Rome II Regulation - Harmonisation of approach to the applicable law in tort

The Rome II Regulation on the law applicable to non contractual obligations (EU Council Regulation (EC) No. 864/2007) will apply in all member states other than Denmark from 11th January 2009. Businesses and their advisers need to get up to speed with the new Regulation now in order to:

- Evaluate the potential impact on businesses post implementation; and
- To begin choosing the applicable law in long term contracts where it is possible, and appropriate, to do so.

Key points under the Regulation

The following are the key points to note under the Regulation:

- The Regulation will apply in all EU member states other than Denmark, thereby harmonising the rules which apply to non contractual disputes (e.g. torts). At present, each country applies its own rules to determine the applicable law (in England these rules are set out in Part III of the Private International Law (Miscellaneous Provisions) Act 1995).
- Rome II will apply in all civil and commercial cases heard in a member state where there is a conflict of laws.
- The application of Rome II may or may not lead to the law of a member state being the applicable law.
- Commercial parties will be able to choose the law which will apply before the event takes place in certain circumstances (which is not currently possible under English law). The agreement has to have been freely negotiated and the rights of third parties cannot be prejudiced. Certain mandatory rules, however, cannot be evaded nor can the application of EC Community law in some circumstances.
- It is not possible to choose the law applicable to infringement of intellectual property rights, unfair competition, or acts restricting free competition.
- If there is no valid choice of law, then the general rule in article 4 is that the law of the country in which the damage occurs will apply, unless both parties have their habitual residence in another country, in which case that law will apply.
Both these rules are subject to a provision that where it is clear that the
tort/delict is manifestly more closely connected with another country, that
law will apply. A manifestly closer connection with another country might
be based on a pre-existing relationship between the parties, such as a
contract.

There are special rules dealing with a number of specific areas including
environmental damage, unjust enrichment, product liability and acts
committed without authority.

There are certain exclusions from the scope of the Regulation (e.g.
relating to negotiable instruments) and provisions allowing effect to be
given to mandatory rules, and the public policy of the forum.

Comment

When Rome II comes into force, it will mean greater certainty and predictability
as to the law applicable to a tort in the EU. As regards proceedings in England,
the starting point under the current rules is that the applicable law is the law of
the country in which the events constituting the tort in question occur – i.e. the
opposite of the general rule under Rome II. However, it is likely that the same law
would end up applying under both regimes as both general rules give way where
there is a more appropriate law to apply.

Areas likely to be of most interest under Rome II are the ability to choose the
applicable law, and the various special rules. As regards choosing the law, on the
one hand this will give certainty to the parties. On the other, it is difficult to predict
all the circumstances that might give rise to a claim, and the chosen law might
turn out to be less favourable than the law which would otherwise have applied.
As regards the special rules, in certain cases these give more flexibility to the
claimant to choose the law which best suits it. For example, in the case of
environmental damage, the person seeking compensation can choose to base
their claim on the law of the country in which the event giving rise to the damage
occurs or the law of the country where the event occurred.

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