Rome II Regulation

From 11 January 2009 there are new rules throughout the EU to determine which laws apply to litigation other than to claims based on contract. We provide a summary of the new rules below.

The new rules are set out in the Rome II Regulation (“Rome II”) which was published on 31 July 2007 and which applies to all EU Member States (with the exclusion of Denmark). These new rules apply, among others, to claims based on competition law. Rome II aims to harmonise the conflict of laws rules applied by Member States when dealing with disputes involving non-contractual obligations and means that one rule for choice of law in such disputes applies across all Member States. In this context “non-contractual obligations” includes claims based on tort such as negligence, breach of competition law and breach of statutory duty.

By ensuring the compatibility of conflict of laws rules, Rome II is intended to be one of a series of measures which ensure the proper functioning of the internal market. This should be achieved to some extent through Rome II’s impact on certainty as to the law applicable. The Regulation sits alongside rules already in place for the recognition of judgments in civil and commercial matters and the rules dealing with the law applicable to contractual obligations.

The rules in Rome II have implications for English choice of law rules. The following represents a summary of the key provisions of Rome II, highlighting some of the main changes to the system currently applied by the English courts.

A: When does Rome II apply?

Rome II applies to all non-contractual obligations arising in civil and commercial matters. It recognises that the concept of a non-contractual obligation varies across Member States and accordingly expresses that it should be understood as an autonomous concept. In English law it is understood as the law of torts. Certain types of non-contractual obligation are excluded from the scope of the Regulation in Article 1(2). These include, amongst others, “non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character.” In addition, Rome II does not apply to company law issues and defamation.

Rome II applies to any damage which occurs or is likely to occur from non-contractual obligations that have arisen or are likely to arise. The Regulation will only apply in cases where events giving rise to the damage occur after the date at which Rome II comes into force.

B: What are the key provisions in Rome II?

The rules set out in Rome II show some marked differences from the current system of law in application in England and Wales. Some of the principal provisions are detailed below:

1. The general rule (Article 4)

Article 4(1) of Rome II sets out the general rule for deciding which law applies to the non-contractual obligation in question. It states that, in general, the law applied shall be that of the country in which the damage occurs (or is likely to occur). This will be regardless of the country or countries where indirect consequences could occur. The general rule will apply unless either:

(a) Both parties are habitually resident in the same country (Article 4(2)); or

(b) The damage is manifestly more closely connected with another country (Article 4(3)). This applies even where the parties are both habitually resident elsewhere. It offers an ‘escape clause’ from Article 4(1) and 4(2) and aims to provide flexibility within the rules.

The general rule marks a move away from current English law. At the moment, the English courts apply the law of the country where the events constituting the wrong occurred. Whilst this may make little difference in most cases, it does mean that in some cases a different law will be applicable to the dispute than was previously the case. In some cases it may not be immediately clear where damage has occurred. This is particularly likely when the damage in question is financial loss.
2. Specific rules (Articles 5-9)
Alongside the general rule are a number of special rules for specific circumstances. Circumstances in which special rules apply for determining choice of law include:

- Product liability (Article 5)
- Unfair competition and acts restricting free competition (Article 6)
- Environmental Damage (Article 7)
- Infringement of intellectual property rights (Article 8)
- Industrial action (Article 9)

The following is a focus on two of these special rules which may be of particular relevance:

(i) Unfair competition and competition law (Article 6)

Article 6(1) states that “the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interest of consumers are, or are likely to be, affected.”

Article 6(3) goes on to state that “the law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.” Where more than one market is affected, a party may choose to base a claim on the law of a country whose market is “amongst those directly and substantially affected by the restriction of competition”. Article 6(3) covers infringements both of Community competition law and of national competition law.

Rome II makes it clear that Article 6 does not act as an exception to the general rule but is a clarification of it.

(ii) Environmental damage (Article 7)

In relation to environmental damage, Rome II discriminates in favour of the person sustaining the damage. Article 7 states that:

“the law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to [the general principle], unless the person seeking compensation for damages chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.”

3. Freedom to choose which law applies (Article 14)

A new development in the rules in this area is that Rome II enables parties to submit non-contractual obligations to the law of their choice. In the past it has been unclear as a matter of English law as to whether the courts will consider any agreement made between the parties about choice of law. Rome II makes it clear that courts will recognise an agreement made in one of two ways:

a) by an agreement entered into after the event giving rise to the damage occurred; or
b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred

In order to apply the choice needs to have been expressed or demonstrated with reasonable certainty by the circumstances of the case and must not prejudice the rights of the third party.

This move will be welcomed by those doing business in multiple jurisdictions. However, it is important to note that this freedom is not unlimited. The choice of the parties will not be applied where it would prejudice either the application of the law of a country where the event giving rise to the damage occurs or the application of Community law, when such law cannot be derogated from by agreement.

The parties cannot use an agreed choice of law to derogate from the application of rules on the law applicable to unfair competition and competition law.

4. Claims arising out of pre-contractual dealings (Article 12)

Rome II presents a change to the English law principle that pre-contractual negotiations are not binding unless an agreement is finally reached. Where a non-contractual obligation arises out of dealings prior to the conclusion of a contract, Rome II provides that an agreement as to the governing law made in those dealings will be determinative of the applicable law even where the contract was never entered into. This means it may be advisable to have governing law clauses checked at an earlier stage in negotiations than might previously have been the case.
5. Scope of the law applicable (Article 15)
The law determined to be applicable in accordance with these rules will be used to determine, amongst other things:

(i) The basis and extent of liability
(ii) The grounds for exemption from liability
(iii) The assessment of damage or the remedy claimed

6. Overriding Mandatory Provision (Article 16)
Rome II contains an overriding rule that nothing contained within the Regulation “shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.” For example, Rome II does not prevent a national court from applying its national competition law in addition to the competition law of the country identified under Article 6(3) above.

For further information on the material in this client alert please contact Katherine Holmes, Marjorie Holmes, Edward Miller, Lesley Davey, Fred Houwen or Richard Waite.

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