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The Shell Settlement and The Dutch Act on Collective Settlement of Mass Damages

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On April 11, 2007, Royal Dutch Shell plc ("Shell") announced that it has reached a settlement (the "Shell Settlement") in connection with the adjustments of its proven oil and gas reserves in 2004. The settlement concerns solely those European and other non-U.S. persons who purchased, outside the United States, shares in Royal Dutch Petroleum Company (*N.V. Koninklijke Nederlandsche Petroleum Maatschappij*) and The "Shell" Transport and Trading Company, plc, the two former parent companies of the current "unified" Shell group, during the period from April 8, 1999 until March 18, 2004 (the "Class"). Shell has agreed to make a maximum payment of USD 352.6 million, plus administrative costs, to members of the Class "without admitting any wrongdoing." In addition, as part of the settlement, Shell agreed to request that the Securities and Exchange Commission ("SEC") distribute to shareholders the USD 120 million paid by Shell in 2004 under a consent agreement resolving the SEC's investigation into Shell's re-categorization of its oil and gas reserves. The Amsterdam Court of Appeals (the "Amsterdam Court") will be asked to declare the Shell Settlement binding upon all affected European and other non-U.S. persons, subject to certain opt out provisions, under the Dutch Act on Collective Settlement of Mass Damages (*Wet collectieve afwikkeling massaschade*) (the "Dutch Act"). Although the Dutch Act has already been invoked for purposes of settling "mass damages" in other (pending) cases, this is the first time it is being used to settle securities law related claims and, if approved by the Amsterdam Court, to cover foreign (non-Dutch) residents. Finally, Shell also announced on April 11, 2007, that a similar settlement shall be proposed to U.S. persons subject to approval by the competent U.S. court.

I. BACKGROUND

The Shell Settlement appears to be the final stage of events that began in January 2004, when Shell's two former parent companies unexpectedly announced that the group was reducing its proven oil and gas reserves by 20%. That announcement led to the resignation of Shell's chairman and two other top officials, and the end of the dual-headed Anglo-Dutch governance structure. In addition, the Shell group became subject to investigations and fines imposed by securities regulators and to shareholder litigation, in each case both in Europe and the United States.

The parties to the Shell Settlement include Shell, 51 pension funds, institutional investors and investor organizations from Denmark, Germany, Ireland, Luxembourg, Norway, The Netherlands, Sweden, Switzerland, and the United Kingdom, as well as the Shell Reserves

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Compensation Foundation, a Dutch legal entity specially set up to process the Shell Settlement and to protect the interests of the Class.

According to press reports, a number of the institutional investors that are party to the settlement agreement, including the Dutch pension funds ABP and PGGM, had previously joined a U.S. class action against Shell. They have agreed to withdraw from participation in the U.S. procedure in exchange for the settlement and reimbursement of their U.S. legal fees, which are reported to amount to USD 47 million.

The press also reports that if the U.S. procedure settles on more favorable terms than the Shell Settlement, the latter will be amended to include those more favorable terms. The Shell Settlement is contingent on a U.S. court's ruling not to include claims by non-U.S. persons in the U.S. class action, which is scheduled to begin on June 15. If that U.S. court retains jurisdiction over non-U.S. persons, the Shell Settlement shall be null and void and the non-U.S. persons who are included in the Class shall have the option to proceed as members of the U.S. procedure.

The parties shall request the Amsterdam Court to declare the Shell Settlement binding upon all European and other non-U.S. persons who, in their capacity as shareholders of the two former parent companies of Shell, were affected by the adjustments of its proven oil and gas reserves.

Finally, the Amsterdam Court is expected to take at least one year before declaring the Shell Settlement binding, and it could take an additional several years before Class members receive any compensation under the Shell Settlement.

II. DUTCH ACT ON COLLECTIVE SETTLEMENT OF MASS DAMAGES

The Dutch Act became effective on July 27, 2005. It is aimed at facilitating the collective settlement of "mass damages," and permits the parties to a settlement agreement to request the Amsterdam Court to declare a settlement binding upon a class or classes of persons whose members suffered similar damages. Thus, it has characteristics that are similar to the settlement of a "class action" under familiar U.S. procedures, though there are important distinctions, which are highlighted below.

To be eligible for treatment under the Dutch Act, the settlement should be agreed upon between the party or parties that shall pay the compensation, on the one hand, and a Dutch legal entity that, pursuant to its constituent documents, represents the interests of the class of persons intended to be covered by the settlement agreement, on the other hand. Contrary to a "class representative" in a U.S. class action, such legal entity is not appointed by a court and need not be personally harmed by the alleged misconduct in order to have standing. Further, while virtually all U.S. class action settlements occur as a result of developments in previously filed litigations, under the Dutch Act the settlement need not be based on an existing, contested, pending litigation; rather, the procedure under the Dutch Act could start with a private, non-court supervised and undisclosed negotiation process among the representatives of the interested parties. In principle, the Amsterdam Court's involvement only starts when a settlement

agreement has been concluded and the parties request the Amsterdam Court to declare it binding upon the class of persons intended to be covered by it. Accordingly, the legal entity, such as the Shell Reserves Compensation Foundation in the Shell Settlement, can in principle be created solely to qualify for the procedure under the Dutch Act. Finally, as in the Shell Settlement, the alleged tortfeasor can take the initiative and, in theory, even incorporate the legal entity.

For purposes of the Dutch Act, a settlement agreement should include a description of the class of persons in whose interest such settlement agreement has been concluded, an approximate number of the persons who are expected to belong to the class, the amount of compensation that will be paid, the conditions for eligibility for compensation, the method(s) by which the compensation payment shall be determined, and the name and domicile of the person to whom an opt out should be notified.

Although it is unclear whether the Shell Settlement covers claims related to the adjustments of the proven oil and gas reserves against, for example, Shell's auditors and underwriters, it is, in principle, permissible to include such claims in such a settlement, as is common practice in U.S. class action settlements.

Once the settlement is agreed between the tortfeasor and the Dutch legal entity, a formal request to declare it binding must be filed with the Amsterdam Court. Provided certain formalities are met, the Amsterdam Court subsequently calls a hearing at which interested parties can express their objections to the settlement, possibly preceded by written submissions. Interested parties clearly include the persons who are intended to be covered by the settlement; however, persons with claims similar to the ones covered by the settlement but who are excluded from the settlement may also qualify as interested parties and thus try to challenge the settlement (for example, in the Shell Settlement, the U.S. class representatives (who are not members of the Class) may try to challenge the Shell Settlement to prevent the U.S. class from losing members). The Amsterdam Court will then declare the settlement agreement binding upon the parties to the agreement and the members of the class, except in certain circumstances. The most significant of these circumstances include a finding that the amount of compensation is unreasonable either in light of the overall damage, the possible causes for such damage or the method and time in which the compensation can be obtained, or that the interests of the members of the class are otherwise not sufficiently protected. It is as yet unclear how the Amsterdam Court shall determine whether the proposed compensation is reasonable, but the Dutch Act permits it to appoint one or more experts to advise it on this and other issues raised by the application of the Dutch Act.

The Amsterdam Court's decision cannot be appealed by the members of the class; rather, it can be appealed (to the Dutch Supreme Court) solely by the parties to the settlement agreement. Thus, it appears likely that there shall only be appeals if a settlement is not approved: the parties to the settlement agreement presumably support it and are not likely to challenge a decision of the Amsterdam Court that declares such settlement agreement binding.

In the event that the Amsterdam Court declares the settlement agreement binding, the final settlement terms and conditions shall be published in the manner set by the Amsterdam

Court. Upon such publication, members of the class have at least one year to file a claim form pursuant to which they will receive compensation under the settlement. In addition, following the publication, a period, to be set by the Amsterdam Court, of at least three months commences during which members of the class may elect to opt out of the settlement. (Opt outs must be filed on an individual basis; there is no procedure for filing an opt out on behalf of a group of persons or entities. Given experience in U.S. class action settlements, this is a significant feature of the Dutch Act: few class members file opt out forms.) Upon expiration of the opt out period, all members of the class are, in principle, bound by the settlement, unless they could not have been aware of their damage. A member of the class who fails to file a timely claim form is bound by the settlement but is not entitled to any compensation thereunder (unless they could not have been aware of their damage).

U.S. class settlements involving classes with opt out rights (there are class settlements under U.S. law in which there are no opt outs permitted) often have so-called “bust up” provisions in which the settlement is terminated where more than an agreed number of class members opt out of the settlement. It is unclear whether the Shell Settlement includes such a provision, although it appears that, if it did, the Dutch Act would permit such a provision.

Under U.S. class action settlements, lawyers representing the class are generally paid out of the fund created to pay class members (the parties generally agree upon the amount, which is subject to the approval of the court). The Dutch Act does not appear to embrace such a procedure. In the Shell Settlement, Shell appears to have agreed to make a direct payment to lawyers representing certain members of the Class in the pending U.S. procedure, who have agreed to withdraw from that procedure.

A key question is to what extent the Amsterdam Court’s decision to declare a settlement binding can have legal effect upon foreign (non-Dutch) resident class members. There would seem to be strong arguments that the Dutch courts would have jurisdiction to bind class members who reside in a member state of the European Union (“EU”)[1]. Whether the Amsterdam Court would approve a settlement that purported to bind class members from outside the EU is open to question, as is whether a decision of the Dutch courts approving a settlement with a worldwide class would be respected in the courts of other jurisdictions. In the absence of a treaty concerning reciprocal recognition and enforcement of judgments, the answer may turn on the connection between the settling company (here, Shell, a UK company headquartered in The Hague) and The Netherlands. For example, if the articles of association of a Dutch company expressly permitted disputes between the company (and its directors and officers) on the one hand and its shareholders on the other to be resolved by the Dutch courts, the argument that a settlement approved by the Dutch courts would bind shareholders worldwide might have considerable force. Finally, open questions under the Dutch Act include whether the settlement can affect pending procedures in other European and non-European jurisdictions.

[1] Such arguments are likely to be based on Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

III. CONCLUSION

The Shell Settlement may prove to be an important precedent for resolving class actions under antitrust, securities or other laws in the EU and, possibly, elsewhere. Its success shall mainly depend on whether the Amsterdam Court is willing and able to have the settlement agreement apply to non-Dutch law causes of action and non-Dutch resident class members, and on the legal effect given by other courts to rulings of the Dutch courts should class members from outside of The Netherlands either seek to reject the settlement outright, or at least seek additional compensation.

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Please feel free to contact any of the authors below, your regular contacts at the Firm or any of our partners and counsel listed under Securities and Capital Markets or Litigation and Arbitration in the "Our Practice" section of our website (http://www.clearygottlieb.com) if you have any questions.

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