‘Shadow of the Law’ or ‘Shadow of the Settlement’: Experiences with the Dutch Act on Collective Settlement of Mass Damage (WCAM)

Annie de Roo and Rob Jagtenberg

Abstract Public and private justice may not be such mutually exclusive concepts as commonly viewed. Public court judgments may co-determine private settlements, but also conversely, private settlements may co-determine court judgments. The latter phenomenon can be found particularly in mass disputes leading to collective settlements that receive broad media coverage. This contribution analyses the practice in the Netherlands, where such collective settlements can even be endorsed by the courts under the Act on Collective Settlement of Mass Damage, or the WCAM Act. Individual parties that decline such a settlement and prefer to pursue their case in court may nevertheless be confronted with such a private settlement to which they themselves are not a party. The contribution rounds off with a non-exhaustive stocktaking of salient pros and cons of negotiated settlement and law enforcement, respectively.

1 Introduction: Public Justice Versus Private Justice?

The very theme itself of the public and private justice series prompts a closer look at the distinction between ‘public’ and ‘private’ justice. This is all the more so in the area of collective redress as analysed in this contribution, where in this area the line between ‘public’ and ‘private’ becomes particularly vague.

Along the curve of human dispute strategies, ranging all the way from ‘flight’ to ‘fight’, there is a linear relationship between the methods of negotiation, mediation, arbitration and litigation. These methods imply a steadily decreasing amount of *control* on the part of the disputants, and a shift from the private to the public sphere (Jagtenberg 2014, 282).

A. de Roo · R. Jagtenberg (✉)
Erasmus School of Law, Rotterdam, The Netherlands
e-mail: jagtenberg@law.eur.nl

A. de Roo
e-mail: deroo@law.eur.nl

A. Uzelac and C. H. van Rhee (eds.), *Transformation of Civil Justice*,
Ius Gentium: Comparative Perspectives on Law and Justice 70,
https://doi.org/10.1007/978-3-319-97358-6_14

Negotiation, or bargaining, usually signifies that we must give up something in order to get something else in return from our opponent. When we do not succeed in that, we can just walk away, and thus there is full autonomy. Typically, bargaining takes place in private conference rooms. Modern mediation refers to a structured process of negotiation under the guidance of a professional neutral third party. According to European legislation, nearly everything discussed during mediation is to be kept confidential, in order to incentivize frankness and creativity. Only the solution itself, once contained in a settlement contract, escapes secrecy in order to allow its enforcement.

Both bargaining and mediation are thus methods based on a mutually agreed solution. This is what is meant, in our view, by private justice: the contents of the solution are solely determined by the immediate parties themselves.

Arbitration and litigation, by contrast, are methods based upon an imposed decision, that is, imposed by a privately appointed neutral third party or by the publicly funded judiciary where party control is reduced to almost zero. The judiciary declares or enforces the law: the public norms to rule the dispute.

Thus, at first sight bargaining and in-court adjudication—to take the extremes—seem to be mutually exclusive concepts. Upon closer inspection, however, a court judgment (from the past or anticipated) may well leave its mark on the bargaining process. As Robert Mnookin observed in his seminal article 'Bargaining in the Shadow of the Law', court judgments rendered in prior, relevant lawsuits may serve as an objective parameter for negotiations that are about to get started (Mnookin and Kornhauser 1978/1979, 950–997), no matter whether these negotiations unfold directly between the parties or as mediations.

In another landmark contribution, 'Against settlement' by Owen Fiss, the author posited, rather, that where the law has any relevance to a dispute, the parties should precisely *not* bargain a private settlement but, instead, resort to the courts. Fiss emphasizes that law enforcement transcends the interests of the immediate parties in having their dispute resolved:

> The social function of the lawsuit is to explicate the values embodied in authoritative legal texts; in case of settlements, society gets less than what appears, and for a price it does not know it is paying. (Fiss 1983/1984, 1073–1090)

One may wonder to what extent this view is rooted in the real world of disputes. In many court cases, already the *facts* to which the law is to be applied are often contested; and the *law* itself may be unclear, if only because there is almost always a legal norm that could counterbalance a first norm invoked by one's opponent.[1]

For decades now, the proponents of mediation like to illustrate the advantages of private solutions in precisely such cases with an unpredictable legal outcome through the classic example of the two cooks who are about to litigate over the ownership of a shipload of oranges that has just arrived from, say, Morocco.

[1]The phenomenon of *contributory negligence* constitutes a good example.

One cook's name appears on the bill of lading, the other's name on the insurance certificate. With the additional necessity of collecting evidence from abroad, pursuing the case in court may take years. Unlike a judge who will be focused on the past, a mediator will help to identify both cooks' present and future interests. It appears that the first cook needs the *pulp* of the oranges for making juice, while the second cook needs the *peel* for making marmalade.

On that basis, an optimal solution serving both parties' interests can be worked out, and both parties may trade off the costs and uncertainty of a legal outcome against a commercially viable solution, with both cooks processing the oranges together from then on.

Still, Owen Fiss might argue: What price does *society* pay here?

Suppose the dispute over the documents arose because a shady agent in Morocco had found he could sell the same oranges *twice* every time by *forging* the documents (bill of lading and/or insurance certificate)?

A public lawsuit would likely expose the villain, and would thus be instrumental in preventing other cooks in society from falling victim to similar duplicity in the future (though these others could be said to enjoy a free ride then on this first and no doubt expensive public lawsuit).

Taking this macro perspective, law enforcement would yield larger returns for society as a whole.

Viewing the legal process primarily as a method of dispute resolution for the *immediate* parties seems to have become dominant in Europe, or perhaps one should say, dominant *again*. On the European continent there is a long existing practice of the 'multi-hat court judge', whereby the judge is statutorily authorized to make an attempt at reconciling the litigants that have appeared before him/her. This tradition has now been complemented (in both Continental and common law jurisdictions) with the relatively new practice of the 'multi-door courthouse' (a concept coined by Frank Sander), whereby the judge no longer attempts to reconcile the parties himself/herself, but refers them to an external, professionally trained mediator (Jagtenberg and de Roo 2011, 7–23).

These practices may make one wonder: How 'public'—in the sense of focused on public goals such as law enforcement—are courts today?

Government policy documents across Europe emphasize that it may be justified to refer those intending to bring their cases to court to external mediation *mandatorily* (de Palo and Canessa 2014, 36–41; Silvestri and Jagtenberg 2013, 7–19).

This objective is often justified by pointing out that many lawsuits do not 'belong' in a courtroom and that the parties themselves would be better off trying mediation. What transpires, however, through these arguments which are not necessarily evidence-based is the perceived need for budgetary restraints.

Meanwhile, the mere power of judges to bring up mediation as an alternative increasingly incentivizes lawyers to discuss direct negotiation or mediation with their clients *at an early stage*, in order to be better prepared in the courtroom. We have termed this phenomenon 'the shadow of the referral', and it amounts to a hidden (or pre-emptive) outsourcing of potential lawsuits to private conference rooms (Jagtenberg and de Roo 2011, 17).

In sum, in the world today court adjudication and bargaining appear to be intertwined in multiple ways.

2 Round Sourcing Between Public and Private Justice: Collective Redress

A striking example of how bargaining and adjudication may become intertwined is constituted by 'round sourcing' of legal dispute resolution. Here is what 'round sourcing' looks like. The court system refers lawsuits brought by large numbers of disputants affected by a single, particular event to a private bargaining scheme accommodating these multiple claimants. There, a mass private settlement may be reached between an agent representing those multiple claimants and the torfeasor(s)—usually a company. Yet, individual claimants may decide not to adhere to that settlement but pursue their claim against the tortfeasor(s) individually in court. If the mass private settlement, despite having been renounced by these claimants, nevertheless comes to guide the courts in adjudicating such claims, this constitutes 'round sourcing'. Having outsourced its public responsibilities to a private agency, the work performed privately eventually flows back to the courts, and is used there as if it were the court's own intellectual achievement.

This phenomenon can be observed notably in the area of collective redress.

Collective redress allows many claims relating to the same case to be bundled into a single court action. In these days of standardized mass production such redress is especially, though not exclusively, relevant for consumer claims following the sale and purchase of defective products or services. Out-of-court, private settlement is particularly promoted in this area.

It should come as no surprise that 'round sourcing' is encountered here, since settlements involving large numbers of disputants can hardly be kept confidential: for 'round sourcing' to operate, it is unavoidable that the terms of settlement become publicly known.

A European Commission Recommendation was issued in 2013 laying down common principles for injunctive and compensatory collective redress mechanisms.[2] The Commission found it necessary to encourage Member States to introduce and align such mechanisms, for two reasons:

1. to improve access to justice. In most consumer disputes the amount in controversy is likely too small to justify lawyer fees paid by an individual—a phenomenon that would result in under-enforcement of the law; and

[2]European Commission Recommendation No. 2013/396 of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under EU Law. *OJ* 2013, L 201/60.

2. to avoid abusive 'American-style' class actions. The Commission therefore recommends that entities representing groups of claimants should operate on a non-profit basis. Moreover, contingency fees and punitive damages should be prohibited.

The Recommendation highlights collective *court* action, but emphasizes that *out-of-court* settlement (ADR) can be a particularly efficient way of obtaining redress in mass harm situations, and should thus always be available alongside judicial collective redress.

3 WCAM[3]: The Dutch Experience

The Netherlands has gained considerable experience in the area of collective redress over the course of about a decade. We will elaborate on the Dutch experience, which is increasingly held up as an example in European discussions, to illustrate the 'round sourcing' phenomenon.

A collective court action to obtain declaratory relief has been available in the Netherlands since 1994. One would expect then that a collective action for compensatory relief would also have been available since that same year. However, this is not the case. Compensation for damage sustained is only available through (subsequent) individual court action. This odd situation has been explained as a result of effective lobbying by Dutch industry. A bill introducing the possibility of collective recovery of damages is currently on the agenda of parliament, but a 2014 internet consultation of industry, consumers and the judiciary suggests there is still a long way to go here (Jagtenberg and Voet 2015, 6–32).

Although it is not possible (yet) to bring damage claims collectively, it *is* possible to negotiate settlements collectively over damage sustained.

Since 2005, Dutch law has been enriched by the Act on Collective (Out-of-court) Settlement of Mass Damage (WCAM).[4] This statute was inspired by the desire to facilitate negotiations towards a settlement in the early years of the new century in the high profile 'DES-daughters' drama, which had been lingering for nearly two decades by then.[5]

The system of WCAM can be summarized as follows. The Act is concerned with settlement agreements regarding compensation for damage caused by the same event; agreements, that is, that are concluded between entities representing claimants and (one or more) defendants.

---

[3] *Wet Collectieve Afwikkeling Massaschade*, wet van 23 juni 2005, Stb. 2005, p. 340.

[4] Technically, WCAM merely adds some new provisions to the existing Dutch Civil Code (BW) and the Dutch Code of Civil Procedure (Rv).

[5] Daughters of mothers who had taken diëthylstilbestrol (DES) during pregnancy had developed forms of cancer and as a consequence, they had filed massive lawsuits against the pharmaceutical industry.

These parties (i.e. the representative entities of claimants/victims and the defendants) may jointly request the Amsterdam Court of Appeal to declare their settlement agreement binding. Binding on whom? Basically, on everyone involved, that is—on the 'victim' side—all those persons to whom damage has been caused. Thereby, the negotiators of the settlement will have placed these persons into classes of sustained damage, a process referred to as 'damage scheduling'.[6]

WCAM then lists several criteria for court approval. The most important is that the judge must be satisfied that the settlement provides for levels of compensation that are reasonable, considering the likely *cause and extent* of the loss suffered, and the *simplicity and speed* at which compensation can be obtained.[7]

Judicial approval of the collective settlement then effectively bars the individual claimants represented by the entity that signed the settlement from pursuing their case further in court.[8]

How does that square with the fundamental right of access to court? The following solution has been found: individual claimants who are *dis*-satisfied after all with the terms of the settlement may yet opt out of the settlement within three months following court endorsement. Such claimants will have to submit a written statement to that end.

4 The *Dexia* Case

The workings of WCAM can best be illustrated through one of the largest disputes settled this way, i.e. the *Dexia* case. Dexia bank had concluded nearly 400,000 'securities lease' contracts with individual consumers during the economic boom of the 1990s.

Through such contracts, a consumer would borrow money from Dexia that Dexia would then immediately invest in shares traded at the Amsterdam stock exchange.

The expectation was that after some years, with share indexes continuously rising, a consumer would easily manage to pay off his/her loan using the expected stock exchange profits, while still having some money gained left.

However, between 2000 and 2003, the Amsterdam share index fell from 700 to 270 points, and all that was left was a huge pile of debts.

Initially, the bank abruptly started debt collection procedures against those unable to redeem their loans. Many felt though that Dexia itself was to blame for not having alerted its customers to the risk associated with such a securities lease product.

---

[6]Article 7:907 lid 2 BW.

[7]Article 7:907 lid 3 BW.

[8]Article 7:908 lid 1 BW; technically, the settlement constitutes a special category of contract (*vaststellingsovereenkomst*) that cannot be voided e.g. based on alleged defects in respect of consent. As such, this form of settlement is not enforceable per se.

Once the issue started to receive nationwide media coverage, individual consumers in great numbers began to report to the national consumer association (*Consumentenbond*) and/or to entities set up as special purpose vehicles for bringing a collective declaratory claim against Dexia, such as the Lease Loss Foundation (*Stichting Leaseverlies*).

Dexia felt somewhat cornered by this media attention and decided to offer its own settlement proposal that essentially allowed customers more time to pay off their loans.

A number of customers accepted Dexia's proposal, but the vast majority of aggrieved consumers registered with the entities to pursue their collective declaratory claims before the district court of Amsterdam (where Dexia's Dutch branch had its seat).

These claims generated mixed outcomes: notably, the district court asked for further and better particulars, which made it necessary for the entities to sort out the allegedly misguiding brochures that had been used to sell the securities lease product.

While these first claims were pending in court, the government decided to intervene, fearing harm to the reputation of the Netherlands as a financial hub. Former Finance Minister and European Central Bank (ECB) President Wim Duisenberg was put forward as a mediator.

His mediation effort took two months and resulted in an agreement between Dexia and the four largest entities representing the consumers.[9]

Slightly simplified, the gist of the agreement was that consumers would have to pay 40% of their outstanding debts, whereas Dexia would pay the remaining 60%.

This mediated settlement was submitted to the Amsterdam Court of Appeal under the aegis of WCAM. The Court of Appeal considered the 40/60 allocation reasonable, and it endorsed the Duisenberg settlement early in 2007.[10]

Over 165,000 claimants decided to adhere to this collective settlement, which brought the total number of cases settled to 230,000: 65,000 customers had accepted Dexia's one-sided offer earlier on. However, in the end about 30,000–40,000 claimants decided to continue the legal fight.[11] A considerable percentage of

[9]For completeness' sake, mention should be made of a further dispute, i.e. between Dexia bank and the AEGON insurance company, that had been lingering for a while but had been resolved just about the time when Mr. Duisenberg's mediation took off. Dexia itself had purchased the lease portfolio from AEGON and had intimated they would sue AEGON in turn. In the end, AEGON decided to contribute a considerable sum of money to the settlement fund that Dexia had started to build up.

[10]Hof Amsterdam 25 January 2007, ECLI:NL:GHAMS:2007:AZ7033; later on, some refinements were made as to the 40/60 ratio by the Amsterdam appellate court in its judgment of 1 December 2009, ECLI:NL:GHAMS:2009:BK4978.

[11]A quick calculation tells us that hence approximately 130,000–140,000 customers neither joined a collective settlement nor pursued their case in court (in all, nearly 400,000 securities lease contracts had been concluded). This remaining group may have undertaken no action at all—this is a likely outcome in view of the options that were identified in a large-scale Dutch survey of conflict strategies in 2003 (the 'Dispute Resolution Delta'): about 45% of the respondents in that

these 'stayers' had lodged formal objections with the Amsterdam Court of Appeal at the occasion of the settlement approval procedure.

They had argued, first, that too much of the financial burden was placed on the shoulders of the consumer. The Court of Appeal, however, considered that the 40/60 Duisenberg settlement had sufficiently differentiated between categories of damage, using the damage schedules. Moreover, according to the court:

> [I]t is inherent in a negotiated settlement that the amount of compensation reflects the end of uncertainty over the outcome of a prolonged court procedure.[12]

It is noteworthy that the court emphasizes the avoidance of uncertainty of litigation outcomes as the main argument why one should accept the settlement. Positive inducements are absent.

Finally, the court considered that while Dexia was to blame for not duly warning its customers, the consumers were not without blame themselves in this case, since a reasonable person should have properly read the terms of such a contract at issue before signing it.

A second objection submitted by the 'stayers' takes us to the 'round sourcing' phenomenon. The 'stayers' had argued that despite the opt-out facility, the WCAM regime constituted a violation of Articles 6 and 1 of the First Protocol of the European Convention on Human Rights (ECHR). This was because a 'reflex effect' emanating from the collective Duisenberg settlement had to be feared in any future court claim that an individual 'opt-outer' might bring for the recovery of damages ensuing from his/her particular securities lease contract with Dexia.

The Court of Appeal rejected the argument that Article 1 of the First Protocol had been violated. The court considered that even if the consumer, by adhering to the collective settlement, would have to satisfy himself/herself with an amount of compensation that might be smaller than what one *might* secure by pursuing and winning a court case, then still such a 'deprivation of a possession' (if a deprivation at all) is justified in the *public interest*, now that through such a collective settlement the major *social costs* involved in large numbers of civil litigations were avoided.[13]

In our view, this reasoning has several flaws. Why would large numbers of civil litigations harm the public interest? Other areas see large numbers of litigations too. Is the real problem that the courts are understaffed, and/or that individual consumers will face a financial access problem? However, if those are the real problems, might one, perhaps, better solve these first instead of simply manoeuvring claims away from the courts?

---

survey said they would just drop their case. Alternatively, at least some customers in this remaining group may have negotiated an individual settlement with Dexia. Such settlements would likely be governed by a confidentiality clause; hence, nothing can be said about the size, or even the very existence, of this category.

[12]Hof Amsterdam, n. 17 above, para. 6.6.

[13]Hof Amsterdam, n. 17 above, para. 5.11.

There are many litigations where the Court of Appeal also dismissed the objection based on Article 6, if only because of the existence of an opt-out option. Moreover, the court deliberated over the anticipated 'reflex effect':

> [S]pecific individual circumstances were not taken into account in the collective settlement endorsement, in the way these *would have to be* dealt with in individual court claims for recovery of damages. A court dealing with such individual compensatory claims in the future will be free to accord just that amount of authority to the collective settlement that it thinks is appropriate.[14]

This reasoning remains somewhat enigmatic. One would have to refer back to the indicators used in the damage scheduling process in order to ascertain how broadly formulated these were, and hence which 'specific individual circumstances' were left out there. One could possibly trigger a court's creativity by submitting such circumstances. Would the 'social status' and 'level of knowledge' of a consumer, once decisive factors in a landmark judgment on Dutch contract law, 'do the job'?[15]

5 Collective Settlement and Reflex Effect

In view of these considerations of the Court of Appeal, it is fascinating to see what actually happened in subsequent individual litigation.

First, a remark on how the remaining litigation was managed by the Amsterdam district court. That court was designated ten judges assisted by 20 clerks to form a special 'Dexia panel'.

Moreover, where individual cases were co-ordinated through entities that had objected to the Duisenberg settlement, some telling cases were sorted out by these entities themselves to be dealt with first, as test (or pilot) cases that could guide cases with similar individual characteristics.

One example of such a test case is singled out here, *De Treek v Dexia*, which was eventually decided by the Dutch Supreme Court (Hoge Raad) in 2009.[16]

Before the lower courts, De Treek had submitted that his case indeed involved a 'specific individual circumstance' that had not been taken into account in the collective settlement. He was a person with low income and very inexperienced in share trading. Consequently, De Treek had pleaded defect of consent, namely error (misrepresentation by Dexia). If this plea were honoured, the defect would have made the securities lease agreement concluded with De Treek void ab initio, meaning that De Treek would have to be reimbursed 100% by Dexia.

But the Supreme Court endorsed the lower court's decision that Dexia had fulfilled its duty to inform De Treek. A new variety of this duty was introduced though: the special relationship between a bank and an inexperienced customer

[14]Hof Amsterdam, n. 17 above, para. 5.14; emphasis added by the authors.

[15]HR 13 March 1981 (*Haviltex*), NJ 1981, 635.

[16]HR 5 June 2009, ECL:NL:HR:2009:BH2815.

such as De Treek implied a duty (for Dexia) to warn. However, Dexia's neglect of this duty had to be weighed against any contributory negligence on the part of De Treek (viz. De Treek's neglect of his duty to investigate). The Supreme Court continued that, therefore, and also being aware of the test case character, as a general guiding principle, a 40/60 allocation of remaining debts would be quite acceptable.[17]

This reasoning leaves the impression that the Supreme Court tried hard *not* to make the courts a more attractive avenue for consumers who had declined the collective settlement.

Does one observe here the shadow of the collective Duisenberg settlement then, hovering above this individual judgment?

It is difficult to give a straightforward answer. The Supreme Court operates rather cautiously. In the *De Treek* case, Dexia itself had also lodged an appeal in cassation, arguing that the court was legally bound by the collective settlement in individual cases. Since such a large percentage of Dexia customers had agreed to the settlement, the 40/60 ratio could be said to embody 'current juridical views' in the Netherlands, according to *Dexia*. Such current views in turn should be determinant of what reasonableness and fairness require, also in the *De Treek* case.[18]

Dexia's argument echoes the general position taken by industry, that collective settlements should be final and conclusive; no opting-out facility should be allowed, as this would leave too many loose ends for industry and undo a major advantage of investing in a settlement in the first place.

The Supreme Court however, explicitly rejected the argument submitted by Dexia.[19] It would be incompatible with the opt-out facility if the court were bound by the terms of the collective settlement in individual lawsuits. It would even be incompatible if the court had to explain why in such individual lawsuits it would deviate from the terms of the collective settlement.

A seemingly clear answer. Yet, many scholars feel that in this and other judgments the courts have started with the 40/60 ratio in mind and then reasoned backwards to a judgment, to avoid the impression that much more could be gained by pursuing an individual claim instead of joining a collective settlement (Van Boom and Lindenbergh 2010, 188).

Perhaps even more telling than the *De Treek* case is a case dealt with by the Amsterdam Court of Appeal on 8 November 2007. This case was about an appeal lodged by Dexia against a judgment by the Alkmaar district court in favour of an individual customer X. The Court of Appeal reasoned that this dispute raised a number of questions that the court had already addressed six months earlier, in its judgment endorsing the collective Duisenberg settlement.

---

[17]HR 2009, n. 23 above, at para. 4.4.5.

[18]The general principle of reasonableness and fairness, which plays an important role in Dutch private law, is not defined exhaustively in the Civil Code, although Article 3:12 BW mentions that current juridical views may be one of the factors to be taken into account in determining what is 'reasonable and fair'.

[19]HR 2009, n. 23 above, at para. 4.9.2.

> The Court assumes that counsel are privy to this settlement; deliberations of this Court at that time, that lend themselves for general application, will be guiding this Court in deciding future [individual] disputes.[20]

One cannot help but wonder what exactly makes a deliberation lend itself for general application. Arguably, the answer can only be found on a case-by-case basis.

An example of a 'specific individual circumstance' of the kind the Amsterdam Court of Appeal may have envisaged in its 2007 consecration of the Duisenberg settlement is provided by a 2016 Supreme Court judgment. In this case, a customer had not contracted directly with Dexia, but through the intermediary of a stockbroker. The stockbroker, *Spaar Select*, had acted beyond the scope of its business licence, however, by acting as an investment consultant to the plaintiff, persuading him to enter into a Dexia securities lease contract. Here, the Supreme Court held that Dexia had to compensate the plaintiff for the full 100%, since Dexia—as the professional party—should have checked whether the intermediary was licenced and thus authorized to bring in clients for the securities lease project.[21]

How would those customers feel who had accepted the 40/60 collective settlement and also had entered their securities lease agreement in the same way (through an unlicensed intermediary)?

6 Private Justice Reassessed: Hybrid Governance and Rule of Law

Does a 'shadow of the (collective) settlement' indeed exist?

The answer, based on the foregoing snapshot of Dutch case law, should be formally no, but informally, most likely.

A preliminary point to consider is whether a collective WCAM settlement can be regarded as 'private justice' at all. One could argue that the larger the number of private parties involved in a settlement, the less 'private' the settlement is bound to be, despite the fact that the content of the settlement still rests on an agreement between private parties and is not imposed by a court of law. The settlement, however, is bound to become more 'public' as a consequence of 'media-tization': if many people sustain damage due to a particular event, the media are more likely to show an interest, as clearly was the case in the Dexia affair (Huls and Van Doorn 2007, 58). Media attention entails a dynamic of its own; public outrage and the fear of one's reputation being damaged can push a 'hardliner' into making concessions. Once an affair has caught the attention of the media, it will be impossible to keep the terms of the settlement confidential, although the process of negotiating towards a settlement may still take place behind closed doors.

---

[20]Hof Amsterdam 8 November 2007, ECLI:NL:GHAMS:2007:BB8135, at para. 4.4 and 4.6.

[21]HR 2 September 2016, ECLI:NL:HR:2016:2012, at para. 5.2 until incl. 5.7.

Endorsement of the settlement by a court of law takes the settlement yet a step farther into the public domain. Such endorsement is by itself a multi-faceted phenomenon. In the WCAM system, the endorsement is perceived as a facility that both sides in the dispute (industry and multiple consumers) could find attractive: the industry may feel such endorsement will enhance the prospect of finality; the consumers may feel endorsement will reduce the risk of the industry not honouring its part of the deal. In addition, both sides may feel reassured that a court will have scrutinized the terms of the settlement as to fairness, and as to consistency with the law.

The latter point takes us back to an observation made at the outset of this contribution, following Fiss's quote: in many cases 'the law' may not be a single, unequivocal norm in need of enforcement. The Dexia example provides a good illustration that the balancing of countervailing norms in a complex dispute remains a matter of careful human observation, intuition and weighing skills. And this is not so different from what are considered typical mediator assets (with the fundamental difference that a court must speak out, whereas the mediator should let the parties speak out).

In the *Dexia* case, moreover, mediator Duisenberg could build on a case analysis, including a legal analysis, prepared by the Dutch National Ombudsman Marten Oosting. Mr. Oosting wrote this analysis at the instigation of the government (Jagtenberg and Voet 2015).

Earlier in this contribution, reference was made to Mnookin's thesis that a court judgment may well leave its mark on the bargaining process. What the individual cases decided in the wake of the Dexia collective settlement demonstrate is that, conversely, the (outcome of) a bargaining process may well leave its mark on court judgments. Moreover, more than that: it seems the courts could not function adequately anymore *without* private settlement. No doubt, processing the full 270,000 claims against Dexia would have burdened the Amsterdam district court (and possibly the higher courts as well).[22] In legal literature, the growing 'rights consciousness' or emancipation of consumers (and individual citizens generally) has long been associated with the litigation explosion, and it was thus assessed negatively (1977 1977, 71).

One could argue that the WCAM settlement facility 'solves' the litigation explosion, but this might be a solution that does not address the real underlying problem: the staffing of courts has not kept pace with the juridification of society. If rights are granted, then the addressees should be able to invoke and enforce those rights; that is a prerequisite of the rule of law. In addition, Owen Fiss might say: the members of a society should be willing to finance as taxpayers a system for enforcing the rules they have ultimately chosen themselves for the benefit of all.

Moreover, one may wonder whether the judicial role is not compromised if the judge (as an interested party in an understaffed court) is to persuade unwilling parties to question the soundness of a settlement no longer.

[22]Deducting the 130,000 cases that were presumably dropped from the overall number of 400,000 securities lease contracts gives 270,000 claims that remain.

7 Round Sourcing: Blessing or Betrayal?

Having established that 'round sourcing' *does* exist, we round off this analysis with the important question: Should such 'round sourcing' be regarded as a blessing or a betrayal?

This question brings into focus an issue that we have raised before: (the lack of) an evidence-based framework for assessing different modes of conflict resolution. One parameter could be costs and returns, with some important qualifications: Who decides which costs are to be acknowledged as costs? Costs (or returns) for whom? and, Costs (or returns) in the short run or in the long run?

To put it differently, Who, in the end, benefits most? In nominal, monetary amounts, the answer is the industry. This could be easily demonstrated through an example with neat figures: 1000 consumers suffer a €100 loss each from a deal with industry Z. Z risks losing €100,000 if each consumer brought a lawsuit and won. But on top of that, Z would have to engage lawyers in 1000 different lawsuits (for, say, €2000 per claim), which would bring the cost of defending against these multiple lawsuits to €2,100,000 (cost of damage to reputation and reduced turnover as a consequence thereof not included). If a 50/50 settlement were achieved, industry would pay €50,000 to its customers (€50 × 1000) and, say, €30,000 in legal fees to three lawyers for preparing and executing this deal. In all, €80,000 is spent to avert the risk of having to pay €2,100,000. A statistical probability analysis would be essential in order to accurately weigh the risk of losing the court case. The potential costs of a damaged reputation and decreased turnover would be (even) more complicated to calculate.

Each consumer, individually, will lose €50 in a 50/50 settlement, but would thereby avoid the cost of losing another €50 in the event of not winning the case in court. On top of that, the consumer would avoid spending €2000 on lawyer fees in his/her case (assuming the consumer has not taken out a legal expenses insurance policy, but assuming also that a consumer association will negotiate the settlement free of charge). In sum, industry can save itself the largest *nominal* amount. *Relatively* speaking, however, there is much more to gain (though in small nominal amounts) for individual consumers.[23]

Here, the problem of under-enforcement of consumer law (where mostly small amounts are in controversy) presents itself. This issue could be translated into the conflict management grid: where the most likely conflict strategy for consumers, in view of the huge cost of hiring a lawyer, would be 'avoiding' or 'yielding', the availability of a tool such as WCAM for collectivizing negotiations with industry brings the more positive strategy of 'solving' within reach. How is this to be valued, in monetary terms?

[23]The maximum loss for Z amounts to approximately 26 times the amount actually paid (€2.1 million versus €80,000); for the individual consumer, the maximum loss amounts to 40 times the amount actually received (€2000 vs. €50).

Lawyer fees were a major cost item in the foregoing example, and this corresponds to the real world situation. In the *Dexia* case, and WCAM practice generally, one could say the lawyers are the real losers—for a change. Only a few of them will be needed to assist in the negotiation process. However, in reverse, 'cutting out the lawyers' constitutes a major gain for the disputing parties.

It is a small step from lawyers to judges. Worthy of mention is that the Amsterdam Court of Appeal, when endorsing the *Dexia* settlement, referred explicitly to the social costs that could be avoided thanks to a collective settlement. To a considerable extent, these costs may be the opportunity costs involved were judicial staff capacity allocated to handle multiple individual lawsuits.

A complication might be that, occasionally, an individual case could entail such unique characteristics that it would deserve to be heard extensively in court. Here, the reflex effect or shadow of the settlement has a dark side, pre-empting a pristine analysis of such an individual case if pursued.

In any proper assessment, it is important to realize that consumers, industry, lawyers and judges are not the only parties involved. It has been suggested, for instance, that government regulators and supervisory bodies (notably in the *Dexia* case, the Supervisory Authority for the Financial Markets, AFM) should have taken part of the blame (and financial burden), since they were slow to react to such a defective product as 'securities lease' being brought into circulation (Huls and Van Doorn 2007, 30). But if such regulators, being publicly funded bodies, had had to contribute to the reimbursement of Dexia customers, the innocent taxpayer would have been burdened, and once again for the dubious activities of a bank.

It is clear that devising an accurate framework for assessing negotiated settlements versus court judgments (i.e. the law) is bound to be a very complicated and demanding exercise.

References

de Palo G, Canessa R (2014) The EU parliament study 'Rebooting the Mediation Directive': an overview of its key findings and a response to its critics. Neth Flemish Mediat Confl Manage Q 18:3641

Fiss OM (1983/1984) Against settlement. Yale Law J 93:1073–1090

Huls NJH, Van Doorn CJM (2007) De constructie van een massaclaim – een rechtssociologische analyse van de eerste fase van de Dexia-affaire. Rechtsgeleerd Magazijn Themis 2:58

Jagtenberg R (2014) Mediation: a desirable case management tool for the courts? In: Van Rhee CH, Fu Y (eds) Civil litigation in China and Europe. Springer, Dordrecht, p 282

Jagtenberg R, de Roo A (2011) Frame for a Dutch portrait on mediation court connected mediation in the Netherlands. The Judiciary Q. Council for the Judiciary, The Hague, pp 7–23

Jagtenberg R, Voet S (2015) When it takes thousands to tango. Neth Flemish Mediat Confl Manage Q 19:6–32

Manning B (1977) Hyperlexis, our national disease. Northwestern Law Rev 71:n6

Mnookin RRH, Kornhauser L (1978/1979) Bargaining in the shadow of the law. Yale Law J 88:950–997

Silvestri E, Jagtenberg R (2013) Juggling a red hot potato—Italy, the EU and mandatory mediation. Neth Flemish Mediat Confl Manage Q 17:7–19
Van Boom WH, Lindenbergh SD (2010) Effectenlease: dwaling, zorgplicht en schadevergoeding. Ars Aequi, 188 ff

Annie de Roo Associate Professor of ADR and Comparative Law at Erasmus University Rotterdam, the Netherlands. Director of the Netherlands Organization for Scientific Research (N. W.O.) sponsored project on Hybrid Governance in the Social Domain. Vice-chair of the Exams Committee of the Mediators Federation of the Netherlands (MFN). Editor-in-Chief of *TMD*, the Dutch-Flemish Mediation & Conflict Management Quarterly.

Rob Jagtenberg Senior Research Fellow of Erasmus University Rotterdam, the Netherlands. Former member of the Supervisory Committee for the national Dutch project on court-connected mediation, and Principal Researcher in projects commissioned by the World Bank and The Council for the Judiciary, The Netherlands.