

Rome II – The Law Applicable to Non-Contractual Obligations

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As of 11 January 2009 all UK courts, including those in Northern Ireland, are bound to follow the EU's Rome II Regulation on the law applicable to non-contractual obligations.

What is Rome II?

Rome II is an EU Regulation which governs the law to be applied to non-contractual obligations arising between parties in most civil and commercial matters. It does not seek to harmonise the substantive laws of each Member State (i.e. those governing how the non-contractual dispute is resolved) but it does aim to ensure that a uniform approach is adopted by all states when determining what law is applicable.

The general rule contained in the Regulation is that the law applicable, in order of priority, is:

- The law of the country where the damage occurs;
- The law of the country where both parties were habitually resident when the damage occurred;
- Where both parties agree, the law of the country with which the case is more manifestly connected than with the country in which the damage occurred.

There are special rules laid down in the Regulation that deviate from the overarching general rule. These relate to the specific domains of product liability, unfair competition, environmental damage, intellectual property, industrial action, unjust enrichment, *negotiorum gestio* (acts performed without due authority), the relationship between insured and insurer and rights of subrogation.

When, and to whom, does Rome II apply?

From 11 January 2009 every court of an EU Member State, with the exception of Denmark, must apply the Rome II Regulation. As noted above it will impact upon most civil and commercial non-contractual disputes but there are certain areas which are excluded from the scope of the Regulation, notably revenue, customs, administrative matters, the liability of the State and matrimonial and family matters.

Secondary legislation has been passed by the UK Parliament (The Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008, which came into force on 11 January 2009) which operates to ensure that the Rome II Regulation also extends to conflicts solely between the laws of England and Wales, Scotland, Northern Ireland and Gibraltar.

In practical terms, what is the effect of Rome II?

Prior to the coming into effect of Rome II all of the UK's domestic courts were bound to follow section 11 of the Private International Law (Miscellaneous Provisions) Act 1995 which states that in choosing the law to be applied "the general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur." It is therefore likely that in many cases Rome II will make very little difference (as the tortious act and damage will occur in the same country), however there will be cases where Rome II will result in a different law being applied than would have been under the 1995 Act (where the tort occurs in one country but the damage occurs in another).

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By ensuring uniformity across all Member States, Rome II will allow parties involved in cross-border transactions to conduct their business with greater certainty as to the law that will apply should a dispute arise.

There are a number of rules contained in Rome II that lack in clarity and it is possible to envisage many scenarios that could arise where the rules do not provide a clear steer as to which governing laws ought to apply. However, as with all legislation in its infancy, the extent of such difficulties will only emerge through the test of time and it is intended that the European Commission will report on the application of the Regulation, putting forward any necessary amendments, no later than 20 August 2011.

Rome II means that it is more important than before that parties agree contractually on the law that will govern their non-contractual obligations, this is particularly so where one or both parties are based in Northern Ireland but operate outside Northern Ireland.

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