

# International investors find a willing ear with Dutch courts for class actions

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In two recent rulings, two Dutch district courts have assumed jurisdiction to review class actions of international investors against the multinationals Petrobras and Steinhoff, despite similar proceedings in other countries. The Rotterdam District Court declared that it has jurisdiction over a claim submitted by investors from different countries against Petrobras and its Dutch affiliates. These investors claim to have suffered losses due to corruption within the company. The Steinhoff case concerned a group of investors that had allegedly suffered losses due to accounting fraud within the company. The Amsterdam District Court ruled that it was competent to handle the damages claim against Steinhoff.

Both decisions show how the Netherlands can be used as a venue for cross-border class actions by including Dutch group companies as defendants or co-defendants, which is significant as many multinationals use Dutch companies as holding or finance companies within their group. The judgments further illustrate how Dutch courts are willing to take on cases even when similar proceedings are pending in other jurisdictions.

## Petrobras judgment (Rotterdam District Court, 19 September 2018)

Between 2004 and 2014, Brazilian oil company Petrobras was involved in an extensive corruption scandal. When the case came to light, Petrobras lost billions of dollars in market value.

US investors filed a class action suit in New York, resulting in a class action settlement of almost USD 3 billion. Investors who were excluded from the US settlement joined forces in the Dutch Stichting Petrobras Compensation Foundation (SPCF), and started legal proceedings at the Rotterdam District Court against Petrobras and several Dutch subsidiaries that had issued Petrobras-secured bonds. In its ruling on jurisdiction, the Rotterdam District Court rejected most of Petrobras' objections. The court **ruled** that the allegations against Petrobras and the allegations against its Dutch affiliates involved the same fact pattern and same claims, and therefore also assumed jurisdiction regarding the Brazilian company. The court also rejected the argument that it lacked jurisdiction because of an arbitration clause in the Petrobras' articles of association, stating essentially that the translation of the arbitration clause presented to investors was ambiguous. The clause was thus regarded as invalid.

Petrobras argued that proceedings in the Netherlands should be stayed because of pending litigation in both the US (for investors that had opted out of the class action settlement) and Brazil, regarding almost identical claims. The court rejected that argument on the basis that there was too much uncertainty about the further course and timing of those proceedings.

## Steinhoff judgment (Amsterdam District Court 26 September 2018)

In 2017, accounting fraud was discovered within the South African group Steinhoff, a global home furnishing company. This caused a significant fall in Steinhoff's share price. On behalf of a group of international shareholders, the Dutch Investors Association (VEB) brought a class action against Steinhoff before the Amsterdam District Court. Steinhoff argued that the Dutch court lacked jurisdiction to rule on VEB's damages claim in view of pending litigation in Germany, and (alternatively) that the legal proceedings in the Netherlands should be stayed pending the decision of the German court. Steinhoff based these procedural defences on the fact that an investor had started prior litigation against Steinhoff in Germany, and an application had been made to the *Oberlandesgericht* (Higher Regional Court) to have the case considered under the Capital Markets Model Case Act (*Kapitalanleger-Musterverfahrensgesetz*, or *KapMug*). Steinhoff argued that as the KapMug could lead to the setting of a precedent that would also apply to the claimant investors, the Dutch court should give precedence to the German proceedings.

The Amsterdam District Court **rejected** this argument, stating that Steinhoff is a holding company with its registered office in the Netherlands and that the proceedings in Germany did not involve the same claimant, since the VEB did not represent the investor who started the proceedings in Germany. Also, a request for adjournment of the case in view of the German KapMug proceedings was rejected mainly because of various limitations inherent to KapMug proceedings.

In addition to providing a liberal venue for class actions, Dutch jurisdiction also offers proven instruments to settle such class actions on an opt-out basis. The Act on the Collective Settlement of Mass Claims provides parties to a settlement agreement the option of jointly requesting the Court to declare the settlement agreement binding. If the Court declares the settlement agreement binding, the agreement then binds all persons covered by its terms, unless a person decides to opt out. The declaration of the settlement to be generally binding can also be favourable to liable companies, because they can settle all potential claims finally and at once.