

# *ACTIO INSIGHT*



PEEKING THE POTENTIAL IMPACT OF THE FOREIGN  
CLIMATE RULING TO THE ENFORCEMENT  
OF FOREIGN JUDGEMENT IN INDONESIA:  
A BRIEF CASE STUDY





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**Keywords :** Climate Change Litigation, Shell Climate Ruling, Emission Reduction, Dutch Landmark Decision, Indonesian Law, Legal Liability, Multinational Corporations

The increasing severe impact of climate change and the approaching emission reduction target set out in the Paris Agreement have led to the proliferation of climate change litigation.<sup>4</sup> Courts across the world have seen a rise in the number of lawsuits filed against corporations for the large carbon dioxide (“CO<sub>2</sub>”) emissions it has caused.<sup>5</sup> The case of *Milieudefensie et al. v. Royal Dutch Shell plc. (Shell)* serves as a pioneer and landmark decision, where a court imposed an obligation on a corporation to reduce its CO<sub>2</sub> emissions.<sup>6</sup> Furthermore, in *Asmania et al. vs Holcim*, 4 residents of Pari Island, Indonesia, filed a complaint against a Swiss-based cement company, demanding for compensation due to the damages suffered as a result of climate change.<sup>7</sup> Due to the cross-border nature of both cases, they may have impact to how foreign judgments are implemented in Indonesia.

This article aims to analyze the potential implications of the foreign court decisions in the cases above to their enforcement within Indonesian jurisdiction based as follows:

## **Case Study: *Milieudefensie et al. v. Royal Dutch Shell plc. (Shell)***

On May 26, 2021, the Hague District Court rendered its decision, ordering the Royal Dutch Shell plc (“RDS”), the holding company of the Shell Group (“Shell”), a global oil company, to reduce its global carbon emissions by 45% compared to its 2019 emission levels, by the year 2030.<sup>8</sup> Having considered the location of Shell subsidiaries around the globe, including in Indonesia, the decision of the Hague Court raises a number of questions. Mainly, (i) Whether the decision of the Hague Court could be enforceable in other jurisdictions, including Indonesia; and (ii) Whether Shell’s subsidiaries outside the Netherlands, including in Indonesia, could be held liable based on the decision.

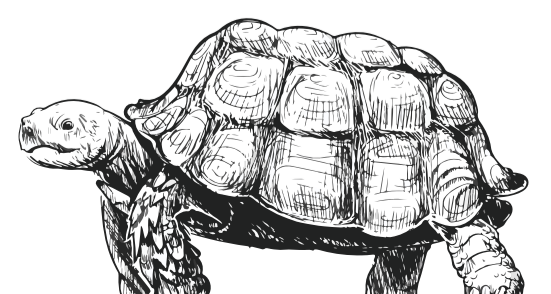
RDS’ emission reduction obligation emanates from Dutch tort law, which stipulates that Shell must not breach “what according to unwritten law has to be regarded as proper social conduct.”<sup>9</sup> In interpreting the proper conduct, the Court referred to: (i) the OECD Guidelines for Multinational Enterprises; and (ii) The UN Guiding Principles on Business and Human Rights, which provides a non-binding responsibility for companies to respect human rights and set suitable policies.<sup>10</sup> The Court also referred to (iii) Art. 2 and 8 ECHR, which provides protection for the inhabitants of the Netherlands against the impacts of dangerous climate change resulting from CO<sub>2</sub> emission.<sup>11</sup>

According to Art. 436 Rv, “...decisions rendered by judicial bodies abroad cannot be executed or enforced in Indonesia”.<sup>12</sup> Decisions of foreign courts cannot generally be enforced within the territory of the Republic of Indonesia. The only way to enforce a foreign court decision in Indonesia is through relitigation. The foreign court decision may be referred as legal basis for filing a new lawsuit in an Indonesian court.<sup>13</sup> Subsequently, the Indonesian court could consider the foreign court decision as written evidence with different weight of evidence, on a case per case basis. A foreign court decision can be regarded as:

- i. An authentic deed that has perfect and binding evidentiary power; or
- ii. Merely as a legal fact that is assessed independently in accordance with the judge's considerations.<sup>14</sup>

Thus, the decision of the Hague Court can only be enforced in Indonesia if the Indonesian court has decided it is so, after having completed the relitigation procedure.

Furthermore, with respect to the legal liability of Indonesian entity of a multinational company, Art. 3 par. (1) of Law Number 40 of 2007 concerning Limited Liability Company as amended by Government Regulation in Lieu of the Law Number 2 of 2022 (“Law 40/2007”) adheres to the principle of separate legal personality. Art. 3 par. (1) stipulates that “*The shareholders of the Company are not personally liable for the agreement made on behalf of the Company and are not liable for the Company's losses exceeding the shares owned*”. Such provisions do not apply if:<sup>15</sup>







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- a. the requirements of the Company as a legal entity have not been or are not met;
- b. the shareholder concerned, either directly or indirectly in bad faith, exploits the Company for personal gain;
- c. the shareholder concerned is involved in an unlawful act committed by the Company; or
- d. the shareholders concerned either directly or indirectly unlawfully use the Company's assets, which results in the Company's assets being insufficient to pay off the Company's debts.

The exceptions to the separate legal personality principle, as stipulated in Art. 3 par. (2) of Law 40/2007, are also known as 'piercing the corporate veil'.

In the case of *Milieudefensie et al. v. Royal Dutch Shell plc. (Shell)*, the provision of piercing the corporate veil does not apply, as the provisions in Art. 3 par. (2) above are not fulfilled. The decision of the Hague Court did not set forth that an Unlawful Act has been committed by Shell subsidiaries across the globe, including its subsidiary in Indonesia, and that RDS has been involved in such Unlawful Act. Rather, the Hague Court merely ordered RDS to reduce the carbon emissions produced by its global operations.<sup>16</sup> Obligation under the Dutch Tort law that Shell must not breach are, as stated in the decision, "what according to unwritten law has to be regarded as proper social conduct," and Art. 2 and 8 ECHR, which provides protection for the inhabitants of the Netherlands against the impacts of dangerous climate change underlines such decision.<sup>17</sup>

Furthermore, the Hague Court stated in its decision that "*RDS has total freedom to comply with its reduction obligation as it sees fit, and to shape the corporate policy of the Shell group at its own discretion. The court notes here that a 'global' reduction obligation, which affects the policy of the entire Shell group, gives RDS much more freedom of action than a reduction obligation limited to a particular territory or a business unit or units.*"<sup>18</sup> Additionally, the court also concluded that "[...] *It is up to RDS to design the reduction obligation, taking account of its current obligations*".<sup>19</sup> Thus, the emission reduction obligation of Shell's subsidiary in Indonesia would possibly be subject to the emission reduction policy implemented by RDS towards its subsidiaries.

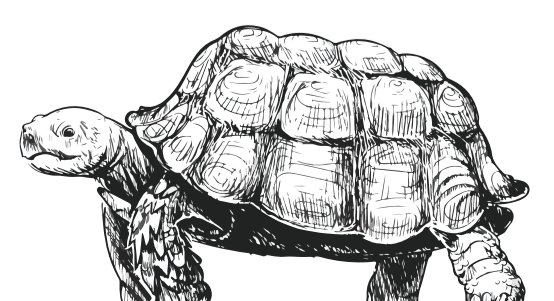
## Case Study: *Asmania et al. vs Holcim*

A more recent case occurred in January 2023, where 4 residents of the island of Pari, Indonesia, filed a complaint against Holcim, on behalf of the entire population of the island, to the Cantonal Court of Zug, Switzerland.<sup>20</sup> The Complainants demanded the leading global cement manufacturer provide: (i) Compensation due to the damages suffered as a result of climate change; (ii) Financial contribution towards measures to prevent flooding; and (iii) Holcim to rapidly decrease its CO2 emissions.<sup>21</sup> Pari Island, whose existence is threatened due to climate change, has experienced flooding on multiple occasions, threatening the livelihoods of its population, despite not contributing to climate change.<sup>22</sup>

Currently, the case is still pending.<sup>23</sup> However, if the Cantonal Court of Zug has rendered its decision, the enforceability of the decision in other jurisdictions, including Indonesia, will be subject to the treatment of foreign court decisions in the sought-after jurisdiction. The process for the enforcement of foreign judgment can be deemed as a rather convoluted process. The labyrinthine process of foreign court judgement enforcement may cause foreign court decision, including the Cantonal Court of Zug decision, to become less effective, as it may not automatically be enforced to Holcim's offices in other jurisdictions to implement the provisions ordered in the decision.

## Conclusion

With the soaring number of claims against multinational corporations, it is pertinent to assess whether foreign court decisions can be enforced in other jurisdictions where a holding company's subsidiaries are located. This is paramount as the effectiveness of a court decision relies on its ability to hold legal entities liable to reduce their CO2 emissions and in creating a real impact towards climate change mitigation. However, in a relationship involving a holding company and its subsidiaries, the legal entity that shall be held liable must first be determined. Where applicable, the piercing of the corporate veil provision stipulated in Art. 3 par. (2) of Law 40/2007 is particularly beneficial in determining the liable legal entity. The applicability of this provision in each case must, nevertheless, be analyzed based on the arising circumstances.







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Drawing a conclusion from *the Milieudéfensie et al. v. Royal Dutch Shell plc. (Shell)*, the decision of the Hague Court may only be enforced in jurisdictions that recognize foreign court judgment. In Indonesia, enforcement of a foreign court decision is not yet possible. Rather, it may require relitigation. It means that the Hague Court decision would only bind the direct disputing parties. In any case, the decision by the Dutch Court specifically stated that “RDS has total freedom to comply with its reduction obligation as it sees fit, and to shape the corporate policy of the Shell group at its own discretion”. Thus, RDS may implement new emission reduction policies whose application extendable to its’ subsidiaries following the Hague Court decision.

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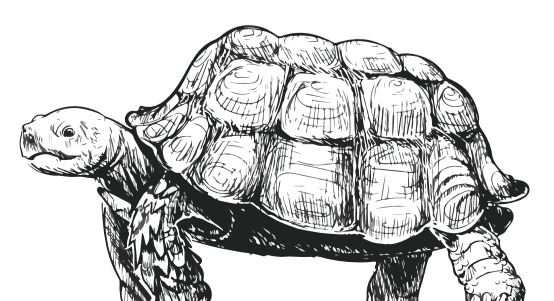
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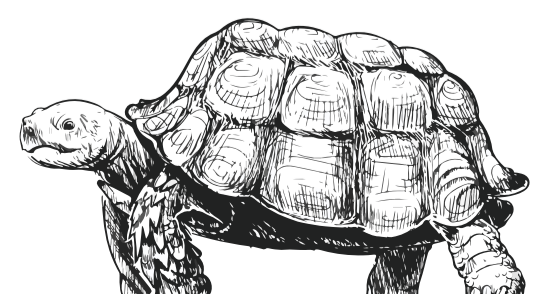
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