recognition and enforcement, whilst at the same time harmonising certain rules of civil procedure regarding the defendant's safeguards, is, of course, Regulation Brussels I of the European Union (No. 44/2001). At a global level the Hague Convention on the Service of Documents could serve as an example.[4] Other European examples would be Regulation 1348/2000 on the Service of Documents and its successor, Regulation 1393/2007.[5]

The second area is the area of specific European civil procedures for certain specific types of cases, such as the Regulations on a European Payment Order Procedure (No. 1896/2006) and a European Small Claims Procedure (No. 361/2007).[6] On grounds of restrictions to the powers of the European legislator under Article 65 of the Treaty establishing the European Community (now replaced by Article 81 of the Treaty on the Functioning of the European Union), these are limited to cross-border cases only. The Directive on certain aspects of mediation in

[4] Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, see http://www.hcch.net/index_en.php?act=conventions.text&cid=17 (last consulted in June 2011).

[5] Regulation No. 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ 2000, L 160 as replaced by Regulation No. 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), OJ 2007, L 324, and repealing Regulation No. 1348/2000, OJ 2007, L 324.

[6] Regulation No. 1896/2006 creating a European order for payment procedure, OJ 2006, L 399 and Regulation No. 861/2007 establishing a European Small Claims Procedure, OJ 2007, L 199.

civil and commercial matters (No. 2008/52) does not belong to that area completely, but does force the harmonisation of certain elements of the national civil procedural laws of the Member States.[7] However, the scope of that Directive is also limited to cross-border mediations. It will therefore only have a limited impact on the national laws on civil procedure.[8] Forthcoming are the projects meant to improve the enforcement of judgments in civil matters: the attachment of bank accounts and the transparency of the debtor's assets.[9] Even if these last two will be limited to cross-border cases, they will probably be far more problematic than the ones previously mentioned. I will discuss this in more detail when discussing unsatisfactory enforcement rates as one of our common challenges.

The third area of increased harmonising activity is the enforcement of the existing acquis. Examples of this last area are the Directive on the Enforcement of Intellectual Property Rights and the forthcoming projects in the field of collective redress in competition law and consumer law.[10] The reason for this increased activity is that in the European Union the harmonisation of the substantive laws in those fields has to a wide extent been completed. But that harmonisation has not resulted in a perfect internal market. The effects of those harmonised substantive laws on the European internal market have been unsatisfactory. A further harmonisation—not of the substantive laws, but—of the rules regarding the enforcement thereof, aims to improve the functioning of the internal market in specific fields. All the instruments and projects in these second and third areas exist because the European Commission or the European legislator has identified them as problematic or as an obstacle to the proper functioning of the internal market.

A fourth area is announced in the Stockholm Action Plan of the European Commission as published on 20 April 2010.[11] It concerns the outright harmonisation of aspects of civil procedural law. The Commission intends to publish a green paper on minimum standards for civil procedures in 2013.

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[7] Directive (EC) 2008/52 on certain aspects of mediation in civil and commercial matters, OJ 2008, L 136.

[8] However, most Member States have chosen to transpose the Directive also for internal cases.

[9] See COM (2011) 445 final, Proposal for a Regulation of the European Parliament and of the Council creating a European Account Preservation Order to facilitate cross border debt recovery in civil and commercial matters which is a follow-up from the Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts, COM (2006) 618 (final). See also the Green Paper on the effective enforcement of judgments in the European Union: the transparency of debtors' assets, COM (2008) 128 (final).

[10] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ 2004, L 157 and its corrigendum in OJ 2004, L 195; White Paper on damages actions for breach of the EC antitrust rules, COM (2008) 165 (final) and Green Paper on consumer collective redress, COM (2008) 794 (final).

[11] Delivering an area of freedom, security and justice to Europe's citizens—Action Plan Implementing the Stockholm Programme, COM (2010) 171 (final).

### *14.3.2 How Governments Deal with this European Activity*

How do national governments deal with this European activity in the field of civil procedural law? What strategies on harmonisation do we have? Roughly speaking, three types of strategies can be distinguished.

1) *When they already have a well-established national solution*
Sometimes these governments have had to come up with solutions for a problem long before the European Union started to address the problem in the context of the internal market. For example, the German *Mahnverfahren* had been in place for ages when the European Commission launched its Green Paper on a European Payment Order.[12] Where this is the situation and where European action is nevertheless required (the subsidiarity requirement has been met), national systems may serve as a model for European solutions based on a 'best practices' approach. And after adoption, the national procedure and the European procedure may merge.

2) *When they do not have a specific solution*
Sometimes, on the contrary, a government has not implemented any specific rules addressing the problem. In such a situation, things become slightly more complicated for a national government. Here, the same European Payment Order Procedure may be used as an example, but now in relation to the Netherlands.[13] The Dutch Code of Civil Procedure does not contain a specific procedure for debt collection. We had nothing against a European Payment Order as such and were in favour of a fast procedure for cross-border debt collection. But the way in which internal claims for debt collection are conducted in practice by the Dutch courts in ordinary civil proceedings will normally be quicker and for the courts less costly than the specific European Payment Order Procedure. For those reasons the Dutch government has implemented the European Payment Order in a strict way, limited to cross-border cases without extending its scope to internal cases. Should it turn out that the European Payment Order is a huge success, we may reconsider an extension of the scope.[14] The harmonisation of national law on civil procedure would then be the effect of such an extension of scope.

3) *When they have recently or are still working on a solution*
A third possibility is when 'Europe' and national governments are working on solutions for problems simultaneously. In my view, this is an even more difficult

[12] Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation, COM (2002) 746 (final) resulting in Regulation (EC) 1896/2006 creating a European order for payment procedure, OJ 2006, L 399.

[13] See Kramer and Sujecki 2007, 1–8. See specifically on the implementation of the European order for payment procedure, Van der Grinten 2010, 109–128.

[14] In view of the government's plans on more cost-effective court fees, the Dutch Parliament has already asked for a payment order procedure for internal cases.

scenario. An example of simultaneous work at a global, a European and a national level would be the work done on collective redress. Nearly all Member States have recently worked on or are currently working on either specific or general collective redress mechanisms, each of the States in very different ways. For some years now the European Commission has been working on collective redress in competition law and consumer law. At first this was based on a sectoral approach with different solutions for competition law and consumer law, depending on the Directorate General within the European Commission responsible for either competition law or consumer law. This sectoral approach was different from the one taken in at least some Member States, such as the Netherlands. Vast opposition has led the Commission to a change in strategy. The proposal for an instrument on competition law was never launched. The plans for collective redress for consumers are now the shared responsibility of three Commissioners: Justice, Competition, and Health and Consumers (Sanco). Thereafter, the Commission announced a single approach for both competition law and consumer law enforcement. To prove its good intentions the Commission started a public consultation on a 'coherent approach' to collective redress within the European Union.[15] It is not at all clear what direction will be taken by the Commission.[16] These rules are meant to apply at a global level.

Here we face a real challenge. On the one hand, this is, at least for Europe, a relatively new area of law and best practices have yet to be established. Any European initiative trying to create a European collective mechanism or trying to harmonise the very recent national mechanisms would threaten to kill those national initiatives. On the other hand, the problem of mass claims is acute. Questions which arise are: who comes first, the national legislators or the European Union? Are there any issues which are inherently transnational and which cannot be solved at the national level but which require European or even global coordination, such as the question regarding jurisdiction in mass claims?

This is where law meets politics. In a Union with 27 Member States there will always be Member States that need the European legislator to force them to take action. Other Member States that are further ahead in their national development in the area of collective redress—like the Netherlands—will want to safeguard their successful national initiatives, initiatives which may not be seen by others as a suitable solution for them. So far the Dutch government's strategy has been to explain and promote its—rather unique—mechanism to other Member States and to the European Commission. Where we see opportunities for European intervention, e.g. in coordinating transnational mass claims, we try to convince those

[15] Towards a coherent European approach to collective redress, SEC (2011) 173 (final).

[16] At the same time the International Law Association (ILA) adopted a resolution on international collective redress during its sessions in Rio de Janeiro in 2008: Paris-Rio guidelines on best practices for transnational group actions, prepared by the ILA committee on international civil litigation and the interests of the public, to be downloaded from their website, www.ila-hq.org (last consulted in June 2011).

responsible to focus on these opportunities rather than coming up with a separate European mechanism for collective redress.

4) *When faced with the choice between a sectoral or specific approach versus a general approach*

A further strategy required from governments, regardless of the three situations mentioned above, is the choice for a sectoral or specific approach rather than a general approach, or vice versa. Examples of a sectoral approach where one could also imagine a general approach are mostly found in the third area of the Commission's activities: new rules on the enforcement of the existing acquis. The policy of the Dutch Ministry of Security and Justice is that a general approach is preferable to a sectoral approach as is clear from the Dutch response to several green papers in the area of civil procedure and collective redress. A general approach prevents fragmentation of the law. The confusion and lack of clarity caused by this fragmentation threatens *de facto* the access to justice for citizens whilst intending the opposite. On the Enforcement of Intellectual Property Rights the Dutch did not manage to stop the Directive from being adopted. However, as explained above, as regards the European Commission's sectoral activities in the area of collective redress we and others have been more effective.

The choice for either a specific instrument or a general approach is the choice for a '28th regime' or minimum standards. Different arguments can be used in favour of either option. For the United Kingdom the choice is simple. As long as the scope of a European instrument is limited to a separate regime for cross-border cases, they can accept such an instrument regardless of how many trimmings such an instrument will get.[17] For them, the prime concern is to ensure that their own national civil procedural law remains unaffected. In the past, the Dutch approach was in general that harmonisation is to be preferred. Harmonisation seems to fit in better with a system of codified law. A separate European regime leads—just as a sectoral approach—to fragmentation and to the existence of different legal systems side by side. This is considered to be undesirable.

Applied to the example of the forthcoming proposal for a European attachment of bank accounts, a special European regime is potentially boundless and disproportionate. In order to create a uniform regime for the European Union, provisions on the ranking of the attachment and on the attachment of joint accounts might have to be included. But at least under Dutch law those provisions are not even part of our civil procedural law. They are at the heart of our substantive law on joint ownership and ranking of debts in general.

However, the harmonisation of attachment of bank accounts may be problematic, too. Where national laws on civil procedure, like the Dutch Code of Civil Procedure, have a general scheme for protective attachments against a third party, the harmonisation of the rules on the attachment of bank accounts alone would seem problematic. Such a European harmonised system for the attachment of bank

[17] See also Van der Grinten 2009.

accounts would interfere with the Dutch scheme for protective attachments against a third party as a whole. However, the consequences for those other types of attachment against a third party will not have been taken into account in the realisation of this European instrument. Moreover, a harmonised European regulation for the attachment of bank accounts threatens to override qualitatively better national rules in this respect.

Thus, governments should carefully choose their strategy in these matters. The Dutch strategy in this specific example of the attachment of bank accounts has been to suggest alternatives and to explain the importance of keeping the attachment itself local, regardless of who gave the order or permission to attach.

## 14.4 Common Challenges and How to Deal with Them

In this last part of my contribution I want to discuss, from a Dutch government's perspective, some of the challenges in civil procedural law which all of us face. I will focus on two of them but many others could be given. The two challenges are: (1) cutting the costs and burden of litigation for citizens and for governments and (2) mass claims.

### *14.4.1 Cutting the Costs and Burden of Civil Litigation for Citizens and for Governments*

The costs of civil litigation are considered to be the ultimate obstacle for parties to embark upon court proceedings. The financial crisis has forced us to make budgetary cuts in our civil justice system in the amount of hundreds of millions of euros. The Dutch government has decided that the court fees will be increased substantially in order to cover these hundreds of millions, partly by a raise in incoming fees and partly by a drop in the number of cases.[18] At the same time the government wants to present an Innovation Agenda that should lead to better and more efficient court proceedings and to better alternatives for going to court.[19] Thinking about this innovation as very preliminary thoughts, I personally see a threefold approach which the government could take.

Firstly, we want to improve substantive laws to provide clear and simple rules which prevent legal disputes. Examples could be stricter and more predictable statutory standards for child maintenance, termination of employment contracts

[18] See the draft bill which is available on the government's website http://www.rijksoverheid.nl/documenten-en-publicaties/regelingen/2011/04/04/wetsvoorstel-invoering-van-kostendekkende-griffierechten.html (last consulted 1 July 2011) and e.g. *Kamerstukken* 31753, Nos. 27 and 36.

[19] See *Kamerstukken* 31753, No. 27.

and damages. Another example would be to provide that any method sufficient for entering into a contract will do for its termination. For example, if sending a text message by SMS is the way a consumer can obtain a certain SMS service, then sending a text message by SMS—rather than a registered letter as often required under the standard terms of the contract—is a sufficient means to terminate this service. A successful example of existing legislation is the Dutch Statute on Electricity (*Elektriciteitswet*) together with the Dutch Grid Code. These include a provision that puts an obligation on the provider to compensate consumers for a fixed amount for a power failure of more than four hours. Each commercial party in the Dutch energy market is bound by the Grid Code, which is part of the party's licence. For the liability of employers we consider the introduction of an insurance-based system rather than a civil liability system.

Secondly, only those cases in which court intervention can be effective should be brought before the court. This should save expenses for the government and for parties that can choose an alternative route to solve their legal problems. To achieve this goal, the use of ADR schemes like our Consumer Claims Tribunals and mediation could be stimulated also financially by using different legal aid fees if an alternative could have been used. Moreover, parties should be stimulated financially to use our Legal Desk as their intermediary before going to a lawyer and asking for legal aid. The use of specialised lawyers in family law should be stimulated. In this way we can filter those cases where non-specialised lawyers start unnecessary or even vexatious proceedings either because they lack sufficient knowledge of the law or because they do not care and only want to get their legal aid money.

A completely different measure with the same goal has been the introduction in July 2010 of the 'partial dispute' procedure in personal injury cases. This procedure will help the parties to resolve their dispute out of court. Either party can ask the court to intervene on one or more specific issues which are an obstacle to resolving their dispute out of court (e.g. on liability, or on medical data). The court only intervenes if its intervention can positively affect the out-of-court resolution of the dispute as a whole. To ensure access for the victim, all the costs of the partial dispute procedure will be borne by the person held liable (his or her insurer) and can be claimed in full should proceedings on the dispute as a whole follow. Moreover, to help the parties in a personal injury case to resolve their dispute, a self-regulatory Code of Conduct exists with rules on a transparent and harmonious compensation scheme.

Thirdly, cases should be dealt with efficiently and speedily. This means that where appropriate, cases should be dealt with in one instance only. This may seem a rather radical measure to propose. However, it offers a high level of predictability for the parties in assessing their risk of starting litigation and it brings their dispute to a close much sooner. In order to be able to have evidence-based proposals in this area, an empirical study will be carried out in 2011 and 2012 on the types of cases in which and the reasons why an appeal is lodged. A condition for a one-instance-only approach is, of course, a high-quality first instance court. Improvements can be made in the Dutch rules and Dutch practice on the taking of evidence and by the introduction of a wizard-based electronic simple claims procedure.

Interestingly enough, the European Commission has put the Regulation on the taking of evidence in its Stockholm Action Plan in order to 'if necessary come up with minimum standards for the taking of evidence.'[20] A more European approach to the sort of information which parties should be able to receive from each other and from third parties could have added value and prevent expensive forum shopping.

### *14.4.2 Mass Claims Which Require Collective Solutions*

In this section, the Dutch approach to mass claims will be discussed separately. Dealing with mass claims in an efficient way can prevent numerous individual claims concerning the same legal dispute from being brought before the court. In that respect, they fit perfectly well in an approach to create a civil justice system where court intervention is focused and efficient.

The Dutch collective redress mechanism is laid down in the Dutch Collective Settlement Act of 2005.[21] It is based on court approval of a collective settlement between the party that is held responsible for the damage and representative organisations on behalf of the injured parties. The Dutch Collective Settlement Act is rather successful. It has led to higher amounts paid to injured parties than anywhere else in Europe (far over a billion euros). It is also a mechanism which has proved to work in cross-border mass claims.[22]

The Dutch system on collective redress does not stop at the Dutch Collective Settlement Act. Dutch civil procedural law has a collective action in which liability can be established but in which no compensation can be claimed collectively. The bundling of individual mass claims in one procedure is also allowed. We are currently looking at measures to promote ways to efficiently deal with mass claims. A bill is pending in Parliament to introduce the possibility for a court to pose a preliminary question to the Dutch Supreme Court if the answer to that question is relevant to a number of cases.[23] Thus, the early intervention of the Dutch Supreme Court can help to resolve many other similar individual cases at an

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[20] See no. 9, 22–23.

[21] Dutch Collective Settlement Act of 23 June 2005 (*Wet collectieve afwikkeling massaschade*, 'WCAM'), Staatsblad 2005, 340.

[22] See the research report commissioned by the Ministry of Security and Justice 'The Dutch Collective Settlements Act and Private International Law, Aspecten van Internationaal Privaatrecht in de WCAM' prepared by Erasmus School of Law (Van Lith, supervised by De Ly and Kramer), available at http://bit.ly/kqHTRP (or www.wodc.nl), also published as Van Lith 2011; Van Boom and Arons 2010, 857–883.

[23] Bill submitted to Parliament in 2010, introducing the possibility for courts to ask preliminary questions to the Dutch Supreme Court ('Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet op de rechterlijke organisatie in verband met de invoering van de mogelijkheid tot het stellen van prejudiciële vragen aan de civiele kamer van de Hoge Raad (Wet prejudiciële vragen aan de Hoge Raad)'), *Kamerstukken* 32 612, Nos 2 and 3.

early stage whether by the lower courts or even out of court. Another measure included in a draft bill to improve our Collective Settlement Act is the possibility for either of the parties involved to ask the court for a prehearing to see what would be needed to facilitate a settlement. In this prehearing the court could, for example, identify points of law which will have to be addressed—either in court proceedings or out of court—before parties will be ready to come to an agreement. Yet another measure considered is to allow collective legal aid both in legal aid schemes and under legal aid insurance policies. This would entail the possibility for the insurer to deal with a mass claim of many individual insureds on a collective basis, e.g. by hiring a lawyer to start a collective action rather than all those individual procedures for individual claims. At the same time we look for ways to put some limits to the rather open system of mass representation by way of *ad hoc* associations. This is a more recent challenge which we face in a civil justice landscape where claims and especially mass claims have become a real market.

In order for the Dutch system on collective redress to work even more effectively we see some room for intervention by the European Union. For example, the European Court of Justice (ECJ) has ruled in a decision on legal aid insurance that any insured person has the right to choose his or her own lawyer under the Directive on legal expenses insurance.[24] In order to work complementarily at a national and European level, it would be very helpful if at a European level we would accept an exception to this rule for the purpose of the efficient handling of mass claims.

Moreover, in cross-border cases and in order to have better coordination at least within the European Union we would need supplementary rules at a European level. These rules do not relate to a European collective redress mechanism or to minimum standards for a national collective redress mechanism. All we need for the time being are rules for international jurisdiction in collective redress of mass claims and rules and clarifications on the meaning of *lis pendens* in mass claims. For example, could or should the Dutch procedure to get approval of a collective settlement of mass claims for the purpose of *lis pendens* count as a procedure concerning the right to compensation of the injured parties? Even if the Dutch court accepts jurisdiction in an international mass claim, that Dutch court cannot stop an individual injured party from starting a procedure in another Member State regarding the same event which caused the mass claim. European rules could solve this. The International Law Association rules on transnational collective procedures could be used as a source of inspiration.

At a later stage when national practices in internal and international cases have been better established a further harmonisation of collective redress could be considered. Of course, we try to promote our model as a pragmatic approach to collective redress which could work for Europe, too. But if a majority would fail to

[24] ECJ 10 September 2009, Case C-199/08, ECR I-8295 (*Dr. Erhard Eschig v UNIQA Sachversicherung AG*); Directive 87/344/EEC of 22/06/1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance, OJ 1987, L 185/79.

see the benefits of the Dutch solution to the problem of mass claims, then what? In my view we ought to think twice before we adopt a supranational European collective redress mechanism. Supposedly, the aim of any European project in the field of collective redress is to enhance the enforcement of mass claims and compensation to victims in those cases in Europe. If these mass claims are cross-border, some coordinating provisions seem necessary, but otherwise national mechanisms may address the need for mass compensation in a perfectly acceptable and successful manner. Only if and to the extent that a State does not have any mechanism for efficiently dealing with mass claims, we may, at least within the European Union, want to stimulate them to create some sort of mechanism. As long as such a mechanism is effective, should we care what it looks like? Should we bother whether it is an opt-in or an opt-out mechanism, or a settlement-based scheme? Having harmonised rules should not be an aim in and of itself. A national mechanism like the Dutch Collective Settlement Act providing for successful collective redress to injured parties should not have to be amended just for the sake of European harmonisation.

Moreover, in as far as the aim is enforcement of the rules violated by the person held liable, we should first discuss whether private law mechanisms can and do indeed serve that purpose.

## 14.5 Where to Go: Civil Justice in Europe

In this contribution I have not dealt with the legal basis for judicial cooperation in Europe. In practice this may give rise to endless discussions and it may prevent us from getting results where we want them. At the same time, I have seen previous examples where the legal basis for a European measure was at best doubtful. When everybody involved wants a measure badly, there will not even be a blocking minority to stop the measure from being adopted just because of a missing legal basis.

I think in the globalising world in which we live the interaction between national and international activity is not just a choice. It is a fact of life. What governments can do with this fact of life is that they should find their own strategy and vision to deal with it. What issues are best dealt with at the international/European level? In what manner should the issue be dealt with at that level? What can best be left to national law? For example, we consider the exclusion of appeal in Dutch civil procedural law based on an analysis of the types of cases in Dutch appeal proceedings in which the case in appeal is not about a second chance or a revision of the first court's decision but rather about the fact that one of the parties is still angry that his or her partner has left him or her.

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