

LITIGATION & DISPUTE RESOLUTION (LDR)

Applying Foreign Procedural Burden of Proof Rules to International Tort Claims

By Michiel Teekens

One of the most interesting Dutch rulings on international law this year came from the Court of Rotterdam (ECLI:NL:RBROT:2016:7258).

Rotterdam is the second largest city in the Netherlands and with Europe's biggest port, with an annual transshipment of approximately 456 million tons, it is one of the most important international business centres in the world. "Old school" taxi speedboats take you to the port and back to the vibrant inner city in just 34 minutes, providing great views of the astonishing 'Skyline of the Maas' along the way. The Court of Rotterdam is located right across the Erasmus Bridge and near Hotel New York, which is the former head office of the Holland America Line from which thousands of optimistic emigrants left for America chasing the American Dream. But I am not selling you the city, I am selling the flexible Dutch approach of the Court of Rotterdam in matters of international law and disputes.

Malaysian plaintiffs accuse Dutch and Malaysian defendants, among other things, of an international conspiracy to prevent recovery from damages. The tort action of MYR 125 million was brought before the Court of Rotterdam in 2015. Based on Article 4 Section 1 Rome II, Malaysian law applies to the tort claim, because the alleged damages occurred in Malaysia. From there, the Court of Rotterdam had to determine to what extent the Malay-



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sian law principle tort of conspiracy applied to the burden of proof and to what extent Dutch and Malaysian procedural law should be applied to the evaluation of the evidence.

The dominant view among commentators and courts, at least within Europe, is that the *lex fori* (law of the forum) applies to the procedural burden of proof rules and the *lex causae* (the applicable law to the tort or obligation) applies to the extent it includes substantive burden of proof rules. The latter includes the division of the burden of proof. Rome I and Rome II include similar provisions. Article 1 Section 3 Rome I and Rome II exclude the applicability of those conventions to rules of evidence and procedure. However, Article 22 Section 1 Rome II states that the law applicable to the tort also applies as far as it provides rules on the assign-

ing of the burden of proof. Article 18 Section 1 Rome I contains a similar provision which results in the applicability of the law governing the contractual obligation to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof. Therefore, if the applicable law to the tort also include rules on assigning the burden of proof, those elements should be applied by the court when adjudicating on the matter. However, the question as to whether the burden of proof rule is procedural or substantive is often difficult to answer.

The Court of Rotterdam ruled that the Malaysian tort of conspiracy includes substantive rules on the division of the burden of proof. These therefore apply. However, the Court of Rotterdam took it a step further by questioning whether the Malaysian procedural burden of proof rules should be applied when evaluating the evidence. Rules on the evaluation of evidence have a procedural character and in principle should not be determined by *lex causae*. Law systems greatly depend on procedural legal certainty and therefore the national rules on evaluation of proof should prevail. The Court of Rotterdam considered that the Malaysian rules on the evaluation of evidence, based on the balance of probabilities using a 'more probable than not' standard (i.e. preponderance of evidence), significantly differ from the stricter Dutch rules on the evaluation of evidence, based on a reasonable degree of certainty. Since



the Malaysian tort of conspiracy is so intertwined with the Malaysian rules on the evaluation of evidence, the Court of Rotterdam ruled that the Malaysian procedural rules must be qualified and applied as substantive rules in this matter. The Court of Rotterdam argues that applying the Malaysian rules on the evaluation of evidence to the tort of conspiracy also benefits the uniformity of international law.

This ruling reveals the international

approach of Dutch courts. It makes sense that if a foreign law principle is applied, such as tort of conspiracy, which is so intertwined with certain procedural burden of proof rules, those procedural rules should be applied because of their substantive character under those circumstances. It makes no sense to apply a foreign law principle if the scope and effects of that law principle are limited or changed by the *lex fori*.

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