PANORAMIC

SECURITIES LITIGATION

Netherlands

LEXOLOGY

Securities Litigation

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GENERAL FRAMEWORK

General climate

Describe the nature and extent of securities litigation in your jurisdiction.

In the Netherlands, securities litigation usually pertains to civil disputes between investors and issuers or vendors of securities. These proceedings occur frequently in the Netherlands and often involve non-Dutch parties. This is because:

- The cost of litigation in the Netherlands (court fees and attorney fees) is significantly lower than in other jurisdictions, especially compared to common law jurisdictions.
- Parties have the option to conduct the entire course of proceedings in English before the Netherlands Commercial Court if they wish to do so.
- Dutch courts are relatively lenient in assuming international jurisdiction regarding non-Dutch defendants.
- Dutch law provides for a class action procedure, in which not only liability can be established or injunctive measures can be obtained, but also redress measures (damages). Damages claims are decided on a class wide basis (damage scheduling), not for each class member individually.
- Dutch law also provides for a class settlement procedure in which parties that have reached an out-of-court settlement can jointly petition the court to declare their settlement generally binding on each party that falls within the scope of the settlement agreement, which (depending on the settlement scope) could potentially also include parties that are domiciled in the United States or the Cayman Islands.

Securities litigation in the Netherlands can also involve administrative proceedings between the financial supervisory authorities and supervised entities on, for example, disclosure of inside information.

Law stated - 22 januari 2024

Courts and time frames

What experience do the courts in your jurisdiction have with securities litigation? Are there specialist courts for securities disputes? What is the typical time frame for securities litigation in your jurisdiction?

In administrative disputes between a financial supervisory authority (ie, the Dutch Authority for the Financial Markets or the Dutch Central Bank) and, for example, the issuer of securities, the district court of Rotterdam is the competent court in the first instance. The Trade and Industry Appeals Tribunal is the competent court in the second instance.

Regarding civil disputes, there is no formally designated specialist court that deals with all securities disputes in the Netherlands. Nonetheless, Dutch courts are experienced in securities litigation, in particular the Amsterdam District Court, which provides parties with the option to conduct the entire proceedings in English. Aside from regular courts, the Financial Services Complaints Institute, which is an independent dispute committee,

deals with disputes between small and medium enterprises (or consumers) and financial institutions (eg, banks, insurance companies, etc) pertaining to financial products and financial services.

As to time frames, usually securities litigation in the Netherlands pertains to complex and international disputes in which a collective claimant initiates class action proceedings against multiple defendants (often Dutch and non-Dutch) for the benefit of a large class (often consisting of Dutch and non-Dutch members). The duration of these proceedings depends on how the court stages proceedings (eg, international jurisdiction, admissibility, applicable law, merits), whether each stage will have an oral hearing, and whether the court will allow for interim appeals (the latter is usually denied, however). Typically, on average, international securities disputes that are litigated in class action proceedings will take around five years to complete in the court of first instance.

Law stated - 22 januari 2024

Government regulation and enforcement

What is the relationship between private securities litigation and government regulation and enforcement in your jurisdiction?

Private securities litigation and government regulation and enforcement overlap in the Netherlands but have different aims.

Government regulation and enforcement mostly apply to listed companies and pertain to, among other things, financial reporting, prospectuses, public offerings, transparency requirements and market abuse. The rules are derived from or contained in, among other things:

- the Transparency Directive (EU Directive 2007/14/EC);
- the Prospectus Regulation (EU Regulation 2017/1129/EU);
- the Takeover Bids Directive (EU Directive 2004/25/EC); and
- the Market Abuse Regulation (EU Regulation 596/2014/EU).

Accordingly, government regulation and enforcement aim to ensure the orderly functioning, integrity and stability of the financial markets and a high level of protection for investors.

Private securities litigation is the body of civil instruments to obtain relief in cases of, for example, breach of contract or tort (eg, in the event of a breach of a statutory duty). Such relief is often ultimately aimed at obtaining monetary compensation.

Government enforcement is not a necessary prerequisite for private securities litigation, but it can be used to pave the way for private securities claims.

Law stated - 22 januari 2024

CLAIMS AND DEFENCES

Available claims

What types of securities claim are available to investors?

Claims can be brought under the Dutch Civil Code (DCC).

Investors can claim damages and, in addition, if they qualify as a consumer and, in the event of an unfair commercial practice, seek a nullification of the purchase agreement of the securities (article 6:193j(3), DCC).

In cases of misrepresentations or omissions of information that aim to promote an investment decision (eg, a prospectus), professional investors can base their claims for damages on the statutory rules on misleading advertising (article 6:194, DCC) and consumers can base their claims for damages or nullification on the statutory rules on unfair commercial practices (article 6:193b, DCC).

Secondary market purchases may create liability for, for example, incorrect investment advice or breach of best execution duties. This will usually lead to claims for damages against securities advisers or securities brokers.

Disclosures that commonly give rise to private claims are disclosures in scenarios where the company is in financial distress, or disclosures (either made by the company or by a financial supervisory authority) regarding, for example, fraud committed by the company. Some products have led to more disputes than others. For instance, interest rate swap agreements have been subject to many proceedings about whether the agreement was entered into under the influence of error given the bank's failure to disclose all relevant information (eg, Dutch Supreme Court 4 October 2019, ECLI:NL:HR:2019:1500).

Law stated - 22 januari 2024

Offerings versus secondary-market purchases

How do claims (or defences to claims) arising out of securities offerings differ from those based on secondary-market purchases of securities?

The context of the dispute and the parties involved are usually different.

A claim resulting from a securities offering will usually be based on a misleading prospectus and will be made against the issuer or other parties that were involved in the offering (eg, the underwriters). Certain rules regarding the burden of proof in cases of prospectus liability have developed in Dutch case law. For example, in ***WorldOnline***(Dutch Supreme Court 27 November 2009, ECLI:NL:HR:2009:BH2162), the Supreme Court ruled that if the prospectus is misleading, it is presumed that investors relied on the misleading prospectus when they decided to invest.

Claims based on a misleading prospectus are not limited to investors who bought their shares directly from the issuer but could potentially also be made by investors who bought their securities on the secondary market. Claims arising out of secondary market purchases are not usually directed against the issuer or the seller of the securities but against an adviser or broker that was involved in the secondary market purchase. As to those types of claims, the Supreme Court held in ***Van Lanschot***(Dutch Supreme Court 9 February 2013, ECLI:NL:HR:2013:BX7846) that if an adviser violates its obligation to warn for specific risks, the (rebuttable) presumption applies that a causal connection exists between, on the one hand, the adviser's failure to warn and, on the other hand, the investor's damage.

Law stated - 22 januari 2024

Public versus private securities

Are there differences in the claims or defences available for publicly traded securities and for privately issued securities?

There are certain statutory rules applicable to issuers of publicly traded securities (eg, the Market Abuse Regulation). These rules aim to protect investors against omissions or misleading statements by the issuer. These rules are not applicable to issuers of privately issued securities. The context in which the issuers operate is thus very different and so are the available claims and defences in the case of disputes about the issued securities.

Law stated - 22 januari 2024

Primary elements of claim

What are the elements of the main types of securities claim?

The main types of securities claims are claims for damages caused by misleading information (eg, prospectus liability) or misselling (eg, the sold security was not in line with the risk appetite of the client).

Under article 6:162 (non-contractual liability) and article 6:74 (contractual liability) of the DCC, for any claim for damages based on misleading information, a claimant must demonstrate that:

- the information that the claimant was provided with was incorrect or incomplete;
- the fact that incorrect information was provided can be attributed to the defendant (ie, the defendant is to blame on the basis of either (1) the law, (2) a judicial act or (3) generally accepted principles (common opinion);
- the claimant suffered damage;
- such damage was caused by the information provided by the defendant; and
- the relativity requirement is met (ie, the rule that was allegedly violated is designed to protect the claimant from suffering the damage it did).

If the claim is based on misselling, the claimant must demonstrate that the securities broker has breached its duty of care, in addition to the elements mentioned above (attributability, damage, causation and relativity).

These elements have to be included in any claim for damages, irrespective of whether the damage was caused by misleading information or mis-selling. However, in the case of prospectus liability (misleading information), certain specific rules apply, among other things with respect to the burden of proof of causation.

Law stated - 22 januari 2024

Primary defences

What are the most commonly asserted defences? Which are typically successful?

For any type of securities claim, the most commonly asserted defences are:

- the information provided or advice rendered was correct;
- the alleged incorrectness of the information or advice cannot be attributed to the defendant; causal defences;
- defences related to the absence of damage or the existence of collateral benefits; and
- damage was partly or wholly caused by the claimant.

Which defence is successful strongly depends on the facts and circumstances of a case.

Regarding prospectus liability, the defendant might have difficulties in refuting causality. In ***WorldOnline***, the Supreme Court held that in the event of misrepresentations or misleading omissions, the causal relationship between the misrepresentation or misleading omission and the investment decision of a claimant is presumed to exist. However, the defendant can still argue that in its specific case, the causal relationship is absent by showing that the claimant did not rely, directly or indirectly, on the misleading prospectus at the time of purchase. Since this requires information that might be difficult to obtain for a defendant, it is usually difficult for defendants to refute this evidentiary assumption.

Law stated - 22 januari 2024

Materiality

What is the standard for determining whether the misstated or omitted information is of sufficient importance to be actionable?

For claims based on misleading advertisement or unfair commercial practices, in ***WorldOnline***, the Dutch Supreme Court provided rules for determining whether the misstated or omitted information is of sufficient importance to be actionable.

The Supreme Court ruled that not every omission or misrepresentation is of sufficient importance. An omission or misrepresentation is of sufficient importance if it can be reasonably assumed that the omission or misrepresentation, considering the whole context, would have a material impact on the investment decision of an average investor. An 'average investor' is considered to be reasonably well informed and reasonably observant and circumspect. These investors are expected to absorb the information provided but are not expected to possess specialist knowledge. This definition is derived from the judgment of the European Court of Justice in *Gut Springenheide* (European Court of Justice 16 July 1998, Case C-210/96).

For claims on the basis of misselling, no specific rules apply as to the standard for determining whether advice is sufficiently incorrect to be actionable. What is relevant is whether the claimant based its investment decision on the advice and whether the investment decision would have been different had the advice been correct.

Law stated - 22 januari 2024

Scienter

What is the standard for determining whether a defendant has a culpable state of mind to support liability? What types of allegation or evidence are typically advanced to support or defeat state-of-mind requirements?

A party responsible for a misrepresentation or for misselling is only liable if it knew or ought to have known about the misrepresentation or misselling. Intent is not required (article 6:162(3), DCC).

A claim that the defendant knew or ought to have known about the misrepresentation or misselling is typically substantiated by either internal documents from the defendant or contemporaneous external sources (eg, analyst reports or expert reports about the situation at the time). The defendant will typically assert that the substantiation by the claimant is based on hindsight bias and that the facts at the time were ambiguous.

Law stated - 22 januari 2024

Reliance

Is proof of reliance required, and are there any presumptions of reliance available to assist plaintiffs?

Whether proof of reliance is required for claims for misstated or omitted information depends on how a claimant has formulated its claim. Claimants can either take the position that without the misleading information they would not have purchased the securities at all or that they would have bought the securities at a different (lower) price.

In ***WorldOnline***, the Dutch Supreme Court set rules on, among other things, the proof of reliance in cases where investors take the position that they would not have bought the securities at all. The Supreme Court held that to provide effective legal protection for investors in case of misleading information, it is presumed that the investor relied on the incorrect statements or omissions if they were part of the prospectus. This presumption is subject to evidence to the contrary. Reliance can also be indirect, for example, if the investors did not read the misleading information but relied on investment advice or sentiments on the market that were based on the misleading information.

As to claims based on misselling, no specific rules regarding proof of reliance exist. As a result, it is up to the investor to demonstrate that it relied on, for example, incorrect advice.

Law stated - 22 januari 2024

Causation

Is proof of causation required? How is causation established? How is causation rebutted?

For any securities claim, claimants must prove that the misleading information or misselling caused damage. Dutch law requires both 'cause-in-fact' causation, as well as proximate causation. Cause-in-fact causation requires that a 'but for' test is adopted. Proximate causation requires that the damage can be reasonably attributed to the misleading information or advice. Causation requirements preclude, for example, damage due to a share price decline that is unrelated to the misleading information or omission.

For claims based on prospectus liability, the Supreme Court held in ***WorldOnline*** that to provide effective legal protection for investors in cases of misleading information, as a general rule, it is presumed that an investor relied on the incorrect statements or omissions if they were part of the prospectus. Although the defendant could rebut this presumption, it does make it more difficult for the defendant to rebut causation successfully.

A similar presumption applies to claims pertaining to the secondary market. As to those claims, the Supreme Court held in ***Van Lanschot*** that if an adviser violates its obligation to warn of specific risks, the (rebuttable) presumption applies that a causal connection exists between, on the one hand, the adviser's failure to warn and, on the other hand, the investor's damage.

Law stated - 22 januari 2024

Other elements of claim

What elements or defences present special issues in the securities litigation context?

Aside from the elements mentioned previously, no other elements or defences present special issues in the context of securities litigation in the Netherlands.

Law stated - 22 januari 2024

Limitation period

What is the relevant period of limitation or repose? When does it begin to run? Can it be extended or shortened?

A claim for damages is subject to a limitation period of five years (article 3:310, DCC). This period will commence once the claimant knows that (1) it suffered damage and (2) which party caused the damage. This is a subjective criterion, therefore, for both elements, actual knowledge is required. The period of limitation can be interrupted by, among other things, a written notice. Generally speaking, the five-year limitation period cannot be extended. It can, however, be interrupted. Furthermore, if the claimant did not complain about the fault with convenient speed (article 6:89, DCC), this could bar a claim, despite the fact that the five-year limitation period has not expired yet.

Law stated - 22 januari 2024

REMEDIES, PLEADING AND EVIDENCE

Remedies

What remedies are available? Do any defences present special issues in the context of securities litigation? What is the measure of damages and how are damages proven?

For each type of claim, investors can claim damages. These are calculated on the basis of a comparison between the actual situation and a hypothetical situation in which the damage-causing act did not occur, which will often be equal to the difference between the actual purchase price and the hypothetical purchase price in the event that the information was complete and correct. Under Dutch law, a claimant cannot make a claim for punitive damages. As a general rule, the burden of proof is on the plaintiff to prove its damage.

Consumers can also seek nullification of the contract (article 6:193j(3), Dutch Civil Code (DCC)).

The main defences relate to causality (ie, asserting that the incorrect or missing information was not the cause for the investment decision or not the cause of the damage).

Law stated - 22 januari 2024

Pleading requirements

What is required to plead the claim adequately and proceed past the initial pleading?

Dutch law does not have special rules for pleading a claim adequately or to proceed past the initial pleading, other than that a claimant must substantiate all elements of the claim in the writ of summons.

If requested by the parties, or ex officio decided by the court, proceedings can commence with a case management hearing, during which parties can express their view on the further course of the proceedings (eg, staging, timetables, etc). This technique is often applied in more complex, international disputes. For instance, the court can decide that parties will first debate international jurisdiction, followed by admissibility, then (if the court assumes jurisdiction and renders the claimant admissible) the applicable substantive law, after which the case moves on to the merits stage.

In class action proceedings initiated on the basis of article 3:305a of the DCC, a staged approach is mandatory (article 1018c(5), Dutch Civil Code Procedures (DCCP)), which entails that before dealing with the substantive aspects of the class action claim, the court must, for example, first decide on the claimant's admissibility, which includes assessing whether class action proceedings are more efficient than individual proceedings.

No special rules in this respect apply to securities litigation. There are no provincial or local securities laws within the Dutch legal system.

Law stated - 22 januari 2024

Procedural defence mechanisms

What are the procedural mechanisms available to defendants to defeat, dispose of or narrow claims at an early stage of proceedings? What requirements must be satisfied to obtain each form of pretrial resolution?

For standard proceedings, Dutch procedural law does not provide for a preliminary review of the merits of the claim or some other form of pre-trial resolution. However, in larger, more complex proceedings, it is common that parties (and the court) agree to stage the proceedings for efficiency reasons (eg, a jurisdiction phase first, followed by an admissibility phase and, finally, a merits phase (if any)). The court renders a separate judgment for each stage. This staged approach can result in the dismissal of the proceedings at an earlier stage (eg, if the court considers that it has no jurisdiction or if it holds the claimant inadmissible in its claims).

For class actions initiated on the basis of article 3:305a of the DCC, a staged approach is mandatory (article 1018c(5), DCCP), which entails that before handling the substantive aspects of the class action claim, the court must, for example, first decide on the claimant's admissibility, which includes assessing whether class action proceedings are more efficient than individual proceedings.

Law stated - 22 januari 2024

Evidence

How is evidence collected and submitted to the court to support securities claims and defences in your jurisdiction? What rules and common practices apply to the introduction of expert evidence and how receptive are courts to such evidence?

In general, there are various ways to collect evidence under Dutch law. For example, a claimant can initiate disclosure proceedings on the basis of article 843(a) of the DCCP, in which it seeks an order from the court that the defendant must disclose certain written documents. Disclosure proceedings are typically initiated prior to filing a claim on the merits but can also be initiated during and within the proceedings by raising a disclosure motion. Unlike in common law jurisdictions, there is no mandatory disclosure at the start of the proceedings.

Additionally, another often-used method to obtain evidence is by engaging an expert or hearing witnesses, or both. Witness hearings take place before a judge and can occur prior to filing a claim on the merits or during the proceedings.

Furthermore, initiating civil inquiry proceedings before the Enterprise Chamber can yield valuable information for shareholders in follow-on securities disputes. Similarly, regulatory findings by the Dutch Authority for the Financial Markets might contain useful information for a claimant to substantiate its claim in (civil) follow-on securities litigation.

As a general principle, the court is free to attach the evidentiary value to the submitted evidence as it deems appropriate. This principle also applies to expert evidence. Generally speaking, Dutch courts are receptive to expert evidence, although the extent of their receptiveness depends on the case at hand (eg, on the relevance and quality of the expert evidence).

As to common practices with regard to expert evidence, it is compulsory to submit any relevant evidence as an exhibit to either the writ of summons (by the claimant) or the statement of defence (by the defendant). If expert evidence becomes available during the proceedings, it is also possible to submit expert evidence to the court after the written round of submissions prior to an oral hearing.

Law stated - 22 januari 2024

LIABILITY

Primary liability
Who may be primarily liable for securities law violations in your jurisdiction?

In civil cases, the issuer is usually responsible for misstated or omitted information. If the information qualifies as a misleading advertisement or an unfair commercial practice, it will be the issuer that qualifies as the publisher of the misleading information or the trader that conducted unfair commercial practices.

For rendering incorrect advice (misselling), the adviser is primarily liable. In addition, under exceptional circumstances, the individual who rendered the incorrect advice on behalf of a company may also be primarily liable towards the investor. In such a situation, the individual will usually have recourse against the company.

Law stated - 22 januari 2024

Secondary liability
Are the principles of secondary, vicarious or 'controlling person' liability recognised in your jurisdiction?

Dutch law recognises certain principles of secondary liability, most notably directors' liability for faults of a company and liability of, for example, lead managers and global coordinators, for omissions in a prospectus. Whether secondary actors can be held liable depends on their specific position and all other circumstances of the case.

Law stated - 22 januari 2024

Claims against directors
What are the special issues in your jurisdiction with respect to securities claims against directors?

Typically, the company (ie, the legal entity) qualifies as the publisher of misleading advertisements or as the 'trader' conducting unfair commercial practices for the purposes of consumer protection. Although directors themselves are not likely to qualify as publishers of misleading advertisements or traders that conduct unfair commercial practices, they can be potentially liable for misleading conduct in their capacity as directors on the basis of the general tort provision (ie, article 6:162, Dutch Civil Code). Pursuant to case law, a director

can only be held liable for faults of a legal entity if serious personal blame can be attributed to the director. Such personal blame can be attributed to a director who was (or should have been) aware of the misleading advertisements and the potential disadvantage to investors. Whether such a situation exists must be assessed on the basis of the specific circumstances of the case. In lower court case law, the evidentiary presumptions regarding the causal link between the misleading conduct and the damage incurred, which was developed in ***WorldOnline*** for prospectus liability, have been applied to directors' liability as well.

In administrative proceedings, the Dutch financial supervisory authorities (the Dutch Authority for the Financial Markets and the Dutch Central Bank) can impose a penalty on the directors of a supervised entity and a penalty on the supervised entity itself if the latter violated an obligation under Dutch financial law and it is established that, briefly put, the directors were aware of the activities that caused the violation. Unlike in civil liability proceedings, no serious personal blame is required to impose a penalty on a director.

Law stated - 22 januari 2024

Claims against underwriters

What are the special issues in your jurisdiction with respect to securities claims against underwriters?

Underwriters can be held liable on the same grounds as issuers if they qualify as a publisher of the misleading advertisement or as a trader who conducted unfair commercial practices. ***WorldOnline*** shows that lead managers involved in the drafting and distribution of a prospectus might qualify as publishers of the prospectus. In addition, the Supreme Court held in ***WorldOnline*** that lead managers can be liable for not correcting misleading statements made by the issuer during a press conference that was held in the context of the book-building process.

Law stated - 22 januari 2024

Claims against auditors

What are the special issues in your jurisdiction with respect to securities claims against auditors?

Vie d'Or shows that auditors can be held liable if they have not acted as reasonably competent auditors (Dutch Supreme Court 13 October 2006, ECLI:NL:HR:2006:AW2082). This could be the case if annual accounts approved by the auditor contain omissions or incorrect information and the auditor knew or ought to have known about the omission or incorrect information. Whether or not an accountant acted as a reasonably competent auditor depends on the circumstances of the case. The Supreme Court ruled in Vie d'Or that the fact that annual accounts contain incorrect information does not automatically render the auditor liable.

In addition, in legal literature, it has been argued that auditors can also qualify as publishers of misleading information or traders that conduct unfair commercial practices. However, we do not deem this very likely. To our knowledge, no case law has been rendered yet on this issue. Should it nonetheless be determined in case law that a claim against an auditor can be based

on misleading advertising or unfair commercial practices, in our opinion, the evidentiary presumptions applicable to misleading advertising and unfair commercial practices would apply.

Law stated - 22 januari 2024

COLLECTIVE PROCEEDINGS

Availability
In what circumstances does your jurisdiction allow collective proceedings?

Collective proceedings can be divided into group actions and class actions.

Group actions, in which injured parties typically assign their claim to or mandate a claiming entity, are, in principle, available to any claiming entity (natural person or legal entity). No particular admissibility requirements apply, other than valid assignments or mandates.

Class action proceedings on the basis of article 3:305a of the Dutch Civil Code (DCC), in which a collective claimant litigates in its own name but purports to protect the interests of a class, are available to any association or foundation that has full legal personality and that represents the interests of the class in pursuance of its articles of association. In addition, the collective claimant must meet a number of admissibility requirements, such as that the interests of the class must be sufficiently similar, the collective claimant must be sufficiently representative of the class, the collective claimant must have sufficient funds to finance the proceedings and the collective claimant is subject to various (financial) disclosure obligations.

Law stated - 22 januari 2024

Reliance, causation and damages
Can reliance, causation and damages be determined on a class-wide basis, or must they be assessed individually?

For the purposes of answering this question, we distinguish between group actions and class actions.

In group actions (in which injured parties typically assign their claim to or mandate a claiming entity) reliance, causation and damages must be assessed for each injured party individually.

In contrast, if a collective claimant initiates class action proceedings on the basis of article 3:305a of the Dutch Civil Code, reliance, causation and damages will be assessed for each category of class members (damage scheduling), not on an individual basis (article 1018(i)(2), Dutch Code of Civil Procedure (DCCP)).

Law stated - 22 januari 2024

Court involvement and procedure

What is the involvement of the court in collective proceedings and what procedures must be followed to achieve collective treatment of claims?- What is the procedure for settling collective proceedings and what is the extent of the court's involvement in settlement?

If a class action on the basis of article 3:305a of the Dutch Civil Code is initiated, the court (on its own motion) will first (subsequent to any jurisdiction defences) assess whether a number of admissibility requirements are met, among which:

- after service of the writ, the collective claimant must register the writ in the (publicly available) class action register;
- the collective claimant is a foundation or association with full legal capacity; the interests of its class are sufficiently safeguarded;
- the interests of its class are sufficiently similar to be jointly handled;
- the founders and directors of the collective claimant do not, directly or indirectly, have a motive for profit that is being realised through the use of the collective claimant (such a profit motive is absent if the founders and directors only receive market-term compensation for costs and offered services); and
- the claim is sufficiently connected to the Dutch legal sphere (known alternatively as the 'scope rule').

The collective claimant does not have to disclose the identity of individual class members.

If these requirements are met, the court will declare the claimant admissible in its class action claims. Then, depending on how the proceedings are staged, the court will typically assess the merits of the class action claims.

As to the court's involvement, the following applies. If damages are being claimed, the court can order each party to submit separate settlement proposals (article 1018i(1), DCCP). Based on these proposals and, if needed, with the assistance of one or more independent experts, the court may subsequently establish a collective 'settlement' in its judgment should the court hold the defendant liable (article 1018i(2), DCCP).

The court applies damage scheduling in a collective settlement, which means that it identifies specific damage categories and objective factors by which it can establish which damage category applies to which class member (ie, not for each class member individually).

Alternatively, if the parties reach an out-of-court settlement, they can make a joint request to the court to declare the settlement generally binding on each injured party that falls within the scope of the settlement agreement (article 7:907(1), DCC). The court will assess, among other things, whether the settlement sum in the settlement agreement is fair (including any fee to be paid to the collective claimant under the settlement) and whether the collective claimant is sufficiently representative of the injured parties it claims to protect (article 7:907(3), DCC).

Law stated - 22 januari 2024

Opt-in/opt-out

In collective proceedings, are claims opt-in or opt-out?

Under the Dutch class action procedure, an opt-out regime applies to Dutch class members (article 1018f(1), DCCP). An opt-in regime applies to non-Dutch class members (article 1018f(5), DCCP). Accordingly, non-Dutch class members must opt-in if they wish to be bound by the outcome of the class action proceedings, and Dutch class members are automatically bound unless they opt-out.

Law stated - 22 januari 2024

Regulator and third-party involvement

What role do regulators, professional bodies and other third parties play in collective proceedings?

They play no formal role in civil class action proceedings. However, regulatory findings of, for example, the Dutch Authority for the Financial Markets, can be used to substantiate a claim in civil follow-on litigation.

Law stated - 22 januari 2024

FUNDING AND COSTS

Claim funding

What options are available for plaintiffs to obtain funding for their claims? What are the pros and cons of each option, including any ethical issues relating to litigation funding?

Claimants have several options for claim funding, such as litigation insurance and third-party litigation funding.

Third-party litigation funding is allowed under Dutch law and is unrestricted. Certain restrictions apply only to class actions (eg, the claimant must ensure that it has sufficient control over its claim (article 3:305a(2)(c), Dutch Civil Code)).

Several local and international third-party funders are active in the Netherlands. A clear benefit of third-party litigation funding is that disputed claims often require costly, lengthy and risky proceedings to fund, and third-party litigation funding shifts those risks and expenses to the funder. A potential downside is that, depending on the funding arrangement, control of the suit and instruction of counsel can shift to the financer (this is not allowed in class action proceedings). In addition, if the claim is successful, the funder will share in the proceeds.

Other ways for plaintiffs to fund litigation are membership fees or through using a percentage of the proceeds.

Contingency fees are not allowed under Dutch law (article 7.7, Legal Profession Bye-law). Some alternative fee arrangements, such as 'no-cure, less fee' or a combination of a basic fee and a success fee, are allowed, provided that the arrangement is reasonable (see District Court Rotterdam 28 March 2018, ECLI:NL:RBROT:2018:2803).

Law stated - 22 januari 2024

Costs

Who is liable to pay costs in securities litigation? How are they calculated? Are there other procedural issues relevant to costs?

Dutch law has a 'loser pays' system in which the unsuccessful party must pay the legal fees, such as attorney and court fees. However, these legal fees to be disbursed are calculated using a fixed table for liquidated costs and will generally amount to only a fraction of the actual attorney costs incurred by the successful party.

Law stated - 22 januari 2024

Privilege

What types of legal privilege exist between litigation funders and litigants?

Under Dutch law, no legal privilege exists between litigation funders and litigants. Only information exchanged between an attorney and its client can be legally privileged, provided that the attorney received the information in their capacity as an attorney (article 11a(1), Act on Advocates). If the attorney is engaged by the funder directly and the funder manages the case, the funder and the counsel will usually enter into an attorney-client relationship. In that case, information exchanged between the funder and the attorney is legally privileged.

Law stated - 22 januari 2024

INVESTMENT FUNDS AND STRUCTURED FINANCE

Interests in investment funds

Are there special issues in your jurisdiction with respect to interests in investment funds? What claims are available to investors in a fund against the fund and its directors, and against an investment manager or adviser?

In the Netherlands, investment funds are structured as either corporations (with legal personality) or as funds for joint accounts (without legal personality). They are regulated under the European Alternative Investment Fund Managers Directive (Directive 2011/61/EU-) or the Undertakings for Collective Investment in Transferable Securities Directive (-Directive 2009/65/EC). If tradeable, participation in these investment funds can be traded in accordance with Dutch property law on the transfer of shares (if the investment fund is a corporation) or in accordance with the investment contract (if the investment fund is not a corporation). Such participations are typically traded through brokers or trading venues.

An investment fund manager is obligated to prepare and share a prospectus that relates to the participation rights in the investment fund. Investors can bring forward claims relating to omissions or misleading information in the prospectus. In addition, investors could file claims against the fund manager for breaches of the terms and conditions of management

and custody or for breaches of statutory obligations as laid down in the Dutch Financial Services Act.

Law stated - 22 januari 2024

Structured finance vehicles
Are there special issues in your country in the structured finance context?

The EU Securitisation Regulation (2017/2402/ EU) has harmonised the rules for securitisations in the EU. Securitisations must be structured in accordance with, most importantly, the Dutch Civil Code and the Financial Services Act.

As the Netherlands does not have a specific national securitisation law, there are no special issues under Dutch law.

Law stated - 22 januari 2024

CROSS-BORDER ISSUES

Foreign claimants and securities
What are the requirements for foreign residents or for holders of securities purchased in other jurisdictions to bring a successful claim in your jurisdiction?

No specific requirements apply to the non-Dutch claimant. If, according to the Dutch conflict of law rules, non-Dutch law governs the claim, the Dutch court will have to apply that non-Dutch substantive law, unless this application would be contrary to Dutch public policy (article 10:6, Dutch Civil Code).

Law stated - 22 januari 2024

Foreign defendants and issuers
What are the requirements for investors to bring a successful claim in your jurisdiction against foreign defendants or issuers of securities traded on a foreign exchange?

In cross-border securities litigation, the Dutch court must assess whether it has jurisdiction to rule on the claims against the foreign defendant pursuant to either an international treaty or convention, the Brussels I Regulation or, if none of these are applicable, Dutch private international law.

Each of these legal systems provides for multiple (alternative) grounds under which a Dutch court can assume jurisdiction over a non-Dutch defendant. For example, if there are multiple defendants and one (or more) of them is domiciled in the Netherlands, the Dutch court can assume jurisdiction over the non-Dutch defendants if the claims against the non-Dutch defendants are so closely connected to the claims against the Dutch defendants that it is

expedient to hear and determine them together to avoid the risk or irreconcilable judgments (see article 8(1), Brussels I Regulation).

In addition, a Dutch court has jurisdiction in matters relating to tort if the damaging event occurred in the Netherlands (see article 7(2), Brussels I Regulation). According to established case law of the European Court of Justice (ECJ), this encompasses both the place of the harmful event and the place where the damage occurred if they did not occur in the same country. As to the place where the damage occurred, the ECJ further clarified how to localise the financial loss of shareholders in ***VEB v BP***. In summary, the ECJ ruled that in light of the foreseeability requirement, the place where the damage occurs cannot be equalled to the location of the investor's securities account if the bank of the securities account is domiciled in a jurisdiction in which BP, the issuing company, is not subject to statutory disclosure obligations. As a result, the court of the place in which the investor holds its securities account can only assume jurisdiction if the issuing company has a statutory disclosure obligation in the said jurisdiction.

Furthermore, in the case of a contractual claim, the Dutch court can assume jurisdiction if the Netherlands is the place of performance of the obligation in question (article 7(1), Brussels I Regulation).

Law stated - 22 januari 2024

Multiple cross-border claims

How do courts in your jurisdiction deal with multiple securities claims in different jurisdictions?

The Brussels I Regulation contains provisions on how courts of European Union member states must handle already pending proceedings in and outside the EU.

If, at the time the suit was brought before the Dutch court, proceedings involving the same parties and the same cause of action were already brought before the courts of a different EU member state, the Dutch court must – on its own motion –stay the Dutch proceedings until the jurisdiction of the court first seised is established (article 29(1), Brussels I Regulation). If the jurisdiction of the first seised court is established, the Dutch court must reject jurisdiction in favour of the first court (article 29(3), Brussels I Regulation). The Brussels I Regulation also contains provisions for related proceedings. These proceedings might have a different cause of action or involve different parties, but, nonetheless, are so closely connected that it might be expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings (article 30(3), Brussels I Regulation). If the Dutch court is not the court first seised, it may stay the proceedings if related proceedings are conducted in another member state (article 30(1), Brussels I Regulation).

Law stated - 22 januari 2024

Enforcement of foreign judgments

What are the requirements in your jurisdiction to enforce foreign court judgments relating to securities transactions?

The enforcement of judgments rendered by a non-Dutch court is, in an EU context, governed by the Brussels I Regulation.

As a general principle, a judgment rendered in a member state that is enforceable in that member state is enforceable in the Netherlands without any declaration of enforceability required (article 39, Brussels I Regulation). Only in exceptional circumstances can enforcement be denied (article 46 in connection with article 45, Brussels I Regulation). This is, for example, the case if recognition of the judgment is manifestly contrary to Dutch public policy.

However, judgments rendered by non-EU courts are not enforceable in the Netherlands (article 431, Dutch Code of Civil Procedure (DCCP)) unless enforceability is provided for in a treaty or in Dutch law. If enforceability is not provided for, the claimant will (in principle) have to re-litigate and bring a new suit before the Dutch court, which will fully and independently assess the claim (article 431 lid 2, DCCP). However, in *Gazprombank* the Dutch Supreme Court ruled that Dutch courts will award a claim without a substantive assessment if certain basic criteria as to the fairness of the proceedings have been met (Dutch Supreme Court 26 September 2014, ECLI:NL:HR:2014:2838).

Law stated - 22 januari 2024

ALTERNATIVE DISPUTE RESOLUTION

Options, advantages and disadvantages

What alternatives to litigation are available in your jurisdiction to redress losses on securities transactions? What are the advantages and disadvantages of arbitration as compared with litigation in your jurisdiction in securities disputes?

Parties can opt for arbitration, binding advice proceedings or mediation. For securities litigation, most financial services providers in the Netherlands are affiliated with the Financial Services Complaints Institute (Kifid), which is an independent dispute agency specialising in dispute resolution between small and medium enterprises (and consumers) and financial institutions (eg, banks, insurance companies, etc). In most cases, the judgment of the Kifid will take the form of binding advice.

The main advantages of arbitration compared to proceedings before state courts are confidentiality and the flexibility to agree on a tailor-made procedure, particularly the appointment of (more specialised) arbitrators by the parties themselves. On the other hand, arbitration is often more costly than court litigation and the outcome can be less predictable in practice.

Mediation has the advantage that it is both confidential as well as voluntary and non-committal. Mediation is often less time-consuming and less adversarial, which can help maintain or re-establish a good relationship between parties. Dutch law does not have a statutory legal framework for mediation.

Law stated - 22 januari 2024

UPDATE AND TRENDS

Key developments of the past year

What are the most significant recent legal developments in securities litigation in your jurisdiction? What are the current issues of note and trends relating to securities litigation in your jurisdiction? What issues do you foresee arising in the next few years?

Recent legal developments

The most significant recent legal development in Dutch securities litigation remains the Act on Collective Settlement of Mass Damages Claims (WAMCA), which is a law that entered into force on 1 January 2020. It is having a profound impact on the Dutch class action procedure (which is often used in securities litigation) and applies to all class action proceedings that, briefly put, are initiated on or after 1 January 2020 and pertain to events that took place on or after 15 November 2016. Most notably, the WAMCA enables a collective claimant to make a claim for damages, which, if the claim is awarded, will be binding for Dutch class members who do not opt-out, as well as for non-Dutch class members who opt-in. Furthermore, the WAMCA has introduced more stringent admissibility requirements. EU Directive 2020/1828 on representative actions for the protection of the collective interests of consumers aims to establish a class action mechanism that allows for both injunctive measures and redress measures (damages). Member states had to implement this directive on 25 June 2023 at the latest. The directive essentially mirrors the WAMCA, which meant that Dutch law required only very minor (technical) amendments in order to implement the directive.

The other major development concerns ESG liability and (civil) follow-on litigation.

First, EU Regulation 2019/2088/EU on sustainability-related disclosures in the financial services sector (SFDR) entered into force on 10 March 2021. The SFDR imposes mandatory ESG disclosure obligations on financial advisers (for instance, investment firms who provide investment advice) and financial market participants (for instance, investment firms who provide portfolio management). They must be transparent about the integration of sustainability risks in their investment advice or investment decisions by issuing a Principal Adverse Impact statement (PAI statement). The PAI statement must be composed in accordance with the Regulatory Technical Standards (RTS), which came into force on 1 January 2023. The RTS establishes rules regarding the further detailing of sustainability risks in investment advice or decisions, the policies equipped to ascertain these risks, the engagement policies, compliance with codes of conduct and internationally recognised standards, and a required historical comparison. In addition, the SFDR also imposes pre-contractual transparency on adverse sustainability impacts at the financial product level (eg, undertakings for the collective investment in transferable securities, alternative investment funds, insurance products and portfolios under discretionary and individualised management), especially if the financial product promotes environmental or social characteristics. While there is no case law yet, misstated or omitted information might give rise to (civil) follow-on securities litigation.

Second, the EU Corporate Sustainability Due Diligence Directive (CSDDD) is nearing its adoption. The EU Council and the Parliament reached a provisional agreement on the CSDDD on 14 December 2023. This proposed directive requires (large) companies to conduct due diligence regarding actual and potential adverse impacts on the environment and on human

rights, with respect to their own operations, those of their subsidiaries, and those carried out by their business partners. The CSDDD envisages civil liability for non-compliance, thus introducing a legal basis for the responsibility of corporates for abuses and potential abuses in their businesses and in their value chain.

The EU Council and the Parliament had different visions on the applicability of the CSDDD on the financial sector. However, according to the provisional agreement reached on 14 December 2023, financial services will be temporarily excluded from the scope of the CSDDD, but there will be a review clause for possible future inclusion of the financial downstream sector based on a sufficient impact assessment. This means that the CSDDD may only become partly applicable to the financial sector: regulated financial undertakings, such as banks, investment firms, and pension funds, will only have to comply with the relevant obligations under the CSDDD in relation to their own operations and upstream supply chains and they will have to provide climate change transition plans and adopt appropriate remuneration schemes.

Law stated - 22 januari 2024