DEALING WITH JOINT AND SEVERAL LIABILITY WHEN SETTLING MASS DAMAGES CLAIMS

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1. Introduction

Complex issues often arise when we assist clients who, together with others, face legal action for allegedly causing mass damage. Several of these issues concern joint and several liability. In this contribution, we will discuss the position of a jointly and severally liable party that decides to settle a pending or potential mass damages claim at an early stage. It generally does so in an attempt to achieve a final resolution of the dispute in which it is involved as a defendant, or a potential defendant. This finality is largely achieved by agreeing a settlement with the various claimants. The defendant's relationship with the settling claimants, and the accompanying settlement issues, are discussed in other contributions. Entering into a settlement within this *external* relationship is not always the end of the matter for the defendant, however. It may be disappointed if it believes that by agreeing a settlement it has rid itself of the problem once and for all. The *internal* relationship between the settling defendant and its co-debtors is also relevant in reaching a final resolution.

In this contribution, we discuss the "internal settlement issue" and the complications that we regularly encounter in our mass damages practice. We will look at the issues from a competition law perspective. Various pending or imminent mass damages actions before the Dutch courts concern competition law (or at least, its enforcement under civil law). For a good understanding of the internal settlement issues, we first make a number of comments on the subject of joint and several liability in section 2 below. In that connection, we also discuss the introduction of some new rules that apply in the case of a competition law infringement. In section 3 of this contribution, we discuss the internal settlement issue and focus on existing provisions (and recently introduced ones in the context of competition law enforcement) that provide a mechanism for reaching a more final resolution of a dispute. In section 4, we give some practical tips that may be of use when entering into a settlement agreement. Section 5 sets out our conclusions.

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2. Joint and several liability

2.1 General rules on joint and several liability

Mass damages claims are relatively common in financial law and, as we mentioned before, competition law. When these claims are brought, special purpose entities are usually involved. Injured parties will have assigned a large number of claims to these "claims vehicles" in advance or will have agreed that the vehicles represent their interests. A case study to illustrate:

Company X and three other legal entities are jointly and severally liable towards a large number of injured parties. Claim vehicle A has been incorporated to represent the interests of all injured parties. In return for a small payment in advance and a substantial percentage of any proceeds if the claim is awarded, claim vehicle A offers to take over the injured parties' claims and to pursue these claims in court. Claim vehicle A thus obtains all existing claims, which total EUR 200 million. Claim vehicle A subsequently claims payment and threatens legal action. Claim vehicle A asserts that Company X's share in the total damage (divided among the relevant companies, each of which are jointly and severally liable) is EUR 50 million. Company X disputes the extent of this liability. Claim vehicle A has already indicated that, in order to not unnecessarily complicate any legal action, it will only take two of the four companies to court and that it will hold those two companies individually liable for the total damage.

When multiple debtors are involved in a damage-causing event, each of these parties can be held jointly and severally liable by the injured parties (whether or not through claim vehicles) for the same, total damage. According to article 6:6(1) and (2) of the Dutch Civil Code (DCC), joint and several liability ensues from the law, custom or a legal act.[2] An example of a statutory ground for joint and several liability is article 6:102 DCC. This article provides that where two or more persons are liable for the same damage (for example, in the case of contributory negligence or concurrent liability) they are jointly and severally liable. A characteristic of joint and several liability is that a claimant can choose which of the jointly and severally liable parties to sue (article 6:7(1) and (2) DCC). When the sued party pays the full amount, it can exercise recourse against the other jointly and severally liable parties for the portion that concerns each of them in their mutual relationship (article 6:10 DCC).

A strictly linguistic reading of article 6:102 DCC seems to imply that this provision cannot be used as an independent ground for an obligation to pay damages. In case law concerning mass damages claims in particular, this obligation is usually based

[2] In this contribution, we assume that Dutch law applies. That is certainly not a given in mass damages cases, because many have an international character and subject to foreign legal systems.

on "article 6:102 DCC and/or 6:166 DCC" (in conjunction with article 6:162 DCC).[3] The background to this seems to follow from the first sentence of article 6:102 DCC: "If two or more persons have an obligation to compensate the same damage, they are jointly and severally liable". This wording assumes that there was already an obligation to compensate damage, which is why the use of article 6:102 DCC as an independent basis seems less plausible. This is also consistent with the statutory system. Article 6:102 DCC is part of Section 10 (Statutory obligations to compensate damage) of Title 1 (Obligations in general) of Book 6 (General part of the law of obligations). The provisions of Section 10 give general rules regarding the content and scope of all statutory obligations to compensate damage which have a basis elsewhere in the law.

2.2 Different joint and several liability provisions in the case of competition law infringements

When mass damages claims arise on competition law grounds, they usually relate to a cartel and follow after a decision by a competition authority (in the cases brought before the Dutch courts, often the European Commission) that a cartel exists and that a fine should be issued. The objective of claim vehicles is often to obtain a court judgment confirming the joint and several liability of the defendants, the cartel participants, with a referral to follow-up proceedings to determine damages, which means that a complex discussion on causality and damage is postponed. In this context, European directive 2014/104/EU (Damages Directive) is relevant. In the Damages Directive, the European Commission has set out rules for damages claims based on competition infringement. Its aim was to encourage civil law enforcement of competition law and to prevent public and private law enforcement interfering with each other. The Damages Directive includes rules on quantification of damage, access to evidence and the impact of decisions concerning infringements in subsequent damages proceedings, but it also gives specific rules that refer to joint and several liability for competition law infringements. These new rules apply only to cross-border infringements of competition law and infringements of national competition law where these also affect trade between Member States. The rules therefore do not apply to purely domestic infringements of competition law. In the Netherlands, a separate bill declaring the rules applicable to national cases, is being prepared. Non-material national provisions adopted as part of the implementation of the Damages Directive only apply to claims for damages based on competition infringements if these have been filed with a national court since 26 December 2014.[4] National

[3] See Supreme Court 2 October 2015, ECLI:NL:HR:2015:2914. According to its legislative history, article 6:166 DCC provides for individual liability of participants belonging to a group for loss unlawfully inflicted by the group. The degree of involvement of the individual participants in the unlawful conduct is not important. This individual liability is justified by everyone's contribution towards creating the chance that such loss would arise. It is limited by the requirement that this chance of inflicting loss should have prevented them from their conduct as part of the group. The conduct taking place at the same time and place is not required for liability under article 6:166 DCC.

[4] See Article 22 Damages Directive.

provisions of a material nature (which are further discussed in this contribution) have no retroactive effect and only apply to competition infringements that took place after the entry into force of the implementing legislation. In the Netherlands, this legislation entered into force on 10 February 2017. For competition infringements that occurred before this date, but also for other matters than competition infringements, those material provisions that are still valid and were already used before the implementation of the Damages Directive, should be relied on.[5]

In Dutch law, the rules introduced by the Damages Directive were implemented by an Act of 25 January 2017 in a separate section in the Civil Code and in the Code of Civil Procedure. Title 3 of Book 6 DCC includes a newly inserted Section 3B ("Infringement of competition law") because the liability and compensation provisions of the Damages Directive partly connect to a number of principles in Dutch civil law, but also contain a number of exceptions to it.[6] Changes in the rules on joint and several liability for damage caused by a competition infringement in case of multiple debtors are particularly relevant.[7] Under the old law, such cartel damages claims were based on tort (article 6:162 DCC) and joint and several liability ensued, at least it was argued that way, based on article 6:102 DCC, in conjunction with 6:166 DCC. The new article 6:193m(1) DCC introduces an independent ground and explicitly provides that if companies have committed an infringement of competition law by a joint action, each of them is liable for the entire damage caused by the infringement.

Even if the European Commission finds that companies, by a joint action, committed an infringement of competition law, the existence of joint and several liability in a civil context is not necessarily a given. This is not clear-cut when complications arise, such as when there is a certain connection as part of a group, an infringement consists of a series of acts or acts did not take place on the same market. The question is whether such complications under the new law have a different effect on the finding that there is joint and several liability. Although article 6:193m DCC seems to suggest that complications in establishing joint and several liability are less relevant because of the independent ground for liability, we do consider it conceivable that any complications will still have to be taken into account. The effect of the new law will have to crystallise in practice and is not further considered in this contribution.

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[5] Incidentally, competition infringements that occurred after the entry into force of the implementation act and which are subject to the material provisions described in this contribution, will probably be established only in the distant future. In addition, the question arises how to deal with a competition infringement that started in the period before the entry into force of the implementation act and which was then continued (the issue of the "*single and continuous infringement*").

[6] Because tort is the most obvious basis for a damages action in the event of violation of competition law, this Section is part of Title 3 ("Tort") of Book 6 of the Dutch Civil Code.

[7] See Sections 2 and 10 of Book 6, Title 1.

2.3 Joint and several liability in the case of leniency and clemency

A first exception to the principle of joint and several liability for the total damage as follows from article 6:193m(1) DCC (and article 6:102(1) DCC in conjunction with 6:6 DCC) is set out in article 6:193m(2) DCC. A small or medium-sized enterprise that has committed a competition infringement can ask for leniency; this would only leave it liable towards its own direct and indirect customers. Direct and indirect customers of other companies involved in the infringement would not be able to sue the small or medium-sized enterprise. A prerequisite for this exception is that this company's share of the relevant market was consistently less than 5% during the period of infringement and that joint and several liability for the full loss would irreparably jeopardise its economic viability and cause its assets to lose all their value.[8] Invoking this leniency arrangement does not succeed, however, if the injured parties cannot obtain full compensation of their damage from the other companies involved in the infringement.[9] Moreover, a leniency appeal pursuant to article 6:193m(2) is not available if the company invoking it played a leading role in the infringement or encouraged other companies to take part, or if it was previously found guilty of a competition law infringement.

A second exception to the principle of joint and several liability for the total damage applies where a company receives immunity in the context of a clemency arrangement. Companies cooperating with competition authorities play an important role in tracking down secret cartel infringements and thus helping to end these infringements. This often limits the damage caused by a cartel infringement. For that reason, the European Commission believed it was important to ensure that a company which has been given immunity from fines by a competition authority in the context of a clemency arrangement, is not unnecessarily exposed to civil damages claims. That risk is real because the competition authority's decision establishing a competition infringement may sooner acquire *res judicata* effect for the company that has been granted immunity than for other companies that have not acquired immunity. This means that there is a preference to file damages claims against the company that has been granted immunity.[10] Moreover, public and private law enforcement would clash, for example when an injured party in a competition infringement case were to get access to information that competition authorities obtained from an infringing company in the context of a clemency arrangement. Infringing companies may be more hesitant in opting for a clemency request if they suffer a disadvantage during damages proceedings later on, especially where that disadvantage is greater compared to other companies involved in the infringement that have not submitted a clemency request. In view of this, article 6:193m(4) DCC provides that an infringer which has reported the infringement to a competition authority and for that reason has been given immunity from fines, may only be sued by its own

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[8] As referred to in Recommendation (2003/361/EC) of the European Commission (6 May 2003), *Concerning the definition of micro, small and medium-sized enterprises*.

[9] Article 6:193m(2) DCC, first sentence, states: "Provided that full compensation for loss can be obtained from the other companies involved in the infringement".

[10] Recital 38 of the preamble to the Damages Directive.

direct and indirect customers and suppliers for full compensation of their damage. Any other injured parties cannot claim damages from this infringer in connection with the relevant infringement. As is the case when an infringer applies for leniency (see above), the company cannot invoke the exception to the principle of joint and several liability for the total damage if the injured parties cannot fully recover their damages from the other infringers.

Let us assume that company X has participated in an illegal cartel together with companies Y and Z. Company X has a 4% market share, companies Y and Z both have a 48% market share, or the situation is such that all have an equal market share but that company X decides to report the cartel and its involvement to the relevant competition authority in exchange for immunity. Based on the existing legislation concerning joint and several liability, company X could in principle be liable for the loss suffered by its own customers, but also for the loss suffered by the customers of companies Y and Z. As a result of the applicability of the new rules on joint and several liability, however, company X can ask for leniency or clemency. In that case, company X will in principle be liable only for the loss its own customers have suffered and not for the loss suffered by customers of companies Y and Z. Companies Y and Z continue to be jointly and severally liable (in addition to company X) for the loss suffered by the customers, including the customers of company X.[11]

3. Recourse relationship and settlement issues

3.1 Introduction

In principle, the result of joint and several liability – regardless of which grounds it is based on – is that each jointly and severally liable party can be sued for the total damage, even if the sued party is only partly responsible for that damage (article 6:7(1) and (2) DCC). Pursuant to article 6:10(1) DCC, joint and several debtors are each required to contribute to the debt and costs for such part of the debt as concerns them in their mutual relationship. Based on article 6:10(2) DCC, if one of the joint and several debtors fulfils the obligation to contribute towards the debt to an extent which exceeds its share thereof, each other joint and several debtors must contribute for that excess amount up to its own part of the debt.

In 2.1 above, we mentioned article 6:102 DCC (whether or not in combination with article 6:166 DCC) as an example of a statutory ground for joint and several liability. The second sentence of article 6:102(1) DCC provides that the damage is distributed between the debtors in accordance with article 6:101 DCC in order to determine what they should contribute towards each other under article 6:10 DCC

[11] In this connection, see also W.H. van Boom, 'Kartelschade, hoofdelijke aansprakelijkheid en wetsvoorstel 34-490', *WPNR* 7127 (2016), p. 950-951. Van Boom rightly states that the Damages Directive is inconclusive on whether the other infringers remain liable, but he considers it noteworthy that the leniency in respect of the small company is in fact paid for by the other infringers. Even after implementation of the Damages Directive, there does not seem to be complete clarity about this issue.

as part of their mutual relationship. In principle, the damage is distributed between the injured party and the debtor in accordance with article 6:101(1) DCC, in proportion to the extent to which the circumstances attributable to each have contributed to the damage. If fairness requires this, a different distribution takes place than the one based on the causality of the circumstances attributable to each. This distribution of liability for damage is often very complicated. This was already apparent in the question of whether and to what extent any joint and several liability can be assumed at all (see 2.2 above), but it also plays a role in determining the internal recourse relationship between the various joint and several debtors. In addition to a causality-based distribution of liability for damage, liability could, for example, also be divided by the parties involved in proportion to their market share or by applying a correction for the degree of responsibility. The limited case law and legal articles give insufficient clarity on this. This will have to develop in practice and therefore goes beyond the scope of this contribution.

The following paragraphs specifically discuss the internal relationship between various joint and several defendants or potential defendants when some of them decide to settle an imminent mass damages claim. A settlement often seems appealing, certainly when costly proceedings are avoided and the risk of financial loss is averted. Moreover, a confidential settlement draws less negative attention than lengthy proceedings. However, for a jointly and severally liable defendant, a settlement does not necessarily lead to an all-encompassing final resolution, especially where its relationship with the other jointly and severally liable parties is concerned, even though the degree of finality that is achieved by a settlement is often an important factor in the willingness to settle. Obviously, a company wants the problem to be fully resolved by a settlement. Whether that objective is actually realised, particularly in mass damages claims, is less clear-cut.

3.2 Impact of a settlement on the relationship between joint and several debtors

In a situation where several debtors are jointly and severally liable for the same debt and only the debtors who are being sued meet the whole debt, those debtors can, as previously explained, take recourse against the other joint and several debtors, each for their relevant part in the relationship. There are rights to make a claim at two levels: claims of the creditors against each of the joint and several debtors (the “external liability”) and claims of the joint and several debtors against each other in connection with their rights of recourse (the “internal liability”).

When a jointly and severally liable party decides to enter into a settlement with a view to achieving a final resolution, it is necessary that the settling claimant grants the settling joint and several debtor final discharge for the external liability. It is important that the settling debtor realises that the discharge at the external liability level does not automatically continue to work in the legal relationship between the jointly and severally liable parties and therefore in principle does not affect the internal liability.

According to article 6:14 DCC, the starting point is: "Waiver by the creditor of its right of action towards a joint and several debtor does not release that debtor of its obligation to contribute". In practice, this means that a settlement concerning the external liability does not automatically affect actual or potential recourse claims that the other joint and several debtors may have against the settling debtor.[12] Without a different agreement, joint and several debtors remain liable for contributing towards the debt and costs in accordance with article 6:10 DCC, each for the part of the debt that concerns them in their mutual relationship.

Back to the case study. Let us assume that company X settles with claim vehicle A to avert the threat of proceedings. Given that claim vehicle A asserts that the share of company X in the alleged loss is EUR 50 million and that company X disputes the extent of this liability, company X is willing to settle its full external liability by paying EUR 40 million. To achieve finality with regard to the external liability, the parties agree on a final discharge clause in the settlement agreement. It is arguable that claim vehicle A can also enforce its claims in the amount of EUR 200 million against the other companies which do not participate in the settlement.[13] Although company X has settled and paid a substantial share of the total loss of EUR 200 million, this does not automatically mean that this benefits the other companies concerned. When claim vehicle A maintains its claims (in full) against the other companies concerned and the other companies concerned pay this debt, for which they are jointly and severally liable, all joint and several debtors, including company X, must contribute for the part that concerns each of them in the mutual relationship. This can result in company X still having to face legal action taken by the other companies concerned.

The case study shows that a settling debtor may be deceived if it believes that, by entering into the settlement, it has resolved the issue once and for all. The lack of finality with regard to recourse claims can affect a debtor's willingness to settle. To increase the range of a settlement, it is necessary to ensure that the settlement also applies to the internal liability and to actually offer the joint and several debtors a final resolution. To do this, a mechanism laid down in Dutch law can be used: article 6:14 DCC.

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[12] *Asser/Hartkamp & Sieburgh 6-1 2016*/121 et seq; MVA II to article 6.1.2.3, Parliamentary History Book 6, p. 106; TM to ed. 6.1.2., Parliamentary History Book 6, p. 95. The amount of the contribution obligation depends on the specific circumstances of the case. If several persons are jointly and severally liable for damage, article 6:102 DCC determines that the loss must be distributed among the liable persons pro rata the extent to which the circumstances attributable to each have contributed to the damage. If fairness so requires this can be a different distribution.

[13] There is discussion incidentally on how the obligation to pay the settlement amount qualifies in a legal sense (as debt modification or renewal). This is relevant to determine whether and to what extent this leads to the extinction of the existing obligation, and with it, whether payment of the settlement amount can be seen as fulfillment of the original obligation and has an impact on the (still remaining) claim against the other joint and several debtors. See further Van Kessel *MvV* 2013.

3.3 Mitigating the risk of recourse claims pursuant to article 6:14 DCC

Although the starting point of article 6:14 DCC is that a settlement between settling claimants and a settling debtor does not affect the other joint and several debtors, the second sentence of article 6:14 DCC provides an important exception: "The creditor can nevertheless release the debtor of the obligation to contribute towards a co-debtor by undertaking towards the co-debtor to reduce its claim against the co-debtor by the amount that could have been claimed as a contribution."

On the one hand, application of the second sentence of article 6:14 DCC leads to the settling debtor being released from any recourse claims made by the other joint and several debtors, which will encourage the settling debtor's willingness to settle. On the other hand, the other joint and several debtors are released in relation to the settling claimants for such share in the damage as the settling debtor is responsible for in the mutual relationship. This means they do not have to pay to the settling claimants what they could have claimed from the settling debtor.

In the example where claim vehicle A maintains its claim amounting to EUR 200 million against the other companies concerned, company X runs the risk of being confronted with recourse claims. Assuming that all joint and several debtors should contribute equally, the other companies concerned will call on company X to recover the total amount overpaid by them. To mitigate this risk for company X as much as possible, company X can apply the mechanism of article 6:14 DCC in the settlement agreement with claim vehicle A. In that case, claim vehicle A undertakes towards company X to reduce its claims against the other companies involved by the share which concerns company X and to limit those claims to the other companies' share in the damage.

The reduction mechanism laid down in article 6:14 DCC does not automatically apply. In principle, the parties must expressly agree on this. Nevertheless, the mechanism has a wide scope of application. Article 6:14 DCC is relevant, among other things, in the context of the Dutch Act on the Collective Settlement of Mass Claims (known in the Netherlands as the "WCAM" and incorporated in Title 15 of Book 7 DCC), which aims to facilitate the settlement of mass damages claims. In article 7:910(1) DCC, article 6:14 DCC is even presumed to apply, unless explicitly deviated from: "If in addition to the party or parties which have undertaken in the agreement to compensate damage, other debtors are jointly and severally liable, article 14 of Book 6 applies *mutatis mutandis*. Unless a different intention is apparent, the agreement is deemed to contain a clause as referred to in that provision". In other words: a settlement that falls under the scope of the WCAM not only regulates the external liability but is also supposed to contain a measure that concerns settling claims relating to the internal liability.

Mechanisms similar to article 6:14 DCC are not unknown in other jurisdictions. This is certainly the case since the implementation of the Damages Directive, which

explicitly focuses on the position of the settling debtor and the application of a reduction mechanism to limit internal liability. This has led to national legislation in the various Member States, but also to some new provisions in Book 6 DCC in the Netherlands . The changes to Dutch law are explained in more detail in 3.5 below. Similar legislation also exists in various part of the US.[14] There too, the idea exists that a settling debtor reaching an agreement with its claimants in good faith deserves protection against claims that relate to internal liability. A defendant which has settled should be able to assume that the issue is definitively settled and that the other joint and several parties will no longer take legal action against it.

3.4 Application of article 6:14 DCC

To release the settling debtor from its internal liability, negotiations on the content of a settlement agreement should steer towards including a provision that contains the mechanism laid down in article 6:14 DCC. An example where the application of article 6:14 DCC in a settlement agreement turned out to be valuable is the Dexia case (a settlement on the basis of the WCAM).[15] In this case, a claimant which was a party to a settlement agreement tried to sue a jointly and severally liable party for a part of its claim that it had already received compensation for. In this respect, the Leeuwarden Court of Appeal found: "To avoid that, through the U-turn of article 6:14 DCC, those claims for which discharge was granted to Dexia in article 14(1) of the WCAM agreement, still have to be partially paid by Dexia as a recourse claim, article 14.3 was included in the WCAM agreement. This is a clause within the meaning of article 6:14 DCC, second sentence."[16]

A more recent example in which the concrete application of the reduction mechanism of article 6:14 DCC was relevant is the Paraffin wax case.[17] The settling claimant, CDC (a claim vehicle to which claims were assigned), entered into a settlement with Sasol, one of the jointly and severally liable defendants. CDC then reduced its claim against the other jointly and severally liable parties by "the part of the loss claimed by CDC for which Sasol, in the view of the court in the main action, is obliged, on any legal grounds, to contribute in its legal relationship to the other cartel participants". The District Court of The Hague assumed on the basis of this reduction in the claim and of the explanation provided, that "CDC had relieved Sasol of its internal contribution obligation towards the defendants and the other parties that were being pursued".[18]

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[14] Such as the law of the States of California (*Cal. Civ. Code Ann. Paragraph* 1431), Florida (F.*S.A. paragraph* 768.81), Illinois (*I.L.C.S. paragraph* 10-5/2 - 1117), Kentucky (*K.R.S. paragraph* 411.182), Texas (*Tex. Civ. Prac paragraph* 33.013) and Virginia (*Va St. paragraph* 8.01-443).

[15] Leeuwarden Court of Appeal 17 July 2012, ECLI:NL:GHLEE:2012:BX1954.

[16] Leeuwarden Court of Appeal 17 July 2012, ECLI:NL:GHLEE:2012:BX1954, legal ground 7.

[17] The Hague District Court 21 September 2016, ECLI:NL:RBDHA:2016:11305. See footnote 40 for a more detailed explanation of some special considerations in this matter.

[18] The Hague District Court 21 September 2016, ECLI:NL:RBDHA:2016:11305, legal grounds 2.18, 2.19.

In the above cases, the reduction of the claim of the settling claimants ensued from the settlement that they had agreed on with the settling debtor. A simple example of a provision in a settlement agreement that declares article 6:14 DCC applicable reads as follows:

> *"To release the Debtor from any obligations to contribute that the Debtor may have towards the co-debtor (the "Co-Debtor"), the Claimant shall reduce its claim against the Co-Debtor by the amount that the Co-Debtor could have claimed from the Debtor on any grounds, including articles 6:10, 6:12 and 6:13 DCC. The Claimant shall take all necessary steps to that effect."*

In formulating a provision in line with article 6:14 DCC, the literal text of the statutory article in question is followed. Sometimes, however, a more tailor-made solution is relevant. Although the provision can obviously be set up in different ways, a settling debtor in any case must ensure that a number of issues are addressed in the settlement agreement. The provision would in any case have to provide for:

(i) a reduction in current and future claims of the settling claimants by the share concerning the settling debtor in the internal liability; and
(ii) a waiver of the rights of action of the settling claimants in the amount of this share.

To further reinforce the position of the settling debtor and reduce the risk of recourse claims, the settling debtor can steer towards:

(iii) an explicit qualification of the clause based on article 6:14 DCC as a third-party clause for the benefit of the other joint and several debtors;
(iv) an indemnification for the settling debtor in respect of any recourse claims;
(v) a best-efforts obligation for the settling claimants to do everything necessary to enable the release of the settling debtor;
(vi) an obligation for the settling claimants to reduce the claim and notify the other joint and several debtors of the third-party clause; and
(vii) an obligation for the settling claimants in any settlement agreement with the other joint and several debtors to implement a ban on bringing recourse claims.

3.5 Different rules on internal liability in the event of competition infringements

In 3.3 above, we already briefly noted that, in the context of the Damages Directive, the European Commission also focussed on the position of the jointly and severally liable infringer and the scheme concerning internal liability. The European Commission asserts first and foremost that parties who are affected by an infringement of competition law are entitled to full compensation of the loss suffered and that it is therefore desirable that infringers can be held jointly and severally liable. When one of the infringers has paid more than its share, it must, however, have the right to claim a contribution from the other infringers. The internal distribution of the liability of the infringers is left to national law. As explained in 3.1, under Dutch law, articles 6:102 DCC, DCC 6:101 DCC and 6:10 apply.[19]

[19] See also *Parliamentary Papers II* 2015/16, 34 490, 3, p. 15 and recital 37 of the preamble to the Damages Directive.

In addition to introducing a number of deviations from the general rules on joint and several liability, where it concerned the external liability (explained in 2.2), implementation of the Damages Directive has also led to changes concerning the recourse relationship between the various jointly and severally liable infringers. A debtor which has received immunity from a competition authority also has a special position. In addition to the fact that its external liability is limited to only its own direct and indirect customers and suppliers and other injured parties cannot apply to this debtor, article 6:193n DCC also limits the internal liability towards other joint and several debtors involved in the infringement. The contribution obligation of a recipient of immunity to compensate the loss of direct and indirect customers and suppliers of the cartel will not exceed the compensation of the loss of the recipient's direct and indirect customers and suppliers and only to the extent to which the circumstances attributable to it have contributed to the damage.[20]

The European Commission furthermore adopts the starting point that infringers and injured parties must reach a "once and for all" settlement. That is why the Damages Directive encourages infringers and injured parties to reach a resolution through systems for extrajudicial dispute resolution. To actually promote the conclusion of settlement agreements, a settling debtor who pays compensation through out-of-court dispute resolution may not, compared with the other joint and several debtors, be in a less favourable position than the debtor would be without the settlement agreement. This would be the case if a settling debtor, even after agreeing a settlement, remains fully jointly and severally liable for the loss caused by the infringement.[21]

Where we noted in 3.2 that it is important that the settling debtor realises that agreeing to a settlement and a discharge at the level of the external liability does not continue to work in the legal relationship with the other joint and several debtors and so in principle does not affect the internal liability, the implementation of the Damages Directive changed this in as far as it concerns a settlement related to damage caused by a competition law infringement. The new article 6:193o(1) DCC determines firstly that the claim for compensation by settling claimants is reduced by the share of the settling debtor in the loss that the settling claimants have suffered. This share is the amount that the other joint and several debtors could claim as a contribution from the settling debtor if they pay the total damage. As a result, the settling claimants cannot recover the part of this share that was not paid as part of the settlement, from the other joint and several debtors who are not a party to the settlement agreement. The other joint and several debtors do not have to pay compensation to the settling claimants for this share.

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[20] This limitation of internal liability does not alter the fact that the recipient of immunity will have to contribute to the infringement-related damages which have to be paid to parties other than the direct and indirect customers and suppliers of the infringers, for example, when there has been "*umbrella pricing*". See *Parliamentary Papers II* 2015/16, 34 490, 3, p. 5, 16.

[21] Recitals 48 and 51 of the preamble of the Damages Directive.

In addition to this, article 6:193o(2) DCC provides that the settling claimants can only sue the other joint and several debtors for compensation of the claim remaining after the settlement. The other joint and several debtors cannot claim contribution from the settling debtor regarding this claim for damages. According to article 6:139o(3) DCC, the settling debtor is only liable for this loss too if, after a settlement, the other joint and several debtors are unable to compensate the settling claimants for the damage corresponding to the remaining claim for compensation.

The arrangement of article 6:193o(1) DCC therefore deviates from the starting point (as referred to in 3.2) in article 6:14 DCC, since a similar reduction mechanism automatically applies, and parties do not need to expressly agree on this. Article 6:193o(1) DCC mandatorily prescribes that the settling debtor can no longer be sued. The claim of the settling claimants is reduced by operation of law (and automatically leads to the situation as described in the case in § 3.3). Moreover, it does not explicitly follow from article 6:14 DCC that the settling debtor can no longer be sued by others. In 3.4 we explained that the settling debtor must therefore steer in the settlement agreement towards reinforcement of its position and a further reduction of the risk of recourse claims. Article 6:193o(2) DCC addresses that risk and explicitly mentions that the other joint and several debtors have no possibility of recourse against the settling debtor. The settling debtor therefore has more certainty that it will not be sued by the settling claimants or by the other joint and several debtors after reaching a settlement agreement.

4. Practical suggestions

4.1 Introduction

Reaching a more definitive solution for the handling of mass damages claims by applying the reduction mechanisms described above may be less simple in practice than it seems. That applies not only when there are mass damages claims and the regime of article 6:14 DCC is applied, but also when article 6:193o DCC applies as a starting point (see 2.2 for the scope of application of the provisions introduced as a result of the Damages Directive). The settling debtor should be aware of this, because this may have an impact on its legal position. In addition to the recommendations that we have given in section 3 of this contribution, we will illustrate a number of potential issues by making some practical suggestions that may be of value in drawing up a settlement agreement.

4.2 Reduction of claim

The settling debtor can in principle expect a more definitive solution to the dispute after the settling claimants have reduced their claim. However, particularly in mass damages claims, the question of the internal liability distribution is a complicating factor and the answer to this question often remains unresolved by the time a

settlement is entered into (see § 3.1). A settling debtor must therefore ensure early on that a reduction in the claim of the settling claimants contains its (at that time possibly still unknown) full share in the liability. The second sentence of article 6:14 DCC refers only to a reduction of the claim "by the amount that could have been claimed as a contribution"; the sentence does not refer to the share of the settling debtor in the liability. The definitive text of article 6:193o DCC was clarified on this point following an explicit request during the consultation on the preliminary draft of this provision. The wording now makes clear that the claim of the settling claimants after the settlement is not only reduced by the amount paid in the settlement, but in fact by the entire share of the settling debtor, even if that share turns out to be higher than the settlement amount paid.

If, for example, the claims of the settling claimants were to be reduced by the amount for which they settled, the settling debtor would run the risk that its obligation to contribute to the damages will end up being higher and that it will be sued for this difference by the other joint and several debtors. By explicitly linking the reduction of the claim in the settlement agreement to the - possibly not yet known or fixed - share of the settling debtor in the internal liability, and therefore not linking to the settlement amount, the settling debtor ensures that it is not affected by discussions about the share of the settling debtor and each of the other joint and several debtors. The risk of recourse claims is therefore limited.[22]

Furthermore, both article 6:14 DCC and article 6:193o DCC refer to a reduction of "its claim against it" and "the claim for damages of the injured party involved in the settlement". The settling debtor should ensure that the reduction of the claim relates to both current and future claims of the settling claimants against both

[22] In the Paraffin wax case cited in 3.4 of this contribution, the effect of a reduction mechanism included in a settlement agreement was looked at in more depth. The District Court of The Hague considered in that case that in the reduction of its claim the CDC had not considered the amount that Sasol had paid to it in the context of the settlement, but the amount that Sasol was internally obliged to contribute in the internal contribution ratios between all cartel participants. CDC argued that the settlement with Sasol was for a much lower amount than the amount that Sasol was internally obliged to contribute. If that was not the case - and Sasol paid significantly more than the amount that it was internally obliged to contribute - the District Court of The Hague believed that CDC should deduct the amount actually paid by Sasol from its claims. The District Court of the Hague considered in that respect: "From the assessment in the main action it appears that the settlement with Sasol is merely the reason for the reduction of claim by CDC and that the content of the settlement agreement with Sasol is not relevant for the further assessment in the main action. The amount concerned in the reduction of claim is that of Sasol's internal obligation to contribute and not the actual amount paid by Sasol. As considered in the main action, the amount paid by Sasol is relevant only if there are grounds to assume that it has paid more than the amount it is obliged to contribute. That is not relevant here yet. Should that be otherwise at any time, the District Court may order CDC to give full disclosure on this matter by naming the amount." Other than the Rotterdam District Court suggested in this case, it is also advocated that the reduction obligation, in principle, should only concern the share of the settling debtor in the liability and not the (possibly even higher) amount that the settling debtor is willing to pay in the context of an amicable settlement. The idea behind this is that non-settling parties should not be able to profit from the fact that a defendant settles at an excessive amount. (This situation should incidentally be distinguished from the scenario where the settling debtor also settles for the share of the other joint and several debtors or some of them. This is discussed in more detail later in this section.)

known and unknown joint and several debtors. After all, the extent of the liability and the parties responsible for it at the time of entering into the settlement agreement may not yet be established. By using broad wording for the reduction obligation, the settling debtor can protect itself against this uncertainty in advance.

In formulating the reduction obligation, a settling debtor should continue to ask to what extent the settling claimants may not be able to take recourse against any of the other joint and several debtors (for example, because there is a risk that they are insolvent). Article 6:13 DCC provides that when recourse against a joint and several debtor is impossible, the unrecoverable share is allocated over the remaining joint and several debtors in accordance with their share in the underlying relationship. The settling debtor therefore runs the risk that it will also be sued for this part. By likewise bringing the additional liability arising from article 6:13 DCC under the scope of the reduction obligation, the settling debtor can ensure that it is also protected against this. In the context of article 6:193o DCC, too, it is important to include this in the settlement agreement. As explained in 3.5, paragraph 2 of article 6:193o DCC precludes the other joint and several debtors from exercising any recourse rights against the settling debtor after a settlement. However, that is different when the other joint and several debtors are not in a position to pay the remaining damages claim of the settling claimants, for example, in the event of bankruptcy. In that case, pursuant to article 6:193o(3), the settling debtor is also liable for this loss, unless it expressly deviates from this in its settlement with the settling claimants, as follows from article 6:193o(4) DCC.

Back to the example. Claim vehicle A has undertaken towards company X to reduce its claims against the other companies concerned by the alleged share of company X. If one of the three other companies concerned offers no recourse in respect of its share in the total loss (assuming that this share is also EUR 50 million), the unrecoverable share will be for the account of each of the other joint and several debtors, including company X.[23] Assuming that the share of all the companies concerned is the same, company X will - in view of the provisions of article 6:13 DCC, and also possibly based on article 6:193o(3) DCC - have to contribute an extra one third of the amount of EUR 50 million. Despite the fact that company X has settled its alleged share of EUR 50 million for EUR 40 million, it will in that case ultimately have to pay more than EUR 56 million to the settling claimants if company X does not include this additional liability in the settling claimants' reduction obligation in the settlement agreement.

[23] Although article 6:13 DCC refers to the situation that "recourse against a joint and several debtor is impossible", article 6:193o(3) concerns the situation where "infringers not involved in a settlement are unable to compensate the loss corresponding to the remaining claim for damages of an injured party involved in the settlement ". The question is whether this leads to a difference in the possibility of allocating the non-recoverable loss. It seems plausible when applying article 6:193o(3) that the non-recoverable loss (as is the case in application of article 6:13 DCC) is not allocated to the settling debtor if one of the joint and several debtors offers no recourse, but only if none of them offer recourse. The difference between the two provisions will have to further crystallise in practice.

A broad wording of the reduction obligation is also relevant with regard to additional costs relating to the settling debtor. Article DCC 6:10(3) provides that a joint and several debtor can recover costs from the other joint and several debtors. Although the article does not specify what these costs are, it is clear from the legislative history that they in any case include litigation costs incurred by a joint and several debtor as part of a joint defence against the claimants.[24] If the settling claimants, given the wording of the reduction obligation, also have to reduce their claims by the amount of the litigation costs incurred or to be incurred by the other joint and several debtors in relation to the settling debtor's share, the settling debtor will prevent having to pay these costs to the other joint and several debtors.

It is important to realise that the reduction obligation described in this contribution is based on the assumption that the settling debtor settles for its share in the liability to prevent the risk that it has to face recourse claims by the other joint and several debtors after entering into a settlement agreement. However, a less common scenario is conceivable as well, where the settling debtor also settles for the share of the other joint and several debtors, for example because it is the only party sued by the settling claimants for more than its own share and a settlement on the basis of other terms is not possible. In that case, the settling debtor will want to take internal recourse against the other joint and several debtors. A complication here is that, in order to exercise his right to contribution by the other joint and several debtors, the settling debtor is dependent on the principal claim that the settling claimants were entitled to. The settling debtor actually takes the place of the settling claimants, where all lines of defence that the joint and several debtors could jointly invoke – and which the settling debtor itself may have waived – can now be invoked against the settling debtor on the basis of article 6:11 DCC. Although this scenario is rare, because a settling debtor usually has no need to file and litigate recourse claims entering into a settlement, and we will therefore not further examine it, the settling debtor should be aware of the possibility since it may affect its position.

4.3 Third-party clause and waiver

To strengthen the effect of a clause based on article 6:14 DCC, the settling debtor can explicitly state in the settlement agreement that this is a third party clause for the benefit of the other joint and several debtors (within the meaning of article 6:253 DCC).[25] This qualification means that after the other joint and several debtors have accepted the settling claimants' obligation to reduce their claims by

[24] For example, the costs of an expert report supporting the joint position of the joint and several debtors. See also Van Boom 2016, p. 121.

[25] A clause based on article 6:14 DCC does not necessarily qualify as a third-party clause within the meaning of article 6:253 DCC. It is therefore advisable that parties explicitly designate the clause based on article 6:14 DCC as a third-party clause. However, a clause based on article 6:14 DCC that uses the same wording as the statutory provision has already been classified as a third-party clause, see Appeals Court Leeuwarden 17 July 2012, ECLI:NL:GHLEE:2012:BX1954.

the share in the liability relating to the settling debtor, they can invoke that obligation against the settling claimants.[26] They can derive an independent line of defence from this and do not have to involve the settling debtor. The wording of the third-party clause should also take into account the potential lack of knowledge about the extent of the liability and about the responsible parties. A broad wording is therefore also suitable for the third-party clause, as it ensures that the clause can be invoked by both known and unknown joint and several debtors.[27]

To further reinforce the position of the settling debtor, the settlement agreement could include that the settling claimants must waive their claims against the other joint and several debtors to the extent that they relate to the share in the liability concerning the settling debtor. If proceedings were already pending at the time of the settlement, then the settlement agreement can provide that the settling claimants will file a document reducing the claim and simultaneously send a copy of this document to the settling debtor. If no proceedings are pending at the time of the settlement, a general obligation of the settling claimants to waive their claim towards the other joint and several debtors in the amount of the share of the settling debtor, will suffice. In that case, the settling claimants should execute the waiver as soon as they want to pursue their claims against the other joint and several debtors.

The classification as third-party clause and the inclusion of any obligation to waive seem to be less important when the article 6:193o DCC regime applies. Article 6:14 DCC only specifically deals with the settling debtor's release from its obligation to contribute towards the other joint and several debtors because the settling claimants undertake to reduce their claim. In contrast, article 6:193o(2) DCC not only makes clear that the other joint and several debtors can no longer sue the settling debtor in respect of the internal liability, but also that the settling claimants can only sue the other joint and several debtors for the amount of the damages claim remaining after the settlement.

4.4 Indemnification

The issue of mass damages claims often comes up in an international context. This international dimension is a complicating factor when applying the second sentence of article 6:14 and article 6:193o DCC. The starting point under Dutch private international law is that the law that materially applies to a settling

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[26] The risk is small that one of the other joint and several debtors does not accept article 6:14 as a third-party clause. Accepting it is in their best interest after all. Incidentally, article 6:253(4) DCC determines that a clause which has been made irrevocably and for no consideration towards a third-party, is deemed to have been accepted if it has come to the knowledge of this third-party and has not been immediately rejected by this third-party.

[27] It is not necessary that the unknown parties are "specifically" designated, see A.S. Hartkamp & C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel III. De verbintenis in het algemeen, eerste gedeelte*, Deventer: Wolters Kluwer 2014/572

claimant's claim, also governs the recourse claim. A foreign court will assess according to its own private international law, which law materially governs the recourse claim. Although the mechanisms of articles 6:14 DCC and article 6:193o DCC are not unknown in a number of other legal systems, their effect under foreign material law is not automatically obvious.[28] If there are jurisdictions in which the effect of the mechanisms laid down in articles 6:14 DCC and article 6:193o DCC are not accepted, the settling debtor will run the risk of being faced with recourse claims, even after entering into the settlement. To mitigate this risk, an indemnification can be included in the settlement agreement, ensuring that the settling claimants bear the risk of claims which are governed by foreign material law (and in respect of which article 6:14 DCC or article 6:193o DCC may not have the intended effect).

The indemnification may also provide protection against any legal or other costs that a settling debtor incurs, for example as part of its defence. This is particularly relevant if the settling debtor has to conduct a costly defence abroad against the other joint and several debtors who are suing the settling debtor in spite of the reduced claim, the third-party clause and the explicit text of article 6:193o DCC.

Incidentally, including an indemnification, particularly for mass damages claims, may give rise to practical objections if a large number of parties are involved that have to back the indemnification and there is no central (solvent) point of contact available which can issue one general indemnification. The party invoking the indemnification in that scenario would have to turn to a large number of parties.

4.5 Performance of obligations

The parties will have to make arrangements in the settlement agreement about the application of article 6:14 DCC in particular, but also about the implementation of the system described in article 6:193o DCC. Where the effect of article 6:14 DCC is concerned, the settling debtor depends on the actions of the settling claimants when it wants to limit the risk of recourse claims. Where article 6:193o(1) prescribes that the settling debtor can no longer be sued, and the claim of the settling claimants is reduced by operation of law (see 3.5 above), it follows from article 6:14 DCC that it is up to the settling claimants to reduce their claims and to act towards the other joint and several debtors in line with that. The settling debtor will therefore want to agree, in the strongest possible wording, that the settling claimants must do everything necessary to ensure that the release has actual effect with regard to internal liability. This involves including a requirement to inform the other joint and several debtors about the reduction of the claim and about the applicability of the explicitly defined third-party clause. The obligation of

[28] This uncertainty is not removed by simply declaring Dutch law applicable in the settlement agreement. Such a governing law clause only refers to the legal relationship between the settling creditors and settling debtor. In principle, the claims of the settling creditors against the other joint and several debtors are therefore not affected.

the settling claimants to include a prohibition against bringing recourse claims against the settling debtor in any settlement agreements with the other joint and several debtors, also contributes to achieving finality. In contrast to the application of article 6:14 DCC, in the case of article 6:193o DCC this follows directly from paragraph 2 (see 3.5 above). Although in applying both article 6:14 DCC and article 6:193o DCC, other obligations of the settling claimants are also obviously conceivable, these are *nice-to-haves* that may be stipulated in return for payment of a substantial settlement amount. Incidentally, the relationship between the settling debtor and the settling claimants, and hence the room to set up the settlement agreement for the benefit of the settling debtor, is not always the same. Whether the settling claimants are willing to agree to clauses that reduce their recourse position, will of course depend on a number of factors.

Especially when a settlement cannot be brought under the scope of application of article 6:193o DCC, and article 6:14 DCC has to be resorted to, it is good to realise that the settling claimants will not have a clear incentive to reduce their claims (especially when commercial claim vehicles are involved, which do not shy away from an aggressive approach). However, a breach of agreed obligations constitutes a failure to perform the settlement agreement. In principle, this results in the settling debtor having a claim for default against the settling claimants and being able to pursue this with the usual arsenal of legal and other remedies. In addition to claiming performance pursuant to article 3:296 DCC, the loss arising as a result of the default can be recovered on the basis of article 6:74 DCC. Obviously, the settlement agreement could also be terminated, but this option is diametrically opposed to the desired finality.

Although the undesirable consequences of non-performance of obligations under the settlement agreement could be removed afterwards by claiming performance or compensation, this threatens the finality desired by the settling debtor. As it is better to be safe than sorry, it is preferable to provide an incentive for the settling claimants to perform their obligations at an earlier stage. This incentive can be built in by obliging the settling claimants to issue a bank or other guarantee or by including a sanction in the form of a fine which is immediately due and payable in the event of non-performance. The amount of this fine would preferably correspond to the amount of any recourse claim and the associated legal expenses. To strengthen the settling debtor's recourse options, parties can also agree that part of the settlement amount will not be paid out directly but is held in an escrow account. This part of the settlement amount is released once the settling claimants have met their obligations and have safeguarded the settling debtor's position. A strong negotiating position is needed for this, as settling claimants are not readily prepared to agree to a provision that can cause uncertainty about the damages that they are entitled to.

5. Conclusion

In a situation where multiple parties are held responsible for the same damage, complications related to joint and several liability of the parties concerned often arise. In this contribution, we have discussed the position of a jointly and severally liable party which decides to settle an impending mass damages claim. A settlement can lead to an early resolution of the dispute, and this limits potential exposure. This option is often appealing only when it actually leads to a final resolution. Entering into a settlement with claimants, however, does not achieve finality as long as a settling debtor runs the risk that, despite entering into a settlement, it may still have to deal with recourse claims by its co-debtors. To secure a final resolution, the internal relationship between the settling debtor and its co-debtors is also relevant.

In this contribution, we have focused on the internal settlement issue, and for a proper understanding of this issue, we first analysed the general rules on joint and several liability as laid down in Book 6 DCC. In addition to explaining the existing provisions, we have looked at some provisions that deviate from the general rules, as introduced by the Damages Directive and implemented in Book 6 DCC. These material provisions specifically apply in the event of competition infringements occurring after the entry into force of the implementing act on 10 February 2017. They contain special rules for infringers falling under a leniency or clemency arrangement. Where competition infringements relate to the period before the implementation date, or where the cases in question do not concern competition law infringement, the statutory regime that already applied remains in full force.

In addition, we have mainly addressed the options of limiting the risk of recourse claims against the various jointly and severally liable parties in connection with their internal contribution obligation. The mechanism laid down in article 6:14 DCC is particularly suitable for this and, as far as damages claims that fall within the aforementioned scope of application are concerned, so is the recently introduced article 6:193o DCC. The use of these provisions in a settlement agreement can effectively contribute to the attraction of agreeing a settlement and achieving a final, or more final, resolution. Moreover, a settlement agreement offers a settling party the room to find a tailor-made solution that satisfies its own interests as much as possible. The effect of article 6:14 DCC and 6:193o DCC is not completely identical, however. It depends on several factors and, above all, requires alertness when drawing up a settlement agreement. We have identified some points that may require attention and we have given practical suggestions. Only if one is aware of these points while negotiating the terms of a settlement agreement, real finality can be achieved.