

Dutch court rules in climate case: Friends of the Earth Netherlands et al. v Royal Dutch Shell

On 26 May 2021, the The Hague District Court (the **Court**) ordered Royal Dutch Shell PLC (**RDS**), both directly and via its group companies, to cut carbon emissions by 45% by 2030, compared to 2019 levels (the **Judgment**). This unprecedented landmark ruling could trigger legal actions against (energy) companies in the Netherlands and, potentially, all around the world. Below, we have set out some of the key findings and points of interest.

It should be noted that the Judgment is still subject to appeal, which appeal should be lodged within three (3) months after the date of the Judgment.

Background

The proceedings against RDS were initiated on 5 April 2019 by seven Dutch environmental groups, amongst which the Dutch arm of Friends of the Earth (i.e. *Milieudefensie*), and more than 17,000 Dutch citizens (the **Claimants**). The defendant, RDS, is a public limited company, established under the laws of England and Wales. Its head office is established in The Hague. RDS is the top holding company of the Shell group and in charge of the group's general corporate policy. For instance, RDS draws up the investment guidelines in support of the energy transition as well as the business principles for the Shell companies.

Jurisdiction of the Dutch courts

Apparently, the jurisdiction of the Dutch courts was not in dispute between the parties since the Judgment is silent on the ground on which the Court based its jurisdiction. However, based on the writ of summons of the Claimants, the following can be noted with respect to the jurisdiction of the Dutch court in this case.

The Claimants based the jurisdiction of the Dutch courts on the Brussels I Regulation (recast) No. 1215/2012 (**Brussels Regulation**). The Brussels Regulation contains rules that courts of European Union Member States apply to determine if they have jurisdiction in cases with links to more than one country in the

European Union. At the time the proceedings were initiated, the United Kingdom was still a Member State.

The general rule under the Brussels Regulation is that the court of the Member State where the defendant is domiciled has international jurisdiction (Article 4 Brussels Regulation). Pursuant to Article 63 of the Brussels Regulation, a legal person is domiciled at the place where it has its:

- (a) statutory seat;
- (b) central administration; or
- (c) principal place of business.

The Claimants argued that RDS is domiciled in the Netherlands, since its central administration and principal place of business are in The Hague.

In addition, the Claimants argued that, pursuant to Article 7(2) of the Brussels Regulation, in matters relating to tort, also the court of the place where the harmful event occurred or may occur has jurisdiction to hear the case. According to standing case law, this place encompasses both the place where the damage occurred (the so-called *Erfolgsort*) and the place of the event giving rise to it (the so-called *Handlungsort*) and it is up to the claimant to choose at which court it submits its claims. In cases in which the Brussels Regulation does not apply, a similar rule is laid down in Section 6 paragraph (e) of the Dutch Code of Civil Procedure.

According to the Claimants, both the *Handlungsort* as well as the *Erfolgsort* are in the Netherlands, since (i) RDS adopts the Shell group's corporate policy in The Netherlands (i.e. *Handlungsort*) and (ii) as a consequence of this corporate policy the Dutch population and the Dutch environment are being harmed (i.e. *Erfolgsort*).

Since the Judgment did not deal with the issue of jurisdiction, it seems likely that jurisdiction was accepted on (at least) one of the grounds discussed above.

Admissibility of the claims

The admissibility of the class action of the Claimants was tested on the basis of Section 3:305a (old) of the Dutch Civil Code (**DCC**). One of the requirements under Section 3:305a DCC is that the interests in question must be suitable for bundling. The Court held that the interests of current and future generations of the world's population are not suitable for bundling, since there are huge differences in the time and manner in which the

global population will be affected by global warming. Therefore, the Court declared the collective claims not allowable insofar as they serve the interest of the entire world population in curbing dangerous climate change caused by CO₂ emissions. The Court ruled however that the interests of the current and future generations of Dutch residents were deemed to be suitable for bundling. Therefore, the collective claims serving the interests of the Dutch residents were allowable.

Another requirement under Section 3:305a DCC is that the class action must align with the objects stated in the articles of association of the claim organization and must also actually be promoted by it. According to the Court, ActionAid, one of the Claimants, does not meet this requirement. ActionAid mainly operates in developing countries and its operations in the Netherlands are geared towards developing countries. As such, it, according to the Court, does not promote the interests of Dutch residents sufficiently for its collective claim to be allowable. Therefore, the Court denied the claims of ActionAid.

The claims of the individual claimants were also denied since their interests are already served by the class action and they do not have an interest in a separate claim in addition to the class action.

Applicable law to the claims

The Rome II Regulation (EC) No. 864/2007 (**Rome II**) is a European regulation that governs the applicable law in civil and commercial matters concerning non-contractual obligations. Since the Netherlands is a Member State, the Court established the applicable law on the basis of Rome II, regardless of where the defendant is domiciled.

Article 7 Rome II determines that the law applicable to a non-contractual obligation arising out of environmental damage shall be the law determined pursuant to the general rule of Article 4 paragraph 1 Rome II, unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

The Claimants alleged that the 'event giving rise to the damage' is the corporate policy as determined for the Shell group by RDS in the Netherlands, and that, therefore, Dutch law applies. Furthermore, the Claimants argued that also the general rule of Article 4 paragraph 1 Rome II leads to the applicability of Dutch law as that rule determines that the law of the country where the damage occurs applies.

RDS asserted that the adoption of a policy is a preparatory act that does not cause damage. According to RDS, the 'event giving rise to the damage' is therefore not the adoption of the policy, but the actual CO2 emissions, which leads to the applicability of a myriad of legal systems.

The Court held that RDS' interpretation of the concept of 'event giving rise to the damage' is too narrow and that the corporate policy of the Shell group constitutes an independent cause of the damage in the sense of Article 7 Rome II, which thus leads to the applicability of Dutch law.

Superfluously, the Court considered that the general rule of Article 4 paragraph 1 Rome II also leads to the applicability of Dutch law insofar as the class action seeks to protect the interests of the Dutch residents.

RDS' obligation to reduce CO2 emission

The Court, applying Dutch law, concluded that RDS is obliged to, through the Shell group's corporate policy, reduce the CO2 emissions of the Shell group's activities. This reduction obligation follows from the (unwritten) standard of care laid down in Section 6:162 DCC (which section deals with unlawful acts), which means that acting in conflict with what is generally accepted according to unwritten law is unlawful.

In its interpretation of the standard of care, the Court took into account the following circumstances:

- (1) the policy-setting position of RDS in the Shell group;
- (2) the fact that the Shell group is responsible for significant CO2 emissions all over the world and that it is not in dispute that these global CO2 emissions of the Shell group contribute to global warming and climate change in the Netherlands;
- (3) the serious and irreversible consequences that climate change caused by CO2 emissions will have for the Netherlands;
- (4) the right to life and the right to respect for private and family life of Dutch residents;
- (5) the UN Guiding Principles;
- (6) the control and influence of RDS on the CO2 emissions of (i) the Shell group and (ii) its business relations, including its suppliers and the end-users;
- (7) what is needed to prevent dangerous climate change;
- (8) possible reduction pathways;
- (9) the twin challenge of curbing dangerous climate change and meeting the growing global population energy demand;

- (10) the ETS system and other 'cap and trade' emission systems that apply elsewhere in the world, permits and current obligations of the Shell group;
- (11) the effectiveness of the reduction obligation;
- (12) the responsibility of states and society;
- (13) the onerousness for RDS and the Shell group to meet the reduction obligation; and
- (14) the proportionality of RDS' reduction obligation.

On the basis of these circumstances, the Court concluded that RDS is obliged to reduce the CO2 emissions of the Shell group's activities by net 45% at end 2030, relative to 2019, through the Shell group's corporate policy.

- This reduction obligation is an obligation of result (in Dutch: *resultaatsverbintenis*) for the activities of the Shell group, with respect to which RDS may be expected to ensure that the CO2 emissions of the Shell group are reduced to the aforementioned level.
- The reduction obligation is a significant best-efforts obligation (in Dutch: *inspanningsverbintenis*) with respect to the business relations of the Shell group, including suppliers and end-users. According to the Court, RDS may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by its business relations, and to use its influence to limit any lasting consequences as much as possible.

Imminent breach of RDS' obligation to reduce CO2 emission

After establishing that RDS has a reduction obligation, the Court weighed the policy, policy intentions and ambitions of RDS for the Shell group against that established reduction obligation. The Court found that RDS is *not* presently in breach of its reduction obligation, as the Claimants had argued. The Court found that RDS has enhanced the Shell group's policy and is working it out in more detail. However, seeing as the policy is not specific, has many caveats and is based on monitoring social developments rather than the company's own responsibility for achieving a CO2 reduction, the Court held that there is an *imminent* breach of the reduction obligation. Therefore, the Court ordered RDS to, both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere due to the business operations and sold energy-carrying products

of the Shell group to such an extent that this volume will have reduced by at least net 45% at the end of 2030, compared to 2019 levels.

English translation of the Judgment

An English translation of the Judgment can be found at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>

Get in contact

This document is primarily intended to provide a high-level overview of the Judgment. It is not intended to be exhaustive and should not be used or construed as legal advice.

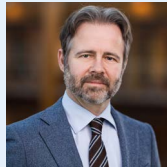
If you would like to know the impact of this Judgment can have on your business and whether your company could also be sued before the Dutch courts, please feel free to contact us. Our team has extensive experience with cross-border disputes, class actions and corporate governance. For more information please contact:

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