The Netherlands

Transatlantic litigation: the Bijlmer air crash case

by Fred J Bruinsma and Leny E De Groot-van Leeuwen

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On Sunday 4 October 1992 at 6.35 pm an El Al cargo plane crashed into two apartment buildings in the south-eastern ('Bijlmer') district of Amsterdam, an area mainly inhabited by immigrants. In the ensuing inferno three crew members and a passenger, as well as 39 people on the ground, were killed. Many more were severely wounded, lost relatives and friends, incurred damages and suffered from shock.

This article reports on the international litigation aspects of the crash. The literature on cross-national litigation has mostly concentrated on law firms, and particularly on their expansionist tendencies; it has focused on the opening of offices and on the forming of global alliances and lacks empirical studies on the effects of the everyday work of the lawyers themselves in the different types of firms. This is the focus of our article. What happened when lawyers and clients on both sides of the Atlantic had to deal with each other because of an air crash? What strategies did the attorneys follow? How successful were Dutch attorneys in their dealings with their American colleagues? Did they feel hampered by the Dutch 'Rules of Conduct' which explicitly proscribe contingency fees?

For an answer to these questions we interviewed the following attorneys in the Netherlands: B J H Crans of the law firm De Brauw, Blackstone Westbroek (on behalf of Boeing, El Al, and their insurers), and on behalf of the victims: P S S Radakishun and L Soedamah of the Advocatenkollektief Bijlmermeer, A H J van den Biesen and Ms A M Willenborg of the Advocatenkollektief Nieuwezijds, L D H Hamer of the law firm Nolen, B Th Moerkoert of the law firm Trenité van Doorne (all in Amsterdam), H Th Bouma, M Dijkstra and J H Lemstra of the law firm Pels Rijcken in The Hague, and B van der Goen of the law firm with the same name in Soest.

SETTING THE LEGAL SCENE

'Half an hour after the accident I was called from London by the solicitor's firm of the Lloyds insurers of El Al', said Crans. *'Somebody asked me whether I would have a conflict of interests representing El Al. I said "No". Next morning at eight o'clock I collected Mark Franklin, Peter Martin's associate at Schiphol, and we had our first meeting here in my office.'*

Since then Crans has been El Al's attorney in the Netherlands. Boeing used to have its own attorney in the Netherlands (Ms L Dommering, a product liability specialist with the law firm Nauta Dutilh), but almost from the beginning Crans's office became the intermediary between the Dutch attorneys representing the victims and Boeing's own law firm, Perkins Coie in Seattle. It is unclear, even to Crans, what sort of arrangement Boeing, El Al, and their respective insurers made.

One of the first things El Al did was to set up an emergency fund, which was operated from Crans's office. Checks on the truthfulness of claimant's allegations were made with the help of the housing corporation 'Nieuw Amsterdam', which owned the two apartment buildings and was much better informed about their tenants than the municipal register of the inhabitants. All of our interviewees underlined the practical and non-legal character of their work during the weeks following the disaster; it had more to do with fulfilling basic needs (shelter, medical services, relief centres, welfare benefits, insurances, etc.) than what is at the core of this article, i.e. disaster litigation, American style.

Legal thinking began again on 14 October, when the mayor of Amsterdam announced that illegal immigrants who could prove they had lived in one of the 230 apartments that had been hit by the crashing plane could apply for legalization of their stay in the Netherlands. It triggered a wave of legalization requests, not only in Amsterdam, but from all over the Netherlands and from parts in the world that had nationals living in the Bijlmer, especially Ghana, Surinam and Pakistan. A three-room flat, allegedly inhabited by more than 30 people, was no exception, and rumour had it that one could buy statements of residence for Fl 5,000. About 2,000 requests were reduced to 91 legalizations of illegal residence, and another 38 immigrants were granted a residence permit on humanitarian grounds. We will not pursue this side issue, but all the attorneys interviewed referred to the painstaking process of preparing a well-founded compensation claim in close consultation with the client. How can you tell the truth from a lie in the absence of documents? The victims of most air crashes are the passengers on the passenger list. As a consequence, the total number of claims to be expected is known shortly after such a disaster. In the Bijlmer disaster, however, various categories of an unknown number overlap: legal and illegal inhabitants who were not at home, relatives and friends watching television at the inhabitant's home (a popular sports program was on at the moment of the disaster), and people who (claimed they) were nearby and suffered shock damage.

The first American case-hunters to arrive (and the last to leave) were Philip Stuto, a detective, and Terence Ford, an 'aviation consultant', who had been expelled from the Californian Bar Association for embezzlement. They prepared the way for Gerard C Sterns of the law firm Sterns, Walker & Lods (San Francisco). From the middle of October they rented an office, recruited intermediaries and a Dutch sole practitioner, for one purpose only: to acquire as many clients as possible, especially in the prized category of next of kin of deceased persons and severely wounded victims, under a contingency fee contract of 30 per cent. They gave a presentation in the Americain hotel, in downtown Amsterdam,

on Monday 19 October. Also in the second half of October, the Ghanaian community in the Bijlmer organized a memorial service and invited some attorneys. This strange mix of mourning and informing was the outcome of a failed effort by Sterns to contract the Bijlmermeer Collective. A few days earlier he had offered them a group of Ghanaian victims in return for a negotiable percentage of his contingency fee. During the mourning and informing session Ford showed compassion and business instinct at the same time. The Dutch attorneys present were disgusted. They said that there was no need to decide on the spot and they pointed out that a joint action would lower the fee percentage.

Crans thought to do good when he distributed in the relief centres a list of attorneys who were members of the Dutch Bar section on personal injury. However he aroused the indignation of other attorneys who were not on the list but who had had experience of the previous air crash three years earlier.

THE MID-ATLANTIC COMPROMISE

On 13 November, Crans organized a meeting in his office, which was attended by approximately 25 attorneys. Keith Gerrard of Perkins Coie, the Boeing law firm, was present, as well as Martin and Franklin. The message they tried to convey to the Dutch attorneys was that litigation in the USA would get nowhere since the American judge would consider himself a forum non conveniens. Secondly, Boeing would act as if liable without explicitly saying so. In the background was the assumption that a claim-receptive attitude on the part of Boeing might persuade any American judge that a denial in the USA would not put an end to justified claims. Under the implied (implicit) condition that the Dutch attorneys would refrain from taking legal action in the USA, Boeing would be willing to accept claims via Crans's law firm. Thirdly, American compensation standards were out of the question. In particular the 'turbo factor', as Crans put it in the interview, of punitive damages would be left out. On the other hand in hard cases of emotional damage, notably loss of relatives, the very restrictive Dutch standard would be relaxed. Overall, the outcome would be somewhere between continental Europe and the USA – a mid-Atlantic compromise, as it was called.

It was not the message the Dutch attorneys, who had hoped for American standards of settlement, wanted to hear. Phon van den Biesen, attorney at the Advocates' Collective Nieuwezijds felt cheated:

'They wanted to intimidate us. We were given a glossy binder with American case law to the effect 'no way in America'. Admittedly, the thrust in American law was not so unambiguous as we preferred to have it, but it wasn't so evidently impossible as they presented it.'

And indeed, what else could explain the presence of the American case-hunters?

Arthur Ballen, attorney of Speiser, Krause & Madole, was seated on the second row, just behind Prem Radakishun, attorney of the Bijlmermeer Advocates' Collective, on whose invitation he had flown in. He scribbled on a note for Prem:

'Do not irritate this man, he is very important. We're going to fix it within thirty days.'

That was too optimistic, but Crans was pleasantly surprised when Ballen confirmed Gerrard's overview of American law. At the end of the meeting Ballen called his senior partner, Jerry Lear, who came over to sign a contract with the Bijlmermeer Advocates' Collective. What made the Bijlmermeer Collective decide to work with the Speiser firm? Their attorney, Soedamah, said:

'I had learned some lessons from this previous air crash three years ago. On that occasion I felt obliged to subsume our clients in the contract with Podhurst. We were not satisfied with the settlement in that case, however. Podhurst gives in too early. What happened three years ago? Podhurst came with a settlement: take it or leave it. We could only take it, and leave him 15 per cent. At the end of October Prem asked a friend in New York to do some research on the leading firms in air crash litigation. The Speiser firm employs a lot of ex-pilots, Lear for example, who by the way has also been in the Federal Aviation Agency. We knew from the very beginning that America is where the money is, if not in proceedings, then in threatening with proceedings. Another lesson I had learned was to stay in command. This time we stipulated veto power in each individual claim. We ended up with 20 per cent for Speiser, 5 per cent for us, and 2 per cent expenses.'

A fortnight earlier the Advocates' Collective Nieuwezijds had tried to take the lead on the plaintiff's side. Six law firms were present at a first meeting: in addition to the two Collectives, Nieuwezijds and Bijlmermeer, there was also Hamer (the attorney who had visited Miami), J M Beer (another personal injury lawyer with his own firm), attorneys of the large corporate law firm Trenité Van Doorne, and of the state attorney's law firm, Pels Rijcken, which is a law firm with the State as its most important client. 'What are you doing here?' joked Radakishun to H Th Bouma of Pels Rijcken at the first meeting. 'Suppose we decide we will sue the State ...?' 'Then you will get all my clients.' The law firm was asked by the political authority of the Dutch Antilles to represent the Antillian victims. Did Pels Rijcken consider the problem of a conflict of interests? H Th Bouma said:

'Of course. We discussed the problem internally, but also with the authorities. We came to the conclusion that neither the Aviation Authority nor any other state authority was to be blamed. The official report of the Aviation Council on the disaster confirmed this conclusion.'

The Nieuwezijds attorneys and Hamer hoped for a joint decision in favour of Podhurst, but not only the Bijlmermeer Collective defected. Trenité Van Doorne and Pels Rijcken followed a different strategy with an hourly fee and a minimum involvement of American attorneys. One attorney with Pels Rijcken said:

'We thought it would be immoral that an American attorney would earn big money in cases in which liability as such is not an issue, but only the amount of money. No cure, no pay supposes that the attorney takes a risk. As soon as Boeing agreed not to contest liability there was no risk anymore, however.'

B Th Moerkoert, attorney with Trenité Van Doorne, had the same mixed feelings:

'The disaster took place here, my clients are here. It is against my professional pride to transfer my clients to American attorneys.'

Both firms, however, hired an American attorney on an hourly fee: this was Dick Crutch, who was practising law in Seattle (in the same building as Gerrard, in fact), for his expertise on American law.

ATTORNEY HOPPING AND CLIENT KIDNAPPING

The availability of two different strategies, and of different percentages within the contingency fees strategy gave rise to the counterpart of ambulance chasing, namely 'attorney hopping'. Clients compared their results: the Podhurst connection promised 78 per cent of the claim awarded, exclusive of appeal litigation, the Speiser connection promised 73 per cent of the claim, but all-in; what might be called the 'going Dutch' strategy promised unreduced claims, but kept silent on the amount that would have to be paid for the litigation. One particular client of Pels Rijcken hopped along different attorneys, only to end up where he started: with the Pels Rijcken law firm, because only here would the attorney's bill be fully paid by the State. Another client of Pels Rijcken was more or less kidnapped by a case-hunter from Sterns, and plied with alcoholic drinks to become their client. A video recording by the Pels Rijcken firm in the revalidation centre, in which the client/patient answered in the affirmative to the question 'Is this your attorney?', was needed to get the client back. Quite common was the situation in which clients asked for a second opinion and got a biased one. The Sterns law firm continued its ambulance chasing on the Dutch Antilles, where a group of victims spent Christmas to recover from the shock (their flight tickets paid for by El Al).

None of the law firms used the claim form Crans's firm had made. Each law firm went its own way, trying to survive in hectic circumstances. In particular the Advocates' Collective in the Bijlmermeer became a round-the-clock centre for all sorts of problems.

'A lot of people came along to ask us about accommodation, household furniture, welfare benefits, insurances ... At first, we worked for nothing; we didn't have time to fill in the legal aid forms. Then we became overwhelmed by legalization requests. I remember that a judge asked me disbelievingly: "Am I right that you wrote this complaint at 3 am this morning? That's what your fax says." "Yes, your honour." In the middle of October, when Ford and Sterns had their press conference in the city, we had to think about claims against Boeing and El Al. My son was born on the 27th of September. Till the end of the year I've only seen him during the night.'

While the Bijlmermeer Collective did everything themselves, the Nieuwezijds Collective hired two para-legals for the intake of the cases. Newsletters kept their clients informed. In the first, dated 30 November, they defended their choice for Podhurst, referring to the earlier SLM (Surinam Airways) settlement and to the bargain of 20 per cent attorney's fee plus 2 per cent expenses. (On 7 June 1989 a Surinam Airways DC8 crashed at Zanderije airport in Surinam. 176 people were killed, ten passengers survived. Although most passengers were Surinam or Dutch nationals and the disaster took place in Surinam, the case had important links with the USA, such as the employment agency, Air Crews International, the holding company of SLM, a lease and a maintenance contract - all Florida-based.) Table 1 (below) gives an overview of the client numbers and fee arrangements that eventually ensued.

For large firms such as Trenité Van Doorne and Pels Rijcken, only the specialized sections on personal injury and/or insurance law were involved, but nevertheless that meant 10 hours a day non-stop intake conversations with clients. They did the intake in teams of attorneys, some of whom, used to well-to-do clients, experienced a considerable culture shock:

'Most of our clients were unmarried mothers on welfare. They only trusted their own people, barely spoke Dutch or English. Only one of them was insured; he was the only Dutch person ... In these circumstances we badly needed their social workers.'

In the first few months the two firms together had about 15 attorneys on the case. At Crans's office, nine attorneys worked day and night during the first month, and it is estimated that the firm still spent 1,000 chargeable hours on the case in 1997, five years after the disaster.

INSIDE OR OUTSIDE THE DANGER ZONE

In the spring of 1993, Gerrard had received most claim files, supplemented with a claim assessment by Crans as to the probable outcome under Dutch law. At the end of September 1993 the framework of the settlement became known. It turned out to be wholly American in its clear distinction between the victims who were within the danger zone and thus eligible for compensation and those outside the danger zone who were thus without any right to compensation. The danger zone was defined as a circle of 100 metres around the zone of impact. The zone of impact itself was identified by the house numbers of the apartments affected. The following four categories of claims were recognised:

(1) next of kin of persons who died in the air crash;

(2) persons living within the danger zone and who were at home at the moment of the air crash;

(3) persons who at the moment of the air crash were visiting persons in category (2); and

(4) persons who at the moment of the air crash were situated within the danger zone and suffered physically as a consequence of the crash.

Table 1: Clients and fee arrangements

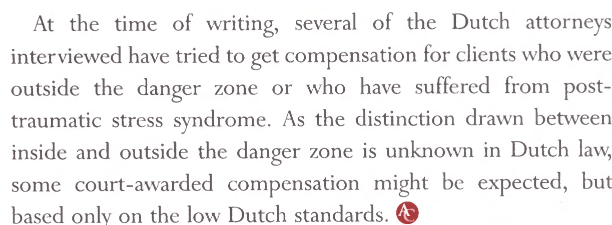
Attorney/law firm	Number of clients	Fee calculation
Bijlmermeer Collective	200	25% (Speiser), legal aid
Nieuwezijds Collective	120	20% (Podhurst), legal aid
Hamer	35	20% (Podhurst), legal aid
Trenité van Doorne	75	hourly basis/legal aid
Pels Rijcken	50	hourly basis/state financed
Van der Goen	75	hourly basis/legal aid
Sterns	200	33%

Several hundred of the approximately 1300 claims were discarded on the ground that they originated from outside the danger zone. It seems that Gerrard had an upper limit of US$100m in mind, two-thirds for the private victims and one-third for the municipality and the housing corporations. The compensation ranged from US$ 10,000 to US$ 2.3m in the case of a severely burnt man. The mid-Atlantic compromise boiled down to approximately 25 per cent of the American standards.

In a newsletter dated 30 September 1993, the Nieuwezijds Collective advised its clients within the danger zone to accept the offer. The Bijlmermeer Collective used its veto power effectively: they went over to Washington and succeeded in getting higher compensations for 20 clients in the first two categories.

'We were the pain in the ass of the Speiser firm. We discussed each individual claim one by one, and ignored their offer of a lump sum for our expenses.'

It remains an open question to what extent the law firms of Trenité van Doorne and Pels Rijcken were able to free ride on the efforts of the Podhurst and the Speiser connection, but it is quite certain that their clients did not have to pay percentages of the claim awarded. A tricky legal question was whether the clients on welfare would have to pass on their compensations to the State. According to legal theory the answer is in the affirmative, but the authorities turned a blind eye to this: they thought it better not to add to the hardship of being a victim by debt collecting.



At the time of writing, several of the Dutch attorneys interviewed have tried to get compensation for clients who were outside the danger zone or who have suffered from post-traumatic stress syndrome. As the distinction drawn between inside and outside the danger zone is unknown in Dutch law, some court-awarded compensation might be expected, but based only on the low Dutch standards.

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India

Legal aspects of oil and gas projects for foreign investors

by Dimple S Bath

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This article discusses the current legal and regulatory framework of the oil and gas sector in India and looks at the main factors within this framework that private investors, in particular foreign investors, should ideally take note of, including issues such as production sharing, canalisation, pricing and taxation. The Government of India has responded to globalisation and the concerns of foreign investors by making significant efforts towards further liberalising policies and guidelines governing this sector. The steps that it has taken towards deregulation are considered and in the light of these, some conclusions are drawn.

BACKGROUND

The distinct advantages of oil and gas over other forms of energy have led to their increasingly important role in displacing coal and other hydrocarbons as fuel in various sectors, particularly in the power sector. Oil contributes 40 percent of the world's energy sources, and India (along with China) accounts for approximately 12 per cent of global energy demand; natural gas contributes nearly 8 per cent to the primary energy supply in the country.

There is vast unexplored terrain in India: over 50% of its sedimentary basins are totally unexplored, approximately 35% of these basins are moderately or poorly explored, and fields offered in the past for acreage have been small and marginal.

Development during the 1980s saw a rapid rise in indigenous crude oil and natural gas production. The production from the Bombay High offshore basin contributed to the increase in oil production. In 1988–89 the production from the Bombay High region was 21.7m tonnes, accounting for 64 per cent of the total crude oil produced in the country, and the gross production of its associated and free gas accounted for about 7 per cent of the total gas produced in India in that period. Since the early 1980s the recoverable reserves of natural gas doubled from 352 billion m^3 to over 707 billion m^3. The net production of natural gas in 1994–95 alone was 17.3 billion m^3 and by the end of the century the power sector is expected to emerge as the largest single user of natural gas.

REGULATORY FRAMEWORK

To understand the legal aspects of oil and gas projects in India it is important to appreciate the manner in which this area is regulated and dominated by the two major public sector enterprises: Oil India Limited (OIL) and the Oil and Natural Gas Corporation (ONGC). Both these undertakings are state-owned companies engaged in the exploration, development and production of hydrocarbon resources, accounting for approximately 92 per cent of the total oil and gas produced in the country. Their role in management and decision making, particularly with regard to private investment and along with that of the Ministry of Petroleum and Natural Gas (MPNG), was further strengthened in 1974, when this sector was nationalised.

Refining and marketing of oil is conducted by several public sector companies including the Indian Oil Corporation Limited (IOC) and Hindustan Petroleum Corporation Limited (HPCL). The state owned enterprises do not seem, at present, keen to give up acreage and in fact ONGC is still contesting existing awards of acreage on the grounds that with their indigenous knowledge and expertise they are potentially the best operators. Furthermore, these undertakings are currently, and quite