

Legal Alert

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Shell: landmark decision regarding international collective settlement of mass claims

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Introduction

On 29 May 2009, the Amsterdam Court of Appeal delivered a landmark decision regarding an international collective settlement of mass claims. This decision is the first international application of a mechanism under Dutch law that facilitates collective settlements of mass claims. The vast majority of the potential claimants in this case were not residing in the Netherlands and were domiciled across the globe.

Background of the case

This case concerned a settlement agreement entered into by, among others, Shell Petroleum N.V. and The "Shell" Transport and Trading Company Limited (collectively: "**Shell**") with respect to the recategorisation of certain of its oil and gas reserves in 2004. The settlement agreement was entered into for the benefit of the worldwide group of Shell's shareholders, excluding all US shareholders, who purchased their shares during the period from 8 April 1999 through 18 March 2004 on any stock exchange other than the New York Stock Exchange. The Amsterdam Court of Appeal (the "**Court**") has now declared this

settlement agreement binding on all shareholders to which it applies according to its terms. De Brauw acted as legal counsel to Shell in this matter.

Dutch Act on the Collective Settlement of Mass Claims

The Dutch Act on the Collective Settlement of Mass Claims (*Wet collectieve afwikkeling massaschade*, the "**WCAM**") entered into force on 27 July 2005. Pursuant to the WCAM, the parties to a settlement agreement may request the Court to declare the settlement agreement binding on all persons to which it applies according to its terms (the "**interested persons**"). The settlement agreement must have been entered into between one or more potentially liable persons and one or more foundations or associations that, pursuant to their articles of association, promote the interests of the interested persons. If the Court declares the settlement agreement binding, all interested persons are bound by its terms. There is an exception for interested persons that timely submit an "opt out" notice, which can only be submitted after the binding declaration has been issued. Being bound by the terms of the settlement agreement basically means that the interested persons who do not "opt out" have a claim for

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settlement relief and are bound by the release in the settlement agreement.

The Court will refuse to declare the settlement agreement binding if, among other things, the amount of settlement relief provided for in the settlement agreement is not reasonable or the petitioners jointly are not sufficiently representative regarding the interests of the interested persons.

As long as the proceedings regarding the binding declaration are pending, other proceedings regarding claims to which the settlement agreement applies will in principle be stayed at the request of the potentially liable person.

Since the entry into force of the WCAM in 2005, the Court has declared a settlement agreement binding in four cases, namely *DES* (regarding personal injury allegedly caused by a harmful drug), *Dexia* (regarding financial damage allegedly caused by failure to warn about the risks of certain retail investment products), *Vie d'Or* (regarding financial damage allegedly suffered by life insurance policy holders as a consequence of the bankruptcy of a life insurance company), and now *Shell*. Currently, a fifth case is pending, namely *Vedior* (regarding financial damage allegedly caused by insider trading).

Decision

Shell is the first WCAM case with a substantial international scope.

In this context, one of the first issues is international jurisdiction. In order to determine whether it had international jurisdiction in this matter, the Court ruled that the WCAM procedure is a "civil and commercial matter" as referred to in article 1 the Brussels I Regulation and the Lugano Convention, and that for the purpose of the application of these international instruments the shareholders are persons "to be sued" as referred to in article 2 section 1 of the Brussels I Regulation and the Lugano Convention.

On this basis, the Court first assumed jurisdiction with regard to the shareholders domiciled in the

Netherlands on the basis of their domicile.

Consequently, the Court assumed jurisdiction with regard to the shareholders domiciled outside the Netherlands, but within the EU, Switzerland, Iceland or Norway (the latter three countries are parties to the Lugano Convention), as their potential claims vis-à-vis Shell were "so closely connected" to the claims of the shareholders domiciled in the Netherlands "that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings" (see article 6 section 1 of the Brussels I Regulation and the Lugano Convention).

Finally, the Court assumed jurisdiction with regard to the shareholders who are not domiciled in the Netherlands or any other EU Member State, or in Switzerland, Iceland or Norway, on the basis of the fact that five out of six petitioners were domiciled in the Netherlands.

A second issue requiring special attention in an international context is proper notification to all interested persons. In *Shell* more than 110,000 notices in 22 different languages were sent out to shareholders located in 105 different countries. In addition, a notice was published in 44 different newspapers worldwide. The Court scrutinised whether this notification process had been carried out in accordance with all applicable national and international rules and decided that it passed the test.

A third issue is representativity. In international cases, the foundations or associations representing the interested persons must also be sufficiently representative regarding the foreign interested persons. In *Shell*, the Court ruled that this requirement was met because, among other things, the Dutch foundation representing the interested persons has a significant number of foreign participants and supporters.

A fourth issue is recognition. If the potentially liable person is sued in a foreign court by one of the interested persons who did not "opt out", the potentially liable person will want to successfully

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invoke the release as contained in the settlement agreement. Although no case law on this issue exists at this point, the decision of the Court implies that its binding declaration must be recognised by the courts in all EU Member States under the EU Brussels I Regulation, and in Switzerland, Iceland and Norway.

Implications

Shell provides a landmark decision on the international application of the WCAM. The ruling on international jurisdiction is tied to the facts of this case. However, the language appears not to exclude the possibility that the Court will assume jurisdiction if none of the potentially liable parties is domiciled in the Netherlands. Nevertheless, some connection with the Netherlands appears to be required in any event, for example: the presence of some interested persons in the Netherlands and one or more Dutch petitioners, such as the foundation or association representing the interested persons. The Court confirmed in this ruling that it has jurisdiction in case (i) not all potentially liable parties were residing in the Netherlands and (ii) the vast majority of the potential claimants were not residing in the Netherlands. It is expected that in the near future the possibilities of the WCAM for application in international collective settlements will be further explored.

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