

Legal update

The forthcoming entry into force of the Act on Management and Supervision of Legal Entities will (among other things) increase the liability risk under Dutch law for directors and supervisory directors of semi-public institutions, such as housing associations and healthcare institutions. In addition, due to a number of other recent developments the possibilities for an efficient and expeditious judicial settlement of disputes in the Netherlands will broaden.

With this update we would like to bring the core of these developments to your attention. The following topics will be discussed:

- a. Bill on the Management and Supervision of Legal Entities
- b. Bill on Redress of Mass Damages in a Collective Action
- c. National Commercial Court (NCC) launched
- d. Expedited Procedure Court of Amsterdam

a. Bill on the Management and Supervision of Legal Entities

The legislative procedure for the Act on Management and Supervision of Legal Entities Act is back on track. The reason for the bill is a series of incidents in the semi-public sector, involving (among other entities) housing corporations and healthcare institutions. The purpose of the bill is to achieve greater uniformity among the various Dutch legal entities that are regulated in Book 2 of the Dutch Civil Code (DCC). The memorandum of amendment, submitted by the Dutch government in November 2018, has brought substantial changes to the original bill from June 2016. The most important amendments to Book 2 DCC that are (still) in the pipeline are:

- a legal basis for a supervisory board for associations and foundations
- the introduction of a general standard that management board members and supervisory directors of all legal entities 'shall in the performance of their duties

act in the interests of the relevant corporation and its allied enterprise or organization'

- the joint and several liability for directors and supervisory directors towards the company will also apply to supervisory directors of associations and foundations
- the liability regime in the event of bankruptcy as included in S 2:138 (subsections 1 and 3–10 DCC), will apply to (all) associations and foundations
- the evidentiary presumption, included in S 2:138 subsection 2 DCC, will apply to semi-public associations and foundations (i.e. which are required to provide financial accounts that are equal or equivalent to annual accounts)
- the regime of joint and several liability for damage as a result of (among other things) a misrepresentation of the condition of the legal entity in the financial statements (S 2:139 DCC with respect to management board members and S 2:150 DCC with respect to supervisory directors), will also apply to semi-public associations and

foundations outside the situation of bankruptcy

The bill is currently under consideration by the House of Representatives. The date of entry into force is not yet known.

b. Bill on Redress of Mass Damages in a Collective Action

On 19 March 2019, the Senate approved the Bill on Redress of Mass Damages in a Collective Action as a formality. The purpose of the new act is to make it possible for injured parties to claim compensation of damages in collective actions.

Currently, the Act on collective settlement of mass damages (WCAM) already provides injured parties with the possibility to have a settlement agreement pertaining to a mass claim declared binding by the Amsterdam Court of Appeal. In that case, the settlement agreement also applies to class members who were not involved in the conclusion of the settlement. A recent example is the settlement that has been reached between (the legal successor of) Fortis, its directors and supervisory directors and shareholders in June 2018.

If parties do not succeed in reaching a settlement agreement, or if the person held liable is unwilling to enter into settlement negotiations, S 3:305a DCC provides for the possibility of a class action to request the court for a declaratory decision that the defendant is liable. However, it is not possible to claim monetary damages. To claim monetary damages, injured parties must initiate their own individual action. The current act aims to fill this gap. The most important elements are:

- a single regime will be created for collective actions under S 3:305a of the DCC, irrespective of whether a claim for monetary damages is made or a declaratory decision is requested
- if several representative entities wish to bring a collective claim that addresses the same damage-causing event(s), the court will designate the most qualified organization to act as exclusive representative ('lead plaintiff') on behalf of all injured parties

- collective actions can be brought before all courts
- all collective actions must be listed in a central register
- collective actions addressing the same facts and events will be treated as one claim. If (almost) at the same time competing collective actions are brought before different courts, referral will first have to take place in order to join the proceedings
- the damage of injured parties will not be assessed individually but will be categorized ('damage scheduling')
- within one month after the appointment of the lead representative or after the conclusion of a collective settlement agreement, injured parties can withdraw from the representation of collective interests and the binding force of the proceedings by opting-out
- the judgment of the court is binding on all injured parties who did not opt out
- the admissibility requirements pertaining to governance, funding and representativeness of the representative entity will be more stringent.

The date of entry into force of the act is yet unknown.

c. Netherlands Commercial Court (NCC) launched

In order to meet the need for English-language dispute resolution in international trade, the international trade chamber of the Amsterdam District Court, known as the Netherlands Commercial Court (NCC), was created on 1 January 2019. Judgments may be appealed to the NCC Court of Appeal (NCCA).

The new international trade chambers will deliver their English-language judgements in complex international trade disputes.

A matter may be submitted to NCC when, in short, the following requirements are met:

- the case relates to an international dispute
- the case concerns a civil or commercial matter

- the District Court has subject matter jurisdiction
- the parties involved in the procedure have expressly agreed in writing that proceedings will be brought before the NCC and – in principle – be in English

Other relevant features of NCC/NCCA litigation are, among other things:

- the communication between the court and the parties will, in principle, be electronically (via 'eNCC')
- the Dutch Code of Civil Procedure applies, as well as the NCC's and NCCA's Rules of Procedure
- parties may apply for provisional or protective measures
- a claim to set aside an arbitral award can be brought before the NCCA (provided that, among other things, the seat of arbitration is in the appellate district of Amsterdam)
- an application seeking a declaration that a collective settlement is universally binding under the WCAM (we refer to the above), can be brought before the NCCA
- the court fees and legal fees are higher compared to ordinary Dutch legal proceedings but are lower than the costs of large international disputes resolved by arbitration (or the costs of litigation in the UK).

Bringing a case before the NCC could be attractive, since Dutch procedural law is considered to be efficient. In addition, the Brexit (if it goes ahead) could work out well for the NCC, as its judgements can be enforced in Europe. In case of a Brexit, enforcement of English judgments in Europe may (without leave of a court and in the absence of further agreements) prove more difficult. Another (possible) advantage over the English court are the lower court fees and lower orders to pay the costs of the proceedings.

On 8 March 2019, the NCC delivered its first judgment (ECLI:NL:RBAMS:2019:1637).

d. Expedited procedure Court of Amsterdam

On 1 June 2019, the Commercial Matters team of the Court of Amsterdam launched a new, expedited procedure. It is an action on the merits that does not require extensive witness hearings or a court-ordered expert examination, and is dealt with in a manner largely consistent with preliminary relief proceedings. It should be noted that the parties should jointly opt for this method of settlement. Furthermore, the court must find the expedited procedure suitable.

This is our update. In case you have any questions with respect to the above, please do not hesitate to contact us. We would, of course, be pleased to provide you with further (detailed) advice, if required.