

## **ROME II – A BRIEF OVERVIEW**

1. Regulation (EC) 864/2007 applicable to non-contractual obligations, or 'Rome II', is the result of a proposal of the European Commission in July 2003 aimed at introducing uniform choice of law rules in respect of non-contractual obligations arising from torts and most other forms of non-contractual obligation.
2. It is to be distinguished from Rome I, which concerned contractual obligations, and which was brought into effect in England and Wales via the Contracts (Applicable Law) Act 1990.
3. The Commission's proposal took a long and winding route but the final draft of the Regulation came into force in the United Kingdom and all other member states except Denmark on 11 January 2009.
4. From this date Rome II has replaced (for those claims to which it applies) the previous rules on choice of law in non-contractual claims set out in the Private International Law (Miscellaneous Provisions) Act 1995.
5. The Law Applicable to Non-Contractual Obligations (England, Wales and Northern Ireland) Regulations 2008 (SI 2008/2986) came into force on the same day and govern issues of choice of law between the various jurisdictions of the UK. However Rome II itself is directly applicable. It will be interpreted in accordance with general principles of interpretation for EU legislation. Final interpretation in cases of dispute will be for the European Court of Justice – once all domestic remedies have been exhausted and there is no further judicial remedy.

### **Scope of Rome II**

6. Rome II is expressed to cover non-contractual obligations in civil and commercial matters. By Recital 11 of the Preamble this is expressed to be an autonomous concept. In other words, just because something is characterised as a tort in English law does not necessarily mean that it falls under Rome II. It can probably safely be assumed that personal injury claims are covered!
7. Furthermore, not all non-contractual obligations are in fact covered by Rome II. Article 1(2) contains a list of non-contractual obligations which are specifically excluded from the ambit of the Regulation, for example obligations arising from family relationships, matrimonial property, company law, nuclear damage and defamation (this last type of claim being excluded at the request of media organisations).
8. Rome II applies to claims commenced after 11 January 2009 where:
  - a. The events giving rise to the damage occurred after the date on which it came into force (Article 31). Applying general EC rules, this is the

20<sup>th</sup> day after its publication in the Official Journal. That was 31 July 2007, giving a date for entry into force of 19 August 2007– or possibly 20 August 2007;

- b. The claim is brought in a UK court – irrespective of where the accident happened or where the defendants are domiciled.
9. There is a line of argument that Rome II applies to all claims where the accident occurred after its entry into force, whenever commenced, now that 11 January 2009 has passed. It is not thought that this is the correct interpretation but we shall see!
10. Rome II does not affect issues of jurisdiction, which continue to be governed (for defendants domiciled in member states) by the Judgments Regulation, or otherwise (depending on the defendant’s domicile) by the Brussels or Lugano Conventions or CPR 6.20.
11. Nor is it intended to apply to issues of procedure or evidence, see Article 1(3). The exclusion of issues of procedure will certainly throw up a number of interesting questions concerning the quantification of a claimant’s damages - considered elsewhere in this seminar.
12. Rome II brings in a number of significant changes relevant to personal injury actions arising out of overseas accidents. Chapter II contains the choice of law rules that will apply to personal injury actions.

### **Current position**

13. The current position is that, as a general rule, the applicable law is the law of the country in which the events constituting the tort occurred, see s.11 of the 1995 Act.
14. Under s.12 the law of another country can be applied to any issue in the claim if it appears, from a comparison of the factors which connect the tort with the country whose law is applicable under the general rule and the significance of any factors connecting the tort with another country, that it is ‘substantially more appropriate’ for it to do so, and see Edmunds v Simmonds [2001] 1 WLR 1003; Roerig v Valiant Trawlers [2002] 1 Lloyd’s Rep 681; Harding v Wealands [2006] 3 WLR 83.

### **General rule under Rome II**

15. Under Article 4(1) the general rule is that the applicable law is the law of the country in which the damage occurs (or is likely to occur – article 2(3)(b) – thus encompassing e.g. a victim who initially considers himself unhurt). Recital 17 of the Preamble provides that, in cases of personal injury, this is the country where the injury was sustained and not, for example, any country where the claimant continues to suffer ongoing damage.

16. It is as yet entirely unclear what law should apply in a fatal accidents case where a victim is killed overseas but where all of the losses suffered by the estate and the dependents are suffered in England.

### **Exception for common habitual residence**

17. Article 4(2) provides an important exception. This principle is to be displaced where claimant and defendant share a common habitual residence at the time when the damage occurs. So, where an English husband and wife are in France on holiday and a road accident occurs in which the wife is injured, English law will be the applicable law as between them.
  - a. This reflects to a substantial degree the position pre-Rome II. Most practitioners would agree that it is almost inevitable that a Court would agree that the general rule under s.11 would be displaced in favour of English law in such a scenario.
  - b. However article 4(2) is mandatory – and so any element of flexibility to reflect exceptional circumstances is removed.
  - c. Furthermore, there is no longer any scope for isolated issues to be considered by different applicable laws. Where article 4(2) applies, it applies to everything governed by Rome II.
  - d. It only applies if all parties have the same habitual residence. Thus:
    - i. English wife sues English husband – English law applies.
    - ii. English wife sues English husband and French insurer – French law applies.
    - iii. English wife sues English husband – English law applies. Husband defends on basis that accident was fault of French lorry driver. Wife joins lorry driver as second defendant – entirely unclear! Likelihood is that English law will continue to apply to the claim but arguments seem likely.

### **Escape clause**

18. Article 4(3) then provides a further alternative. If the tort is ‘manifestly more closely connected’ with another country, the law of that country will apply. This connection might be based in particular on ‘a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort in question’
  - a. It remains to be seen if ‘manifestly’ sets a higher threshold than ‘substantially’.
  - b. This provision cannot (it would appear) be used by either party affected by Article 4(2) as a route back to the law of the country where the accident happened.

### **Freedom to choose**

19. And the final option is that, under Article 14, parties have the freedom to submit to a law of their choice if they do so after the event giving rise to

the damage occurred. So, theoretically, the English wife could agree with the French insurer that English law should be the applicable law.

### **What is governed by the applicable law?**

20. The scope of the applicable law is set out in Article 15, and is extremely wide. Its application to ‘the existence, nature and assessment of damage’, and the implications of this startling provision, is considered elsewhere in this seminar. In addition, it covers issues including:
  - a. The basis and extent of liability (e.g. who is liable, vicarious liability);
  - b. Exemptions from liability, limitations of liability and divisions of liability (e.g. contribution, contributory negligence);
  - c. Whether a right to claim damages can be transferred, including by inheritance (e.g. claims on behalf of a victim’s estate);
  - d. Limitation, including rules relating to commencement, interruption or suspension.
  
21. The general view amongst those instrumental in pushing the Regulation through is (or was...) that it is a marked improvement on the current position as far as claimants are concerned. The view amongst practitioners and the judiciary might be somewhat more guarded. The one thing that is clear is that a lot is unclear. Plenty of litigation ahead!

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24 February 2009