

Recognition of a WCAM settlement in Germany

Abstract

The Dutch 'Wet Collectieve Afwikkeling Massaschade' (WCAM) [Collective Settlements Act] has emerged as a noteworthy model in the context of the European discussion on collective redress procedures. It provides an opportunity to settle mass claims in what appears to be an efficient procedure. As the WCAM has been used in important transnational cases, this article looks at questions of jurisdiction and the recognition of these court-approved settlements under the Brussels Regulation. It is argued that because of substantial participation by the courts, such declarations are to be treated as 'judgments' in the sense of the Brussels Regulation and thus are objects of recognition in all EU Member States. Written from the perspective of the German legal system, the article also takes the position that the opt-out system inherent in the WCAM procedure does not violate the German *ordre public*, but is compatible with fair trial principles under the German Constitution as well as under the European Human Rights Convention. The WCAM therefore appears as an attractive model for the future reform of collective proceedings on the European level.

1. The Dutch WCAM as a European model?

The Dutch 'Wet Collectieve Afwikkeling Massaschade' (WCAM) [Collective Settlements Act] has become an important model in the context of the European discussion on the development of collective procedures. Especially the settlements in the transnational *Shell* and *Converium* cases have attracted considerable attention around the world.¹ The German government has explicitly pointed to the 'successful Dutch model' of settlement rules in its reform plans regarding the German law on a model procedure for capital markets claims.² In a nutshell, the Dutch WCAM enables a settlement between a potential defendant and a legal entity that purports to represent potential plaintiffs – such as an association or foundation, be it already existing or created *ad hoc* as an SPV/SPE (special purpose vehicle/special purpose entity) to be a party to the settlement. This settlement is presented to the court and can be declared binding by the court if the court finds it to be an adequate solution to the case. The court declaration then creates a legally binding effect for all affected persons, unless they declare an opt-out after being informed about the procedure and the settlement.³

As the *Shell* and *Converium* cases show, this effect does not end at the Dutch borders, but can potentially be of a European or even worldwide scale. The next question is therefore whether and how the WCAM model fits within the European system of civil procedure.⁴ More specifically, under what circumstances will a WCAM settlement be recognized as binding in other EU Member States? At this moment, this question may be primarily of academic interest; in the future, if collective procedures should become more widespread in the EU Member States, it

may also become relevant in practice. Furthermore, the recognition question leads to important issues of jurisdiction, fair trial and *ordre public* which must be taken into account if one looks at the WCAM as a possible model for future EU rules on collective procedures.

Under the current system in EU procedural law, the recognition question is posed from the perspective of a specific Member State according to Articles 33 et seq. EC Regulation 44/2001 (Brussels I Regulation). In this article, the question will be discussed from the perspective of the German legal system, but one should expect that some of the issues outlined below are also relevant in other Member States; this holds true in particular for common principles such as the fair trial requirement in Article 6 of the European Convention on Human Rights (ECHR) and Article 47(2) of the EU Charter of Fundamental Rights.⁵

The recognition question will remain relevant even after the reform of the Brussels I Regulation that is currently being discussed in the EU institutions. Although this reform is aimed at the abolition of *exequatur* proceedings in the sense of a 'free movement of judgments', its current draft contains an exception that leaves the *exequatur* procedure – and thus the possibility of *ordre public* scrutiny – intact for collective pro-

1 *Gerechtshof Amsterdam* 29 May 2009, no. 106.010.887, NJ 2009, 506, NIPR 2010, 71 (*Shell*); *Gerechtshof Amsterdam* 12 November 2010, NJ 2010, 683, NIPR 2011, 85 and 17 January 2012, no. 200.070.039/01, LJN: BV1026 (*Converium*). For a reaction in the European business community, see, e.g., Clifford Chance client briefing, February 2012 (on file with the author): the Amsterdam Court of Appeal is described as an 'attractive venue for parties wishing to reach a global settlement'; see also B. Allemeersch, 'Transnational class settlements: Lessons from *Converium*', in: S. Wrba, S. van Uytzel and M. Siems (eds.), *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests* (Cambridge, Cambridge University Press 2012, forthcoming).

2 Proposal for a reform of the *Kapitalanleger-Musterverfahrensgesetz* (KapMuG), p. 23, available through the Federal Ministry of Justice at <www.bmj.de>. However, the proposal is much more limited than the WCAM as it would restrict the settlement effects to those claimants who have already filed an ordinary suit before the courts.

3 For descriptions of the WCAM in English see I. Tzankova and D. Lusingh Scheurleer, 'The Netherlands', *Annals of the American Academy of Political and Social Science* (622) 2009 pp. 149-160; T. Arons and W.H. van Boom, 'Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from The Netherlands', *European Business Law Review* (21) 2010, pp. 857-883; H. van Lith, *The Dutch Collective Settlements Act and Private International Law*, The Hague: WODC, Ministerie van Justitie 2010. The Dutch government provides information on the WCAM in English at <www.rijksoverheid.nl/documenten-en-publicaties/circulaires/2008/06/24/the-dutch-class-action-financial-settlement-act-wcam.html>.

4 A German commentator has claimed that 'opt-out mechanisms are not in accordance with current European procedural law'. B. Hess, 'Cross-border Collective Litigation and the Regulation Brussels I', *IPRax* 2010, p. 116 at p. 120; see also H. Muir Watt, 'Brussels I and Aggregate Litigation or the Case for Redesigning the Common Judicial Area in Order to Respond to Changing Dynamics, Functions and Structures in Contemporary Adjudication and Litigation', *IPRax* 2010, p. 111 at p. 115. For general perspectives on the opt-in/opt-out issue see, e.g., C.J.S. Hodges, *The Reform of Class and Representative Actions in European Legal Systems*, Oxford: Hart 2008, pp. 118 et seq.; G. Wagner, 'Collective Redress – Categories of Loss and Legislative Options', *Law Quarterly Review* (127) 2011, p. 55 at pp. 70 et seq.

5 Insofar as the issues dealt with in this article are concerned, the fair trial principle does not differ between Art. 6 ECHR and Art. 47(2) EU Charter; therefore, the case law discussed below with regard to Art. 6 ECHR will also apply to Art. 47(2) EU Charter.

* Professor of Private and Comparative Law, Leuphana University Lüneburg. E-mail: halfmeier@leuphana.de. I wish to thank Xandra Kramer and Ianika Tzankova for very helpful comments on an earlier draft. Remaining errors are mine.

ceedings.⁶ According to the European Commission, the differences in collective procedures among the Member States are so grave that the 'required level of trust' for an abolition of exequatur proceedings does not yet exist in this area.⁷ In this regard, it is hoped that further practical experiences as well as academic discussion may lead to that amount of trust among the Member States.

This article will first examine the jurisdiction claimed by the *Gerechtshof* Amsterdam in transnational WCAM cases (section 2). Afterwards, the question is discussed whether such settlements are 'decisions' to be recognized under the Brussels Regulation system at all (section 3) and whether there are any grounds for non-recognition as viewed from the German perspective (section 4). The conclusion (section 5) will show that such recognition is possible and that the Dutch WCAM is therefore indeed a promising model for the future of collective litigation in Europe.

2. Jurisdiction of the *Gerechtshof* Amsterdam

Under the Dutch procedural rules introduced by the WCAM, the *Gerechtshof* Amsterdam has exclusive jurisdiction for the declaration of the binding effect of a settlement. However, this is to be distinguished from the question of international jurisdiction, in particular under the EU Brussels I Regulation insofar as parties from other Member States are concerned.⁸

It should be noted that according to Article 35(3) Brussels I Regulation, the jurisdiction of the original court is not a prerequisite for recognition or enforcement in another Member State. The Regulation relies here on mutual trust among the Member State courts in that they will correctly apply the jurisdictional rules; it only protects the defendant in case of default judgments.⁹ However, Article 35(1) lays down certain exceptions to this principle, namely for insurance and consumer contracts and for the rules of exclusive jurisdiction. Whether one of these exceptions applies to a WCAM settlement depends on the individual case. For example, in securities cases, the sale of securities to natural persons for private investment purposes may be a consumer contract in the sense of Article 15(1) Brussels Regulation, so that the other party may only sue the consumer in his or her home state according to Article 16(2). However, securities cases such as *Shell* and *Converium* normally do not deal with contractual claims but rather with non-contractual claims such as prospectus liability so that Article 15 will normally not be applicable.

But even if international jurisdiction is not an issue with regard to recognition and enforcement under the Brussels Regulation, it should nevertheless be discussed: The necessary mutual trust among the Member States is in danger if one Member State would regularly overstep the boundaries created by the Regulation's jurisdictional rules. For this reason, one should look more closely at the jurisdictional arguments delivered by the *Gerechtshof* Amsterdam in the *Shell* and *Converium* cases.

In this respect, one may distinguish between two issues: One is jurisdiction over the parties who have actually come to the court to have their settlement agreement declared binding, that is, the representative of the potential plaintiffs, on the one side, and the potential defendant on the other. The second and more complicated question is whether there is also jurisdiction over the absent 'class members' or potential plaintiffs.

2.1 Jurisdiction over the actual parties to the settlement

The first issue poses few problems since the parties actively go to the *Gerechtshof* Amsterdam with their application to declare the settlement binding. With this application, they consent at least implicitly to the *Gerechtshof's* jurisdiction. Therefore, this court's jurisdiction could be based on Article 23 Brussels I Regulation if it were not for the formal requirements of that provision; but at least jurisdiction is given by tacit consent according to Article 24 Brussels I Regulation, unless there would be the rare case of a matter under exclusive jurisdiction (Art. 22). Nevertheless, in the *Converium* case, the court referred to Article 5(1) Brussels I Regulation as the obligations under the settlement were to be fulfilled in the Netherlands.¹⁰ This argument seems somewhat superfluous and also not fully convincing: Article 5(1) speaks of the 'obligation in question' and is therefore designed to cover cases where a specific alleged contractual obligation is to be enforced, but not declaratory cases regarding the binding force of a contract.¹¹ Therefore, the international jurisdiction of the *Gerechtshof* Amsterdam does not depend on the fact that the settlement proposal includes obligations that are to be performed in the Netherlands. It is sufficient that the actual parties to the proceedings consent to its jurisdiction through their application to the court.

2.2 Jurisdiction over absent class members?

The situation is much more complicated with respect to those persons who do not appear before the *Gerechtshof* Amsterdam, but who are meant to be bound by the settlement. This binding force for every affected person – unless they choose to opt-out after notification – makes the WCAM procedure attractive and brings it very close to the US class action. At the same time, it raises difficult questions in the area of jurisdiction.

The *Gerechtshof* Amsterdam has argued in both the *Shell* and *Converium* cases that it has jurisdiction over the absent 'class members' according to Article 6(1) Brussels I Regulation because there were some class members domiciled in the Netherlands and the case needed a uniform decision for all class members.¹² If one looks at the language of that provision, it speaks of persons who 'may be sued'. This does not really fit the situation where an agreement is made that gives the absent class members enforceable claims. The *Gerechtshof* work-

6 Proposal COM (2010) 748 final of 14 December 2010, Art. 37 para. (3)(b); for a detailed evaluation of the planned reform see X.E. Kramer, 'Abolition of Exequatur under the Brussels I Regulation: Effecting and Protecting Rights in the European Judicial Area', *NIPR* 2011, pp. 633-641.

7 Proposal COM (2010) 748 (previous footnote), p. 7.

8 The Lugano Convention, which played a role in the *Converium* case as one of the settlement parties was a Swiss corporation, shall not be discussed here but is identical in the relevant aspects. With regard to parties from non-EU and non-Lugano countries, the *Gerechtshof* Amsterdam relied on the Dutch law on jurisdiction which is beyond the scope of the present article.

9 This principle was already established in the 1968 Brussels Convention which preceded the Brussels I Regulation, see the Jenard Report, *OJ EC* 1979, C 59/1 at p. 46.

10 *Converium* case (12 November 2010), para. 2.9 (*supra* n. 1).

11 The *Gerechtshof's* reference to ECJ Case C-38/81, *Effer v. Kantner*, [1982] *ECR* 825, does not really solve this problem as that case dealt with the question of the validity of a contract as a prerequisite for the enforcement of a specific contractual obligation, not with a declaration of a contract as legally binding.

12 *Converium* case (12 November 2010), paras. 2.10 and 2.11 (*supra* n. 1); *Shell* case, paras. 5.18 et seq. (*supra* n. 1).

ed around this problem by explaining that due to the binding force of the settlement under the Dutch WCAM rules, the decision to make the settlement binding not only grants certain claims to the class members but also precludes them from claiming anything other or more than what is fixed for them in the settlement. Therefore, the application to declare the settlement binding is seen as similar to a negative declaratory action against all class members in the sense that the court is asked to declare that they will not get more than what the settlement provides for.¹³ In that sense, the class members are 'sued' and Article 6(1) may be applicable.

If, for the sake of argument, one follows this construction by the court, it still has to be asked whether the 'close connection' requirement of that provision is given in such cases. The case law of the European Court of Justice (ECJ) on this provision is not very precise.¹⁴ On the one hand, the ECJ has argued that alleged violations of a European patent by sister companies in several Member States are not sufficiently connected as these violations are to be judged by the respective Member States' patent laws.¹⁵ On the other hand, the same court has later said that Article 6(1) can be used even if several claims are based on different legal provisions.¹⁶ In view of such a lack of clarity, the *Gerechthof* Amsterdam is probably well within the interpretational frame set by the ECJ when it finds that the respective claims in the *Shell* and *Converium* cases are sufficiently connected even if they may be based on several different applicable national laws.¹⁷ However, if one considers the EU-wide importance of the specific cases and of the developments in Dutch law, a reference to the ECJ to clarify things would have been quite appropriate even if it had stalled the proceedings for some time.¹⁸

By basing its jurisdiction on Article 6(1) Brussels I Regulation, the *Gerechthof* Amsterdam has found a practical solution that is at least not in conflict with ECJ case law. From an academic point of view, however, the problems lie deeper: Is it really the same – as the *Gerechthof* seems to imply – to be sued as a defendant (and be it in a negative declaratory action) and to be part of a class of potential plaintiffs whose claims are defined in a settlement with the chance to opt out if one does not agree with the terms of the settlement? These are different positions: As a defendant in an ordinary action, one clearly risks losing something (including the payment of costs), and there is no 'opt-out' possibility when one is sued in court. As a member of a WCAM settlement group, one can probably gain something in comparison to not enforcing one's rights at all – and if one wants to take individual enforcement action, one is free to do so and to opt out of the settlement. It is therefore not very convincing to describe the absent class members in WCAM proceedings as 'defendants' in the sense of the Brussels I Regulation.¹⁹

Historically, it is clear that the Brussels I Regulation – and the Brussels Convention of 1968 as its predecessor – was only concerned with the situation of regular defendants in ordinary civil or commercial proceedings. Precisely because they have no opt-out possibility, the general aim was to protect them from being dragged into a foreign court (Arts. 2 and 3) unless – as an exception to the *actor sequitur forum rei* principle – there was sufficient reason for being sued in a foreign court (Arts. 5 et seq.). This aim becomes clear in the explanatory report on the 1968 Brussels Convention, which speaks of the difficulties to 'defend oneself in the courts of a foreign country'.²⁰ More specifically and with regard to Article 6(1), these materials give the example of 'joint debtors' to be sued together,²¹ but clearly not of a number of creditors as it is typically the case in the WCAM proceedings. The whole idea of jurisdiction over potential plaintiffs in a collective procedure was not thought

of at the time and therefore does not fit with the language and aim of Articles 2 et seq. Brussels Convention / Regulation. This leaves us with a big black hole in the EU jurisdictional rules as far as the WCAM or similar collective procedures are concerned. Even the planned reform of the Brussels Regulation does not propose any solutions to this problem. In the absence of adequate legal provisions, what are the national courts to do? The solution of the *Gerechthof* Amsterdam is to try to make the existing rules like Article 6(1) fit the new problems even if they need to be stretched somewhat. If one goes in that direction, one should involve the ECJ in order to have a uniform European interpretation.²² A different solution – which would have the benefit of realistically exposing the problem – would be to simply admit that 'jurisdiction over absent class members' is a concept that the Brussels I Regulation in its current state does not cover at all and that therefore at the moment is left to the Member States themselves – provided that they follow basic human rights standards which will be discussed below when the question of recognition is raised.

3. Recognition of a 'settlement'?

Looking into the area of recognition, one needs to determine whether a court-approved settlement can be the object of recognition in other Member States. The language of the Brussels I Regulation is not very helpful in this respect: According to Articles 33 et seq., 'judgments' must be recognized in all Member States. The definition in Article 32 tautologically states that a judgment is 'any judgment', whatever it may be called.

With regard to settlements, the Brussels I Regulation contains a specific provision in Article 58 for a 'settlement which has been approved by a court', so that these are to be distinguished from judgments in the sense of Article 32. With regard to

13 *Converium* case (12 November 2010), para. 2.11 (*supra* n. 1).

14 For a critical appraisal from a German perspective see C. Althammer, 'Die Auslegung der Europäischen Streitgenossenzuständigkeit durch den EuGH – Quelle nationaler Fehlinterpretation?', *IPRax* 2008, p. 228 at p. 230.

15 ECJ Case C-539/03, *Roche Nederland v. Primus*, [2006] ECR I-6535, no. 35.

16 ECJ Case C-98/06, *Freeport v. Arnoldsson*, [2007] ECR I-8319, no. 47; ECJ Case C-145/10, *Painer v. Standard*, NIPR 2012, 75, nos. 80 et seq.

17 A. Stadler, 'Grenzüberschreitender kollektiver Rechtsschutz in Europa', *JZ* 2009, p. 121 at p. 126 also sees the jurisdiction of the Amsterdam court under Art. 6(1).

18 The provision of Art. 6(1) also plays an important role in other collective redress cases, such as in the hydrogen peroxide cartel case, where several members of the alleged international cartel were sued together before a German court (LG Dortmund, case no. 13 O 23/09), which may soon refer the question of applicability of Art. 6(1) to the ECJ. The German literature supports the application of Art. 6(1) in transnational cartel cases with a view to the coordinated behaviour of the cartel members, cf. P. Mankowski, 'Das neue Internationale Kartellrecht des Art. 6 Abs. 3 der Rom II-Verordnung', *RIW* 2008, p. 177 at p. 191; Hess 2010, p. 118 (*supra* n. 4); but see the detailed and critical analysis by J. Basedow and C. Heinze, 'Kartellrechtliche Schadensersatzklagen im europäischen Gerichtsstand der Streitgenossenschaft (Art. 6 Nr. 1 EuGVO)', in: S. Bechtold, J. Jickeli and M. Rohe (eds.), *Festschrift Wernhard Möschel*, Baden-Baden: Nomos 2011, pp. 63-84.

19 Van Lith 2010, pp. 37 et seq. (*supra* n. 3) with reference to A. Briggs, *Civil Jurisdiction and Judgments*, London: Informa 2009, p. 201 who convincingly defines the 'defendant' as somebody 'who stands at the risk of being ordered by the court to perform an act'.

20 Jenard Report of 1968, *OJ EC* 1979, C 59/18.

21 *Ibid.*, p. 26.

22 See Van Lith 2010, p. 61 (*supra* n. 3) with proposals for questions to be referred to the ECJ.

execution, however, there is not much difference between the effect of the two provisions: Article 58 points to the rule on authentic instruments (Art. 57), so that settlements in the sense of Article 58 may be declared enforceable according to Articles 38 et seq., that is, in the same procedure as court judgments within the meaning of Article 32. The difference between an Article 32 judgment and an Article 57/58 instrument/settlement lies somewhere else, namely in the area of recognition: Article 32 judgments will always be recognized *ipso iure* in all Member States under Article 33(1), while Article 57/58 instruments/settlements will not be automatically recognized, but can only be enforced. If they do not have any enforceable content, they have no *res judicata* effect in other Member States. This is especially true for declaratory instruments or settlements: A pure declaration cannot be enforced, so the procedure of Articles 38 et seq. is not available. Not only is there no recognition *ipso iure* for Article 57/58 instruments/settlements, there is not even a procedure for allowing recognition at the request of a party; such a procedure is described in Article 33(2) only for judgments.

It now becomes clear why it is important to qualify the WCAM settlement decision either as an Article 32 judgment or as an Article 58 settlement. Let us assume the following hypothetical situation.²³ Dutch company D is faced with possible securities liability claims by its shareholders from all over the world. It therefore enters into a settlement agreement with the Dutch foundation F which claims to represent the interests of the potential claimants. This agreement is declared binding by the *Gerechtshof* Amsterdam. Shareholder S (who lives in Germany and has bought shares in D at the Frankfurt stock exchange) is not satisfied with the amount X allocated to him under the settlement agreement and now sues D in a Frankfurt court.²⁴ Will D be successful in claiming that the case is inadmissible because there is already *res judicata* by virtue of the *Gerechtshof* Amsterdam's settlement decision?

The answer would be no if we see the *Gerechtshof*'s decision as a settlement according to Article 58: D does not want the 'enforcement' of the settlement in the sense of Article 38. Instead, D wants the recognition of the declaratory content of that decision, namely that S – as well as all other affected shareholders – is entitled to amount X and nothing more. Such recognition will only take place if the *Gerechtshof*'s decision is seen as a judgment in the sense of Article 32 Brussels I Regulation.

The ECJ has addressed the interpretation of this provision in its relation to settlements in 1994 in the *Solo Kleinmotoren* case.²⁵ In that case, the German Federal Court had asked the ECJ whether a German court-documented settlement which – to simplify the case – declared that after a certain payment the parties no longer had any claims against each other, could hinder the enforcement of a subsequent Italian court judgment on the same issues. The ECJ decided that this German court-documented settlement was not a 'judgment' in the sense of today's Article 32 Brussels I Regulation²⁶ and therefore could not hinder the enforcement of the Italian judgment. In this context, the ECJ construed the term 'judgment' as something that 'must emanate from a judicial body of a Contracting State deciding on its own authority on the issues between the parties' and contrasted this with settlements as being 'essentially contractual in that their terms depend first and foremost on the parties' intention'.²⁷ Whether this is a correct depiction of the practice of German court settlements is questionable: It is very often the case that the court proposes (and the *Oberlandesgericht* Stuttgart apparently did this in *Solo Kleinmotoren*)²⁸ and discusses the terms of a settlement with the parties during an oral hearing, so that the terms of the settlement may clearly be influenced by the court.

But even if one takes *Solo Kleinmotoren* as the existing case law, its description of a settlement – in contrast to a judgment – does not really fit with the details of the WCAM procedure. First of all, the Dutch law itself gives the *Gerechtshof*'s decision binding legal force similar to an ordinary judgment.²⁹ This point was taken up by Advocate General Gulmann in *Solo Kleinmotoren*, when he argued that settlements do not have *Rechtskraft* and therefore should not be considered as judgments whereas 'consent judgments' as they are known in the United Kingdom and other Member States do have this force and therefore are judgments – even if they also correspond to the will of both parties or have even been drafted by the parties.³⁰

A further and probably decisive difference between an 'ordinary' two-party settlement and a court decision that declares a WCAM settlement binding is that the former is indeed 'essentially contractual' in the sense that it binds only the two contracting parties. The WCAM settlement, however, binds every person in the group of possible claimants even though none of these persons may have actually participated in the proceedings, let alone in the drafting of the settlement agreement. This *erga omnes* effect of the decision to declare the settlement binding clearly sets it apart from conventional settlements. The *erga omnes* effect of the decision cannot come from a contract, since the affected group has not participated in any contract. Even though the group is 'represented' by the self-appointed foundation or other institution, this representation is not based on any mandate or order by the affected persons (as may be the case with opt-in group actions), but the power of representation exists only by virtue of the special WCAM procedure and in particular through the *Gerechtshof*'s decision to declare the settlement binding. Here, therefore, we do not have a case of contractual self-binding as was the case in *Solo Kleinmotoren*.

Instead, in the WCAM procedure, the binding effect on all affected parties emanates from the *Gerechtshof*'s own authority, to use the ECJ's own words. Furthermore, in the WCAM proceedings, and unlike in the German settlement that was at issue in *Solo Kleinmotoren*,³¹ the *Gerechtshof* must determine, of

23 In reality, this scenario will probably not (yet) occur for a number of reasons, e.g., very strict statutes of limitation in Germany on securities claims, large cost risks for the plaintiff, inadequate mechanisms of collective procedures in Germany etc. Nevertheless, it should be taken into account as a theoretical possibility in evaluating the success and possible limitations of the Dutch WCAM system. It may also affect the 'export value' of the WCAM in comparison to 'tulips and cheese', as discussed by Arons/Van Boom 2010, p. 857 (*supra* n. 3).

24 The Frankfurt courts will probably have jurisdiction under Art. 5(3) Brussels I Regulation; this at least is the opinion of the Higher Regional Court there: *Oberlandesgericht* Frankfurt/Main 5 August 2010, *EuZW* 2010, 918, 919 (in capital markets cases, the place where the damage occurred is to be seen as the place of the affected stock exchange).

25 ECJ Case C-414/92, *Solo Kleinmotoren GmbH v. Emilio Boch*, [1994] ECR I-2247.

26 At the time Art. 25 Brussels Convention.

27 *Solo Kleinmotoren*, nos. 17 and 18 (*supra* n. 25).

28 *Ibid.*, see the opinion of GA Gulmann in [1994] ECR I-2239.

29 Comparable with the effects of a judgment, see N. Frenk, 'Bundeling van vorderingen' [Joining of Claims], *TPR* 2003, p. 1413 at p. 1473.

30 *Solo Kleinmotoren*, p. I-2245 (*supra* n. 25).

31 In German law, the court will normally not scrutinize the content of a settlement. There may be exceptions in special cases such as association actions in the public interest, see A. Halfmeier, *Popularklagen im Privatrecht*, Tübingen: Mohr Siebeck 2006, pp. 160 et seq., or if the illegality or immoral character of the settlement is obvious to the court.

its own motion, whether the proposed settlement is ‘*redelijk*’ [reasonable] (Art. 7:907(3)(b) BW) in relation to all affected parties. To determine what is fair and adequate is a typical exercise of judicial authority. Therefore, even under the analysis of *Solo Kleinmotoren*, it must be concluded that the *Gerechtshof*’s declaration on the binding force of a WCAM settlement is a judgment in the sense of Article 32 Brussels I Regulation.

This conclusion is supported by most of the relevant literature. In general commentaries on Article 32, it is said that a consent judgment is ‘probably’ a judgment in the sense of that provision³² and that the key issue is whether the judge has a ‘certain control’ over the content of the decision, as such control is typical of the exercise of judicial authority.³³ Specifically on the WCAM procedure, leading German commentators have already argued that a WCAM decision should fall under Article 32 because the court does not only document the settlement, but scrutinizes its content to safeguard the interests of the victims.³⁴ In the WCAM procedure, the court also hears the opinion of and possible objections from interested parties with regard to the proposed settlement. The court may also suggest alterations to the settlement and refuse to declare it binding if the parties do not follow such suggestions. It is therefore quite convincing when the Dutch literature argues that the court in the WCAM procedure ‘renders a judgment’,³⁵ mainly because of the ‘considerable degree of control on the substance of the settlement’.³⁶

It has thus become clear that the decision to declare a WCAM settlement binding is a judgment in the sense of Article 32 Brussels I Regulation and is therefore entitled to *ipso iure* recognition in all EU Member States, unless one of the grounds for non-recognition according to Article 34 is given.

4. Non-recognition according to Article 34 Brussels I Regulation?

4.1 Violation of *ordre public* (Art. 34 no. 1)

4.1.1 Applicable criteria

The main issue here is the *ordre public* exception in Article 34 no. 1. This provision reflects the idea that the Member States’ laws are not yet harmonized in such a way that major frictions between them can be completely ruled out and gives the possibility of a denial of recognition in exceptional cases. This exceptional character of the provision means that it must be applied restrictively.³⁷ In today’s wording of the provision, this is underscored by the word ‘*manifestly* contrary to public policy’. Even though the provision refers to the internal public policy of the Member State in which recognition is sought, this cannot mean that the Member States are completely free in its application as that would defeat the regulation’s purpose. The ECJ has therefore said that there are limits to the application of the *ordre public* concept and that these limits are ‘a matter of interpretation of that regulation’,³⁸ thus being controlled by the ECJ.

According to the ECJ case law, these limits mean that only manifest breaches of ‘essential’ rules of the forum state’s law or a violation of ‘fundamental’ rights or principles may constitute an *ordre public* violation in the sense of this provision.³⁹ Before the *Krombach* decision⁴⁰ it was even doubtful whether procedural law differences among the Member States could amount to an *ordre public* violation at all or whether such a violation was confined to differences in substantive law.⁴¹ In *Krombach*, the ECJ has shown that this possibility exists in particular with respect to the fair trial guarantee in Article 6 ECHR.⁴² Nevertheless, this extreme case shows that violations of the *ordre public* regarding procedural law will be very rare

as one may assume that all Member States normally respect such fundamental procedural rights.⁴³

As a starting point, it is clear that mere differences between the procedural laws of the Member States – or *in concreto* the fact that German law does not have an opt-out settlement procedure comparable to the WCAM – do not necessarily mean that there is a violation of the German *ordre public*.⁴⁴ In this respect, the criteria applicable to Article 34 no. 1 Brussels I Regulation do not differ from the criteria that have traditionally been used by the German courts in the area of the recognition and enforcement of foreign judgments.⁴⁵ For example, the German Federal Court has clearly stated that the recognition of a foreign judgment must not be refused simply because the foreign procedure deviates from mandatory rules of German procedural law.⁴⁶ According to the Federal Court, a violation of the *ordre public* in view of the foreign procedural law is only given if the foreign procedure can no longer be regarded as an orderly procedure that respects the rule of law.⁴⁷ In the German literature, it is said that a violation of the procedural *ordre public* is given if the foreign procedure ‘violates fundamental requirements of procedural justice which we cannot disregard without deeply violating our *Rechtsgefühl*’.⁴⁸

From the viewpoint of German law, one must therefore look at the WCAM procedure and ask whether it violates such essential principles of German law. In this respect, there are mainly two critical issues: One is the constitutional guarantee of the right to be heard in relation to the notification of absent class members, the other is the ‘disposition principle’ that is often seen as a cornerstone of German civil procedure law. Both issues have been extensively discussed in the literature

32 A. Layton and H. Mercer, *European Civil Practice*, Vol. 1, 2nd edn., London: Thomson, Sweet and Maxwell 2004, margin no. 25.004.

33 P. Wautelet, in: U. Magnus and P. Mankowski (eds.), *Brussels I Regulation*, Munich: Sellier 2007, Art. 32, margin nos. 39 and 41 with supporting references from French and English case law.

34 Stadler 2009, p. 131 (*supra* n. 17); J. Kropholler and J. von Hein, *Europäisches Zivilprozessrecht*, 9th edn., Frankfurt am Main: Verlag Recht und Wirtschaft 2011, Art. 58, margin no. 1b; the same result is reached in a German doctoral dissertation on the Dutch developments: A. Mom, *Kollektiver Rechtsschutz in den Niederlanden*, Tübingen: Mohr Siebeck 2011, p. 387.

35 Arons/Van Boom 2010, p. 881 (*supra* n. 3).

36 Van Lith 2010, p. 93 (*supra* n. 3).

37 ECJ Case C-420/07, *Apostolides v. Orams*, [2009] ECR I-3571, no. 55.

38 *Ibid.*, no. 56.

39 *Ibid.*, nos. 58 et seq; the same is true where a breach of European law principles is alleged, ECJ Case C-38/98, *Renault v. Maxicar*, [2000] ECR I-2973, nos. 31 et seq.

40 ECJ Case C-7/98, *Krombach v. Bamberški*, [2000] ECR I-1935.

41 See S. Francq, in: Magnus/Mankowski (eds.) 2007, Art. 34, margin no. 28 (*supra* n. 33) with further historical references.

42 ECJ *Krombach v. Bamberški*, nos. 25 et seq. (*supra* n. 40).

43 From the German point of view see, e.g., S. Leible, in: T. Rauscher (ed.), *Europäisches Zivilprozessrecht*, 2nd edn., Munich: Sellier 2006, Art. 34, margin no. 13.

44 See, in general, Francq 2007, margin no. 30 (*supra* n. 41).

45 The German literature regards the criteria in Art. 34 no. 1 as equivalent to the German rules, see B. Schinkels, in: H. Prütting and M. Gehrlein, *ZPO*, 4th edn., Cologne: Luchterhand 2012, Art. 34 EuGVO, margin no. 3.

46 BGHZ 48, 327, 331.

47 *Ibid.*; see also OLG Frankfurt am Main, *IPRax* 2002, 523, 524: An English procedure that is different, but nevertheless ‘*rechtsstaatlich und geordnet*’, does not violate the German procedural *ordre public*.

48 R. Geimer, in: R. Zöller, *ZPO*, 29th edn., Cologne: Verlag Dr. Otto Schmidt 2012, § 328, margin no. 216.

regarding a possible recognition of US class actions.⁴⁹ The US class action is similar to the WCAM procedure at least insofar as it also creates an *erga omnes* effect with respect to the class members unless they opt out of the procedure. In the German literature, it is still disputed whether the results of US class actions may be recognized in Germany or not.⁵⁰ The courts have not yet had an opportunity to address this question directly.⁵¹

Turning to constitutional law first, Article 103(1) of the German Constitution guarantees everybody the right to be heard in a court procedure that affects his or her rights. Interpreting this provision, the German courts have stressed that it does not require specific procedures or formalities to be complied with.⁵² Instead, in evaluating the constitutionality of proceedings, the courts have looked to the purpose of the right to be heard: It requires to give the affected person an opportunity to express himself before a decision is made.⁵³ Furthermore, it preserves human dignity by allowing the participants an opportunity to influence the proceedings.⁵⁴ As long as the foreign procedure respects these principles, there is no violation of the procedural *ordre public*.⁵⁵ This means that if an affected person is individually notified of the proceedings and thus has a real possibility to either influence the WCAM proceedings or opt out (and thereby evade any binding force of the settlement), the right to be heard is complied with in principle.

The more difficult cases are those where affected persons are not notified individually, but through other means such as websites, newspaper advertisements or other public media. If such measures are adequately designed, there is a certain probability that the affected persons will take notice, but this obviously cannot be guaranteed. In comparison to individual notice, such instruments of public notice are therefore only second best. If individual notices are possible with reasonable effort – in particular when addresses are known to the court or to the parties or can be determined more or less easily – the German courts have held that the right to be heard requires such individual notice.⁵⁶ On the other hand, it is also accepted under German constitutional law that procedures of public – and thus potentially fictitious – notice may legitimately be used in cases where the names and/or addresses of the affected persons are neither known nor readily available.⁵⁷

4.1.2 Comparable procedures in German law

This general proposition can be illustrated with many examples which show that forms of public and therefore potentially fictitious notice are common practice in current German law. In administrative law, public notices are common in many areas, for example in zoning law and environmental law.⁵⁸ If an affected person does not react to such public notices within a specified period of time, she loses her right to intervene in the relevant procedure.⁵⁹ In zoning law, for example, this may lead to a significant financial loss for a property owner when the status of her real estate is changed from building land to non-building land.

In corporate law, there is a long-standing rule in the German Commercial Code which states that a judgment against a commercial partnership has *res judicata* effect also against an individual partner of that company (being personally liable for its debts) as the law assumes that every partner of the partnership will be or at least should be informed about such proceedings.⁶⁰ Significant similarities to class actions can be found in the German *Spruchverfahrensgesetz* that deals with the valuation of a company's shares, for example to determine the amount of compensation due to minority shareholders in cases of a squeeze-out. Here, a common representative for all affected shareholders is appointed, and this is published on an

official website. There is no individual notice to the affected persons and not even a possibility to 'opt out'. Nevertheless, the representative acts for these persons in the proceedings and the resulting court decision are legally binding on all shareholders. In German literature, these proceedings were already referred to as a model for a possible German group action.⁶¹

The most significant parallels to class actions probably come from the field of insolvency law. As in the class action context, the goal in insolvency law is to efficiently arrive at a binding solution with a large group of affected participants. In the interest of procedural efficiency, German insolvency law relies heavily on public and thus potentially fictitious notices. An individual notice regarding the initiation of insolvency proceedings is sent only to those creditors who are known to the court with their name and address.⁶² Beyond that, the court is not obliged to find any further creditors who are not yet registered in the files.⁶³ Instead, there is a public notice on an official website and it is the creditors' burden to check this website and participate in the proceedings or risk losing their claims.

49 For an overview, see A. Halfmeier and P. Wimalasena, 'Rechtsstaatliche Anforderungen an opt-out-Sammelverfahren', *JZ* 2012 (forthcoming).

50 Against such recognition – depending on the circumstances – is probably P. Gottwald, in: *Münchener Kommentar ZPO*, 3rd edn., Munich: Beck 2008, § 328, margin no. 160; but see more in favour of recognition B. Hess, 'Die Anerkennung eines Class Action Settlements in Deutschland', *JZ* 2000, p. 373 at p. 379.

51 See the *obiter dicta* in LG Stuttgart, *IPRax* 2001, 240, 241 (against recognition); but see for contrary views OLG Frankfurt/Main, *RIW* 1991, 417, 419 (a class action as such does not violate German *ordre public*); OLG Düsseldorf, *WM* 2003, 1587, 1589 (a class action procedure does not violate fundamental legal principles).

52 *BVerfGE* 1, 418, 429; BGH, *NJW* 1980, 519, 531.

53 *BVerfGE* 1, 418, 429 et seq.; BGHZ 118, 312, 321.

54 BGHZ 118, 321.

55 See, e.g., BGH, *NJW* 1968, 354, 355 (no violation of German procedural *ordre public* where a defendant before a British court was excluded from the proceedings for *contempt of court* according to local rules); but see BGH, *NJW* 2010, 153 (a violation of German procedural *ordre public* where the defendant was excluded for *contempt of court* and the court refused to hear the defendant's appeal against the exclusion with the somewhat circular argument that the defendant was already excluded from the proceedings); BGH, *NJW* 2009, 3306 (a violation of German procedural *ordre public* where a Polish court had declared paternity based on hearsay evidence and after declining to use a scientific paternity test that was offered by the defendant).

56 *BVerfG*, *NJW* 1988, 2361; OLG Koblenz, *NJW-RR* 1991, 521, 522.

57 *BVerfG*, *NJW* 1988, 2361.

58 See, e.g., § 3 para. 2 sentence 2 *Baugesetzbuch* where a *Bebauungsplan* – an instrument that typically places heavy restrictions on landowners' rights to use and build on their land – is notified *vis-à-vis* the affected persons according to 'local usage' which in practice means that there are advertisements in local newspapers and an information board in front of the town hall.

59 See §§ 214, 215 *Baugesetzbuch* and § 10 *Bundesimmissionsschutzgesetz*.

60 See, in the context of US class action recognition, P. Oberhammer and A. Reinisch, *IPRax* 2001, p. 211 at p. 212.

61 T. Baums (ed.), Report of the German Government Commission on Corporate Governance ('Bericht der Regierungskommission Corporate Governance (Unternehmensführung – Unternehmenskontrolle – Modernisierung des Aktienrechts), Bericht vom 10.7.2001'), BT-Drucksache 14/7515, 14 August 2001, margin no. 190.

62 See §§ 8 and 30 *Insolvenzordnung*.

63 H.-P. Kirchhof, in: *Heidelberger Kommentar Insolvenzordnung*, 4th edn, Heidelberg: Müller 2006, § 30, margin no. 8.

The same mechanism is used in Germany where an *Insolvenzplan* is at issue. This is an instrument that may be used to restructure an insolvent company with a view to continuing its operations, and it typically involves a 'hair cut', a swap or other modifications or reductions of the creditors' claims. After the *Insolvenzplan* is approved by the court, it has binding legal effect on every creditor, regardless of whether this creditor has in fact known about the procedure.⁶⁴ Again, individual notice is given only to creditors whose address is already on file, for all others the public notice on the internet is deemed sufficient.⁶⁵ The German Constitutional Court has explicitly approved such rules as being compatible with the constitutional right to be heard:

'From a constitutional law perspective, there is nothing wrong with giving public notification the effect of service of process, as long as the protection of rights before the courts is not inadequately restricted by such rules [citation omitted; AH]. In mass procedures with a large number of affected persons which cannot always be fully determined beforehand, this form of service is adequate and therefore prescribed by the legislator in many instances. Insolvency proceedings usually have a large number of participants whose identity and residence are not always known [citation omitted; AH]. Herein lies the legitimacy of the fiction of service of process according to § 119 par. 4 *VerglO* [the predecessor of today's rules on insolvency plans; AH]. This holds true even if – as is the case here – a limited number of persons are affected. The legislator may use typicalities for such rules. Since norms are necessarily of a general nature, the legislator is forced but also entitled to use a general picture resulting from past experiences [citation omitted; AH].'⁶⁶

These principles stated by the German Constitutional Court are also applied in other areas of German procedural law. Before the administrative courts, if more than 50 persons are necessarily affected by the proceedings, public notification is sufficient to create the binding force of the decision for all these persons, irrespective of whether they in fact participate or even take note of the proceedings.⁶⁷ An explanatory commentary states that these provisions are necessary for the 'special circumstances of mass proceedings' and are designed to allow the court to hear 'large proceedings within adequate time'.⁶⁸ A similar rule is used in social security cases with more than 20 affected persons.⁶⁹

All these examples show, the constitutionally guaranteed right to be heard in Germany is understood in a functional way.⁷⁰ It does not always require an individual notice to every affected person. Instead, it needs to be put into an adequate relationship with efficiency goals, and therefore does indeed allow the use of public and thus potentially fictitious notice in mass procedures, as is regularly done in the existing German procedures described above.

4.1.3 Article 6 European Human Rights Convention

In determining the adequate limits of the *ordre public* exception, the ECJ has stressed that the ECHR and in particular its 'fair trial' principle (Art. 6 ECHR) should receive special attention as it gives an indication of the common traditions of the Member States with respect to fundamental rights.⁷¹ Even though Article 6 ECHR does not explicitly mention a 'right to be heard' as the German Constitution does, it should be obvious that this is necessarily included in every acceptable conception of a 'fair trial' and that therefore Article 6(1) ECHR is in this respect identical with Article 103(1) of the German Constitution.⁷²

These parallels are not only theoretical, but also appear in the case law of the European Court of Human Rights (ECtHR) in Strasbourg. Just as the German Constitutional Court has done

in the case cited above with respect to insolvency law, its colleagues on the other side of the Rhine have accepted that in mass procedures, not every single claim must necessarily be dealt with individually. The leading case here is *Lithgow v. United Kingdom*, which concerned claims from shareholders of an industrial company that was nationalized by the British government in pre-Thatcher times. To avoid a flood of individual litigations, the relevant British statute introduced a 'stockholders' representative' who was elected by the shareholders of the affected companies or alternatively appointed by the government. Negotiations regarding compensation claims were held only with this representative and individual litigation for compensation was precluded under the statute.⁷³ The Strasbourg court first stated in the abstract that the right to an individual procedure may be limited or restricted if such restriction serves a legitimate goal and is not disproportional.⁷⁴ According to the court and in this specific case, these requirements were fulfilled, because in the context of a large nationalization procedure, a flood of individual compensation claims would be impossible to handle. The court argued that the interests of the shareholders were sufficiently protected as they could take part in a shareholders' assembly which could influence the representative and even vote him out of office.⁷⁵ Later, the Strasbourg court had to deal with a German statute that liberalized the rules regarding attorney representation at the higher courts – thus ending the previously existing oligopoly of certain lawyers. These lawyers complained to the court that their right to be heard had been violated because they had not been heard individually. Here, the court referred to *Lithgow* and saw no violation of Article 6 ECHR since 'in proceedings involving a decision for a collective number of individuals, it is not always required or even possible that every individual concerned is heard before the court'.⁷⁶

This case law of the Strasbourg court shows that an opt-out procedure including public notice is a 'fair trial' in the sense of Article 6 ECHR if the procedure is introduced for a legitimate purpose, if the restrictions on individual rights – such as public notice – are proportional to this purpose and if sufficient effort is made to inform the affected persons adequately about the procedure and about their right to opt out.⁷⁷ With

64 E. Braun, in: P. Gottwald (ed.) *Insolvenzrechts-Handbuch*, 3rd edn., Munich: Beck 2006, p. 1020.

65 A. Flessner, in: *Heidelberger Kommentar Insolvenzordnung* (supra n. 63).

66 *BVerfGE* 77, 275, 285 (translation by the author).

67 See §§ 65 para. 3 and 121 no. 2 *Verwaltungsgerichtsordnung*.

68 H. Posser, H.A. Wolff and R. Kintz (eds.), *Beckscher Online-Kommentar VwGO*, Munich: Beck, § 65, margin no. 22.

69 See § 75a para. 2a *Sozialgerichtsgesetz*.

70 See, to this effect, already P. Gottwald, 'Class action auf Leistung von Schadensersatz nach amerikanischem Vorbild im deutschen Zivilprozess', *ZfP* (91) 1978, p. 1 at p. 9.

71 *Krombach v. Bamberski*, nos. 25 et seq. (supra n. 40); ECJ Case C-394/07, *Gambazzi*, [2009] ECR I-2563.

72 C. Grabenwarter and K. Pabel, in: R. Grote and T. Marauhn (eds.), *EMRK/GG*, Tübingen: Mohr Siebeck 2006, chapter 14, margin no. 91.

73 ECtHR 24 June 1986, *Series A* no. 102, p. 71.

74 *Ibid.*, para. 194.

75 *Ibid.*, paras. 195 et seq.

76 *Wendenburg et al. v. Federal Republic of Germany*, ECtHR 6 February 2003, decision no. 71630/01, *ECHR* 2003-II, 347.

77 In this sense also G.E. Kodek, 'Kollektiver Rechtsschutz gegen Diskriminierung im Arbeits- und Wirtschaftsrecht: Rechtsvergleichende und rechtspolitische Tendenzen', in: P. Gottwald (ed.), *Europäisches Insolvenzrecht – Kollektiver Rechtsschutz*, Bielefeld: Gieseking-Verlag 2008, p. 249 at pp. 282 et seq.; see with regard to the recognition of US class action results in Europe

regard to these standards, there is probably not much difference between the constitutional requirements in Germany and in the Netherlands as well as under Article 6 ECHR: All three legal orders seem to agree that a fair trial does not necessarily require individual notice or participation, but nothing more – and nothing less – than what has been called the ‘best notice practicable under the circumstances’ in the US class action procedure.⁷⁸

4.1.4 The disposition principle

In Germany, foreign opt-out procedures are often viewed critically as they allegedly violate the ‘disposition principle’ that is said to be a core idea of German civil procedure.⁷⁹ It guarantees everybody free disposition over their claims in the sense that they cannot be forced to realize such claims or bring them before the courts.⁸⁰ The disposition principle can be understood as the procedural side of the more general principle of private autonomy as a core concept of liberal private law in its classical understanding. However, the basis and extent of the disposition principle is disputed and it probably does not absolutely prohibit the enforcement of somebody’s rights without his or her consent.⁸¹

Looking at the WCAM procedure, the individual claim holder is typically better off with this procedure than without it: If she has very small claims, she will probably not bring them before the courts anyhow out of rational disinterest, so the settlement procedure can only improve her position. The loss or partial loss of the claim according to the terms of the settlement is irrelevant for a claim holder who would not have pursued the claim anyhow. In such small claims cases, the disposition principle therefore does not need protection because the claim holder does not want to dispose at all.

With regard to bigger claims or where the claim holder is – for whatever reason – willing to pursue the claim in court, her freedom of disposition is protected through the notice system. If the Dutch court gives ‘best notice possible under the circumstances’, a claim holder who is alert and informing herself about her possibilities will be reached by the notice and can then dispose by opting out of the Dutch procedure or even participating in it. In these cases, the right to be heard at the same time protects the disposition principle.⁸² The remaining burden for the claim holder is to react when notified. This burden seems bearable and proportional in view of the efficiency advantages of a collective resolution of mass damages.

4.1.5 Preliminary result

In conclusion, both the right to be heard in Article 103(1) of the German Constitution and the fair trial principle in Article 6 ECHR allow the use of public and thus potentially fictitious notices in mass procedures under certain conditions. Therefore, the use of such notices in the Dutch WCAM settlement procedure does not as such constitute a violation of the German *ordre public* in the sense of Article 34(1) Brussels I Regulation.

4.2 Adequate service of process (Art. 34 no. 2)

All of the considerations above may be superfluous if one considers Article 34(2) to be the relevant provision with regard to the recognition of a Dutch WCAM decision in Germany. The reason for this is that Article 34 no. 2 is seen as *lex specialis* in relation to no. 1 when it comes to violations of the right to be heard: In the situation described by Article 34 no. 2, only the criteria of no. 2 shall be applied and no recourse can be had to general considerations as in Article 34 no. 1.⁸³

However, Article 34 no. 2 does not fit the situation discussed here. First of all, the provision is about the protection of a ‘defendant’. This is not the case in the WCAM situation insofar as the notifications of the absent group members are concerned. They are potential plaintiffs and not defendants who are sued. As discussed above with regard to the jurisdictional issues, one should admit that the Brussels Regulation as well as the preceding Brussels Convention were simply not designed with collective actions and their specific problems in mind.⁸⁴ In view of this insufficient design, one should not bend a rule like Article 34 no. 2 out of its shape where it is clearly designed to apply to an ordinary two-party civil litigation.

Furthermore – and in contrast to the jurisdiction problem, where there is no solution in the existing provisions – an extensive or even twisted interpretation of Article 34 no. 2 is not necessary since one may always fall back on the general principle of Article 34 no. 1 as discussed above. This has also been exercised by the ECJ in the *Krombach* case where the court acknowledged that there may be issues regarding fair trial and the right to be heard outside of (today’s) Article 34 no. 2 and then dealt with these issues under the general rule in no. 1.

Nevertheless, there are authors who tend to apply Article 34 no. 2 in the WCAM context.⁸⁵ This position may be supported by the ECJ’s *Hendrikman* judgment where the court stated that the term ‘default judgment’ also covers a situation in which the defendant was allegedly represented by an attorney even though this attorney had no authority to act for the defendant.⁸⁶ However, the difference with the WCAM procedure still lies in the fact that in *Hendrikman* the affected person was a defendant in ordinary civil proceedings, while the absent class members in the WCAM procedure are not defendants in the classical meaning of the term.

Notwithstanding this question of whether Article 34 no. 2 is applicable at all, the next issues in the context of that provision would be adequate time and the form of service of documents on the ‘defendant’ – in this case on the absent group members

also J.C.L. Dixon, ‘The *Res Judicata* Effect in England of a US Class Action Settlement’, *ICLQ* (46) 1997, p. 134 at p. 150 (in favour of recognition from an English perspective); A. Pinna, ‘Recognition and *Res Judicata* of US Class Action Judgments in European Legal Systems’, *Erasmus Law Review* (1) 2008, p. 31 at p. 59 (seeing a reduced hostility by European systems to the US class action).

78 With regard to this requirement in US class action procedure see Rule 23(c)(2)(b) Federal Rules of Civil Procedure (FRCP) and the case law, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306, 317 (1950); *Eisen v. Carlisle & Jacquelin*, 417 US 156, 176 (1974); *Phillips Petroleum Co. v. Shutts*, 472 US 797, 811 (1985).

79 See, e.g., R. Mann, *NJW* 1994, p. 1187 at p. 1188; C. Greiner, *Die Class Action im amerikanischen Recht und deutscher ordre public*, Frankfurt am Main: Peter Lang 1998, p. 189.

80 K. Reichold, in: H. Thomas and H. Putzo (eds.), *Zivilprozessordnung*, 29th edn., Munich: Beck 2008, Introduction I, margin no. 5.

81 Gottwald 1978, p. 19 (*supra* n. 70).

82 See, with regard to the US class action, H. Schneider, *Class Actions – Rechtspolitische Fragen in den USA und Anerkennung in Deutschland*, Muenster: Lit 1999, p. 107.

83 Francq 2007, Art. 34, margin no. 19 (*supra* n. 41), citing ECJ Case 145/86, *Hoffmann v. Krieg*, [1988] ECR 645, no. 21; ECJ Case C-78/95, *Hendrikman v. Magenta*, [1996] ECR I-4943, no. 23; cf. also Leible 2006, Art. 34, margin no. 14 (*supra* n. 43): Infringements of the right to be heard fall under no. 2 insofar as they relate to the initiation of proceedings.

84 But see Van Lith 2010, p. 49 (*supra* n. 3), arguing that the concept of ‘defendant’ in Art. 34 no. 2 is to be understood more broadly than in Arts. 2 et seq.

85 See, e.g., Mom 2011, p. 389 (*supra* n. 34).

86 *Hendrikman v. Magenta* (*supra* n. 83).

if one regards them as 'defendants' regarding the declaratory action brought 'against' them by the settlement parties. Here, it is important to note that the Brussels I Regulation in its current form abolished the requirement that such documents must be 'duly' served upon the defendant and therefore no longer relies on formalities, but on the factual requirement that the defendant must be enabled to arrange for his defence: 'A mere formal irregularity in the service procedure will not debar recognition or enforcement if it has not prevented the debtor from arranging for his defence.'⁸⁷ Whether this has been the case or not is a question of fact where all relevant circumstances must be taken into account.⁸⁸

However, it is also said that the formal rules regarding service of process still play a role even under today's version of Article 34 no. 2: If the service on the defendant was effected according to the applicable rules – within the EU, this is mainly the Service Regulation no. 1393/2007 – this will normally be sufficient for the recognition of the judgment insofar as Article 34 no. 2 is concerned.⁸⁹ Conversely, a severe violation of such service provisions may indicate grounds for non-recognition according to this provision.⁹⁰ Therefore, it is advisable in a WCAM procedure to follow the Service Regulation and other applicable instruments and this was done by the *Gerechtshof* Amsterdam in the *Shell* and *Converium* cases.⁹¹

The Service Regulation, however, is not applicable with regard to potential recipients of a document whose address is unknown, so that national rules on public notice or other procedures can be used.⁹² Insofar as addresses are not known and cannot be ascertained with reasonable effort,⁹³ public notifications as used by the *Gerechtshof* Amsterdam are therefore sufficient. Such public notices or other forms of fictitious service under the Member States' procedural laws are not forbidden by Article 34 no. 2 Brussels I Regulation.⁹⁴

In addition, Article 34 no. 2 places a heavy burden of activity on the defendant (or the absent group member): If he is in fact informed about the proceedings – albeit through less than perfect service or other notification – he must 'commence proceedings to challenge the judgment' when it is possible to do so, otherwise he cannot later claim non-recognition of the 'default' judgment delivered against him.⁹⁵ The extent and limits of this burden depend on the specific circumstances.⁹⁶ If one transfers this idea to collective actions, it again shows that the opt-out system used in the WCAM and the burden it puts on the group members – namely, to either react and exit the proceedings or not to react and be bound by the results – cannot be regarded as a violation of Article 34 no. 2 as long as sufficient care and effort is invested in a proper notification system. In sum, even if one were to apply Article 34 no. 2 – against its wording and intentions – to the WCAM procedure, there would be no violation of that provision as long as the EU Service Regulation is observed for known group members and adequate public notices are given for others.

5. Conclusion

The foregoing analysis does not exhaustively cover all aspects that may ever become relevant with regard to the recognition of a Dutch WCAM settlement in Germany. Depending on the particular case, many other factors may play a role, such as special defects of the procedure that would qualify as *ordre public* violations or theoretically even conflicting judgments in the sense of Article 34 no. 3 or 4 Brussels I Regulation. Nevertheless, it could be shown that the WCAM procedure *as such* and

as it has been used in practice by the *Gerechtshof* Amsterdam in the *Shell* and *Converium* cases does not create any obstacles to recognition. According to Article 33 Brussels I Regulation, a WCAM settlement decision must therefore in principle be recognized in Germany. Whether the same result applies to other EU Member States depends on their understanding of the local *ordre public*, but in view of the general principles discussed above and the case law on Article 6 ECHR, it seems that similar results for other Member States are likely.⁹⁷

The analysis also shows that the WCAM procedure may indeed become a model for future legislation regarding collective procedures – be it on an EU level or within individual Member States. It has proven successful in practice and fulfils the requirement of a 'fair trial' in the sense of common constitutional law principles.

With regard to transnational cases, however, the issue of jurisdiction is not yet adequately solved. Even though a possible lack of jurisdiction is not an obstacle to recognition under the Brussels I Regulation, the jurisdiction problem may become more pressing if other Member States' courts were also to take up transnational collective procedures under their own procedural rules. The provisions of the current Brussels I Regulation are not designed to deal with collective procedures and are clearly insufficient. This problem must therefore be tackled by EU institutions in the near future, because the WCAM experience once more confirms the diagnosis that collective procedures are 'here to stay'.⁹⁸

87 Explanatory Memorandum to Regulation 44/2001, COM (1999) 348 final, Art. 41.

88 Layton/Mercer 2004, margin no. 26.052 (*supra* n. 32).

89 Kropholler/von Hein 2011, Art. 34, margin no. 39 (*supra* n. 34).

90 BGH, *IPRax* 2008, 530, 532.

91 In both cases, the *Gerechtshof* Amsterdam followed the procedure prescribed by the European Service Regulation and – with regard to non-EU states – the Hague Service Convention and similar instruments, see *Shell*, para. 5.7 (*supra* n. 1); *Converium* case (17 January 2012), para. 4.2.2 (*supra* n. 1). With regard to the affected persons in the *Shell* case with unknown addresses, several websites were established and advertisements placed in more than 47 newspapers, for details see Van Lith 2010, pp. 72 et seq. (*supra* n. 3). In *Converium*, there were also several websites and more than 19 newspapers involved, see *Gerechtshof* Amsterdam 17 January 2012, para. 4.2.3 (*supra* n. 1).

92 See Art. 1(2) Service Regulation (EC) 1393/2007.

93 In this regard, the parties to the settlement may have a duty to make reasonable efforts to ascertain the address of the defendant, cf. with regard to similar plaintiffs' duties ECJ Case 49/84, *Debaecker v. Bouwman*, [1985] ECR 1779.

94 Leible 2006, margin no. 32 (*supra* n. 43); similarly P. Oberhammer, in: F. Stein and M. Jonas, *Kommentar zur Zivilprozessordnung*, 22nd edn., Tübingen: Mohr Siebeck 2011, Art. 34 EuGVVO, margin no. 61 with further references.

95 Oberhammer 2011, margin no. 66 (*supra* n. 94), points out that in comparison to the prior Brussels Convention, this provision significantly increases the burden on the defendant to take action.

96 See ECJ Case C-283/05, *ASML v. SEMIS*, [2006] ECR I-12067, nos. 32 et seq.: the defendant must act if he knows the reasons for the default judgment.

97 Things may be different with regard to French case law on the necessity of personal notice, see Muir Watt 2010, p. 111, fn. 11 (*supra* n. 4).

98 Muir Watt, *ibid.*; see also Stadler 2009, p. 133 (*supra* n. 17) in favour of a reform of the Brussels Regulation with respect to collective procedures; some possible solutions are discussed by Van Lith 2010, pp. 48 et seq. (*supra* n. 3).