

Dutch court overturns ruling in Petrobras fraud suit

Cosmo Sanderson
18 June 2021



Credit: Shutterstock/Fernando Dias Fotografia

A Dutch court has reversed its decision to exclude certain claimants from a class action brought on behalf of investors in Petrobras who suffered losses due to the Lava Jato corruption scandal - after it emerged the Brazilian company had taken conflicting positions on the applicability of an arbitration clause.

On 26 May, the District Court in Rotterdam ruled that the Stichting Petrobras Compensation Foundation (SPCF) has standing to pursue declaratory relief against Petrobras on behalf of all the company investors it represents in the Netherlands.

After initially refusing to throw out the class action in 2018, the court issued a preliminary ruling last year that SPCF could not represent some investors who should have been aware they were bound by an arbitration clause in the articles of association of Petrobras, Brazil's national oil and gas company.

But in its most recent ruling, the court found that Brazilian case law on this issue was not settled; and that Petrobras had failed to earlier disclose it has argued for a more restrictive interpretation of the same clause in arbitrations that have been brought under it.

In view of that new information, the court said it had to overturn last year's ruling.

SPCF is represented in the court by Dutch firm Lemstra Van der Korst. It is also using a global counsel team including Withers in London and US litigation firm Motley Rice.

The foundation was set up in 2015 to represent the interests of investors who purchased Petrobras securities outside the United States and suffered losses because of fraud uncovered by Brazil's Lava Jato investigation – a corruption scandal in which Petrobras executives allegedly awarded billions of dollars of contracts to construction companies at inflated prices in return for kickbacks over a 10-year period.

In 2018, Petrobras agreed to pay almost US\$3 billion to settle a similar US class action relating to Lava Jato. But that settlement primarily covered investors who purchased securities in the US and not those who bought shares in Brazil or in linked European markets. Petrobras also agreed to pay over US\$850 million to US and Brazilian authorities in connection with the scandal.

SPCF brought its class action in 2017, contending the case had a close connection with the Netherlands because three Petrobras vehicles that participated in the fraud are based there – including Petrobras Global Finance, which raised over €47 billion for the company through bond issuances during the relevant period.

The foundation is currently seeking a declaratory judgment that Petrobras misled investors by concealing the bribery scheme and publishing misleading financial information.

The Dutch suit names as defendants seven former Petrobras executives residing in Brazil who have been targeted by the Lava Jato investigation – only two of whom have appeared in the Dutch proceedings. Of those who have not appeared, two have been criminally convicted in Brazil while the other three were given reduced sentences in exchange for making statements about the fraud.

In its 2018 ruling, the court ruled it had jurisdiction under the Dutch Code of Civil Procedure (DCCP) to hear many of the foundation's complaints.

The court further dismissed the defendants' arguments that Petrobras' articles of association required disputes involving the Brazilian company and its shareholders to be submitted to the Market Arbitration Chamber (CAM) in Brazil.

It held that English-language version of the articles of association that had appeared on the Petrobras website until 2016 was insufficiently clear and therefore not a valid arbitration clause under Brazilian or Dutch law.

However, in January 2020, following further objections from Petrobras, the court held that SPCF could not represent Petrobras investors who – among other things – were able to read Portuguese when they purchased securities on the Brazilian exchange. This was because they should have been aware that they were bound by the Portuguese version of the by-laws and its arbitration clause.

But the case has once again swung back in favour of SPCF in the most recent ruling.

The Dutch court has now found that the Brazilian judiciary has not yet reached a conclusion on the scope of the clause and it may take years before this issue is settled.

The court also criticised Petrobras for not revealing it had commissioned an expert opinion in a Brazilian arbitration initiated under the CAM clause, which argued the clause did not provide investors with jurisdiction for their claims.

Petrobras said it has taken different stances regarding the clause in different proceedings to secure its legal position until Brazilian case law on the issue is settled – but the court said the company could and should have disclosed this earlier.

In the next phase of the Dutch proceedings, the court will determine if Petrobras violated the anti-corruption and securities laws of several EU countries and Brazil. If SPCF is successful in that phase, in which an oral hearing is expected next year, the investors will be able to seek damages in a new proceeding.

Petrobras said in a press release that it denies all of SPCF's arguments and that Brazilian authorities and courts have declared it is a "victim" of the Lava Jato scandal.

The International Securities Associations & Foundations Management Company (ISAF), a Connecticut-based body that is funding SPCF's litigation costs and providing administrative services, said the ruling means Petrobras faces "increased exposure to material liability."

"The fact that Petrobras has already admitted to violating the US laws, which are similar to many countries in these matters, further supports the thesis that Petrobras faces significant legal jeopardy and associated shareholder damages in the Netherlands."

Battea Global Litigation Research, which advises on class actions, has said SPCF represents international and Brazilian shareholders with an estimated amount of damages near US\$15 billion. This, says Battea, does not account for bondholders, which also have significant damages.

Last year, it emerged that two Petrobras shareholders are bringing derivative claims on behalf of Petrobras against the Brazilian government over losses the state-owned oil company sustained following the Lava Jato probe. Those claims have been consolidated before a panel at the Arbitration Chamber of the Brazilian Stock Exchange, which upheld its jurisdiction last year.

The two investors disagree over the valuation of the claim – with one seeking US\$8.5 billion and the other up to US\$35 billion – and over who would be entitled to the proceeds.

Stichting Petrobras Compensation Foundation v Petroleo Brazieiro SA – Petrobras, Petrobras Global Finance BV, Petrobras Oil & Gas BV, Petrobras International Brazpetro BV and the former executives (names redacted)

In the District Court in Rotterdam

Counsel to the foundation

- Lemstra Van der Korst

Partner **Flip Wijers** in Amsterdam

- Withers

Partner **Hussein Haeri**, special counsel **Robert Kovacs** and associate **Clàudia Baró Huelmo** in London

Counsel to Petrobras, Petrobras Global Finance BV, Petrobras International Brazpetro BV and certain former executives

- Houthoff

Partner **Albert Knigge** in Amsterdam and counsel **Paul Sluijter** in Rotterdam

Counsel to Petrobras Oil & Gas

- NautaDutilh

Partner **Frans Overkleeft** in Amsterdam

Other respondents

Not represented