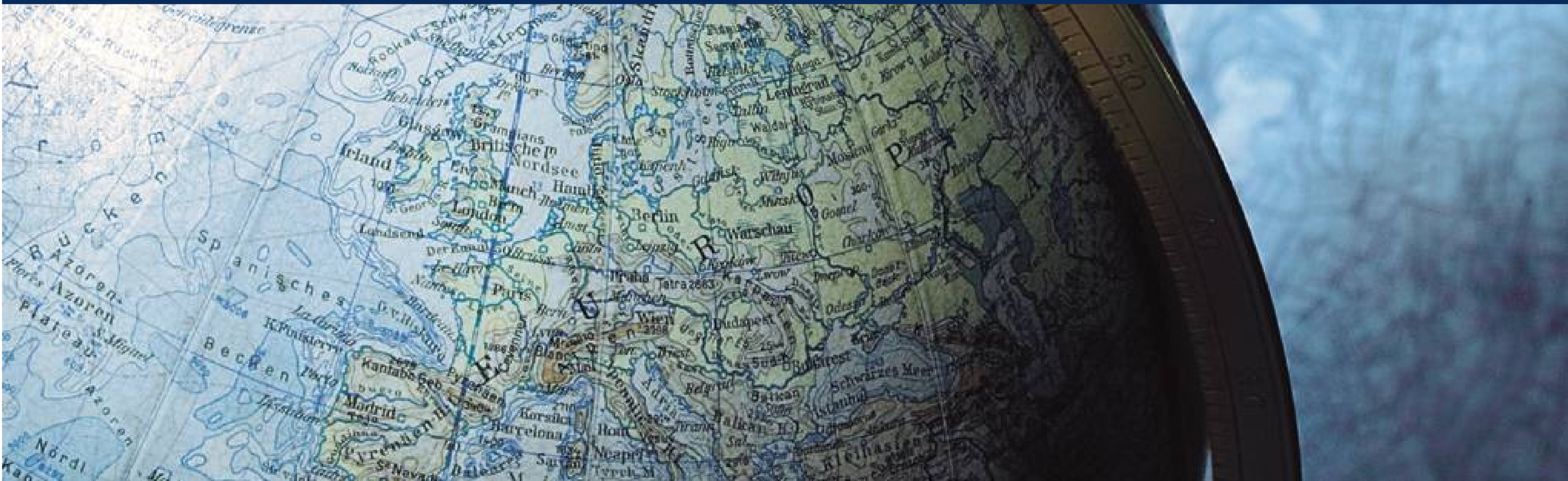
Litigation vehicles; much ado about nothing?

Jeroen Kortmann, VvM, June 2014

Stibbe



(1) Litigation vehicles: as old as the hills

Lex Anastasiana of 506 A.D. (C. 4.35.22); the emperor Anastasius to the praetorian prefect Eustachius:

By two different reports which have been made to Us, We have ascertained that certain individuals, being desirous of obtaining the property and fortunes of others, have exerted themselves to have rights of action assigned to them by third parties, and in this way litigants are subjected to many annoyances (...)

We order by this law that hereafter attempts of this kind shall be prohibited. (...) [I]f anyone, after having paid money, should obtain such an assignment, he shall only be permitted to bring the actions which he has purchased to the extent of the amount of money which he has paid (...)

(2) Litigation vehicles in the Netherlands

Derivative claims

- Vereniging van Effectenbezitters (“VEB”): Shell, Ahold, KNPQwest, Fortis Bank
- Stichting Onderzoek Bedrijfs Informatie (“SOBI”): Dexia Bank, Ahold, DSB Bank
- Stichting Meldpunt Collectief Onrecht (“SMCO”): DSB Bank, “Loterijverlies”

Antitrust damage claims:

- Claims Funding International: Air cargo
- OmniBridgeway & Hausfeld LLP: Elevators, Air Cargo
- CDC Cartel Damage Claims: Sodium Chlorate, Candle Wax
- East-West Debt: Elevators, Air Cargo

Foreign interest in the Dutch jurisdiction: example

Parent

A

B

C

D

‘Article 6(1) Brussels I Reg.’

CDC

‘Customer’

‘Customer’

‘Customer’

‘Customer’

‘Customer’

(3) Litigation vehicles; drawbacks

Risk of abuse:

- Lack of professionalism
- Untransparent reward structures
- Frivolous lawsuits

Potential conflicts of interest:

- Conflicts between the “class members”
- Conflicts between the vehicle and the “class”

Reduced appetite for amicable settlements:

- Relational aspects claimant/defendant removed by assignments to vehicle
- Concern that settling with vehicle will attract new “business” to vehicle (and …)

Illustration of drawback: untransparent reward structures

Derivative case:

d. Van alle schadevergoeding of waardeherstel die wordt gerealiseerd komt 90% volledig aan u toe; 10% is aan ons verschuldigd als succesfee.

De succesfee wordt berekend over alles wat u na het moment van uw eerste inschrijving ontvangt met betrekking tot deze kwestie, ongeacht door wie dat wordt betaald of wat de aard daarvan is. Daaronder valt dus ook de mogelijke waardestijging van het aandeel, omdat dat één van onze doelen is en dus zeker een gevolg van onze acties kan zijn.

(4) ‘Checks and balances’: the Dutch ‘Claimcode’?

“Dit succes van het collectief actierecht heeft echter ook een keerzijde. Het leidt in toenemende mate tot, wat wel wordt genoemd, een wildgroei aan claimstichtingen die na een massaschade in het leven worden geroepen. … In bepaalde gevallen wordt wel getwijfeld aan de zuiverheid van de motieven van deze stichtingen, die niet zelden louter commercieel gedreven zijn (entrepreneurial lawyering).”

Memorie van Toelichting Wijziging WCAM, p. 5

“Gezien het bovenstaande is er echter wel reden om maatregelen te treffen die moeten ontmoedigen dat stichtingen belangen behartigen van gedupeerden uit motieven die louter commercieel gedreven zijn. Bovendien is er reden om gedupeerden en hun wederpartijen houvast te bieden en beter inzicht te geven in het functioneren en de professionaliteit van ad hoc opgerichte stichtingen. Ik juich dan ook van harte toe het initiatief tot het opstellen van een zogenaamde ‘claimcode’...”

Opstelten, Nota n.a.v. Verslag, p. 6-8

(5) 'Checks and balances': the European Commission's view

"The mandate must not be given to an uncontrolled litigation vehicle set up by lawyers who may be pursuing primarily their own financial interests."

Neelie Kroes, (2008)

Recommendation on Collective Redress (2013):

Standing to bring a representative action

The Member States should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility. These conditions should include at least the following requirements:

(a) the entity should have a non-profit making character;

(b) there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and

(c) the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

(5) The European Commission's view (continued)

Recommendation on Collective Redress (2013):

Funding

The claimant party should be required to declare to the court at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action.

The court should be allowed to stay the proceedings if in the case of use of financial resources provided by a third party,

(a) there is a conflict of interest between the third party and the claimant party and its members;

(b) the third party has insufficient resources in order to meet its financial commitments to the claimant party initiating the collective redress procedure;

(c) the claimant party has insufficient resources to meet any adverse costs should the collective redress procedure fail.

(5) The European Commission's view (continued)

Recommendation on Collective Redress (2013):

Constitution of the claimant party by 'opt-in' principle

The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.

A member of the claimant party should be free to leave the claimant party at any time before the final judgement is given or the case is otherwise validly settled, subject to the same conditions that apply to withdrawal in individual actions, without being deprived of the possibility to pursue its claims in another form, if this does not undermine the sound administration of justice.

QUESTIONS?