

Charles Dougherty and Marie Louise Kinsler

Introduction

On 11 January 2009 Regulation (EC) 864/2007 on the Law applicable to non-contractual obligations ("Rome II") came into force in the United Kingdom. From that date Rome II will, where it applies, replace the previous choice of law rules contained in the Private International Law (Miscellaneous Provisions) Act 1995 ("the Act"). It is the intention of this brief guide to provide an overview of Rome II.

Scope: How, when, where and to what does Rome II apply?

How?

Rome II is an EU Regulation and is, therefore, directly applicable in the UK. There is no need for implementing legislation and inconsistent legislation is disapplied.¹ The Regulation will be interpreted in accordance with general principles of interpretation for EU legislation. It will be given a purposive interpretation with assistance being drawn from the Recitals and *travaux préparatoires*. Ultimately, the interpretation will be a matter for the European Court of Justice ("ECJ") although, in common with the Judgments Regulation², references to the ECJ are restricted to courts against whose decision there is no judicial remedy in national law – in England this means the House of Lords.

When?

Rome II applies in respect of proceedings commenced from 11 January 2009. It is likely that it applies in such proceedings to events giving rise to damage which occur after 19 August 2007, although surprisingly this is not beyond doubt. That, however, appears to be the combined effect of Articles 31 and 32 of Rome II.³

Where?

Rome II will apply in all proceedings brought in the UK, whether the conflict of law situation arises in relation to a Member State of the EU or another country: see Article 3. For example, Rome II would apply to proceedings brought in England in relation to an accident in Australia. The fact that there is no connection with the EU, other than that the proceedings are brought in a Member State, is irrelevant.

Rome II does not as such apply to resolve choice of law questions arising between the various jurisdictions in the United Kingdom. Regulations have been introduced to extend the application of Rome II to cover such cases.⁴ The Regulations entered into force on 11 January 2009.

¹ Note, however, that Regulations have in fact been introduced to remove inconsistencies. See fn 4.

² Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments.

³ Article 32 provides that Rome II applies from 11 January 2009. Article 31 states that Rome II applies to "events giving rise to damage which occur after its entry into force." Applying general EC rules for legislation, Rome II came into force on the 20th day after publication in the Official Journal (see Article 254(1) EC Treaty) i.e. 19 August 2007, having been published on 31 July 2007. See Dicey and Morris S-35-168

⁴ The Law Applicable to Non-contractual Obligations (England, Wales and Northern Ireland) Regulations 2008: SI 2008/2986

To What?

Rome II applies in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters: see Article 1(1). A number of matters, such as defamation, obligations arising out of company law or voluntary trusts, are specifically excluded from Rome II: see Article 1(1) and 1(2).

The new choice of law rules for Tort

Chapter II contains the choice of law rules for tort. Article 4 is entitled “General rule”⁵ and comprises three elements: a general principle, an exception and an escape clause. Article 4 as a whole looks not dissimilar to the current provisions under the Act although differences may arise when the courts come to apply it.

The general principle: Article 4(1)

The general principle is that the applicable law will be the law of the country in which the damage occurs – *lex loci damni*: see Article 4(1).⁶ Any role for the law of the country in which the event giving rise to the damage occurred or in which the indirect consequences of an event occurred is specifically excluded. Which law should apply to a claim by a company which has suffered loss in Germany, Denmark and Italy in reliance on advice given by a professional advisor in the UK?

The general rule focuses on the distinction between direct and indirect damage. This distinction is familiar from the ECJ’s caselaw on Article 5(3) of the Judgments Regulation. The ECJ has drawn this distinction and only gives a

⁵ Articles 5-9 provide for specific cases: product liability, unfair competition, environmental damage, intellectual property and industrial action.

⁶ Damage includes damage likely to occur: see Article 2(3)(b)

determining role to direct damage: see Case C-364/93 *Marinari* [1995] ECR I-2719. It is clear from the *travaux préparatoires* of Rome II that the legislature intended to reflect this distinction in Article 4(1) and, therefore, the ECJ’s caselaw on this point may be of assistance in interpreting Rome II.

Article 4(1) should present few problems in a straightforward personal injury case. The country in which the injury was sustained i.e. where the accident took place, will generally be the country in which damage occurs: see Recital 17 of Rome II.⁷ The fact that the victim subsequently suffers ongoing consequences in another country should not be relevant: cf. *Henderson v Jaouen* [2002] 1 WLR 2971.

However, more difficult questions may arise in related areas especially in claims involving indirect victims or, possibly, indirect damage. For example, which law should apply to a claim by dependents in England in respect of a fatal accident abroad is a matter on which there are likely to be divergent opinions.

The exception for common habitual residence: Article 4(2)

The general principle is displaced where the Claimant and Defendant share a common habitual residence at the time when the damage occurs. A similar concept is found in the conflicts rules of a number of Member States and, indeed, in England in the “cocoon” cases⁸ under the Act. However, it should be noted that Article 4(2) is a rigid rule not a flexible exception as under the Act.⁹ The only scope for argument

⁷ Note that this accords with the current position under the Private International Law (Misc Provisions) Act 1995.

⁸ Cocoon cases are cases where all the relevant parties are from a country other than that where the accident occurred and there is no material connection between the tort and the place where it occurred. For example, *Edmunds v Simmonds* [2001] 1 WLR 1003 is a cocoon case.

⁹ Had Article 4(2) applied the result on the issue of applicable law in *Harding v Wealands* [2007] 2 AC 1 might have been different thereby rendering redundant the argument on substance and procedure.

under Article 4(2) is whether there is in fact common habitual residence. If there is, it automatically displaces the law applicable under Article 4(1).

The “escape clause”: Article 4(3)

If it is clear that the tort is manifestly more closely connected with a country other than that indicated by Article 4(1) or (2), the law of that country will apply: see Article 4(3). This Article is in similar terms to s.12 of the Act although some commentators have questioned whether the standard of “manifestly” is higher than that of “substantially” under the Act. Article 4(3) specifically refers to a pre-existing relationship, such as a contract, being relevant to the assessment. Other relevant factors will be similar to those relevant for s.12 including: the parties; the event giving rise to the damage and, possibly, the consequences of that event.

An open question exists as to whether the wording of Article 4(3) permits displacement of the law determined by Article 4(2) in favour of that determined by Article 4(1): the wording would suggest not, but there is no other good reason why not.

Special rules

Rome II lays down special choice of law rules relating to product liability, unfair competition, environmental damage, intellectual property and industrial action in Articles 5 to 9. It is beyond the scope of this short guide to consider these special rules.

The new choice of law rules for unjust enrichment, negotiorum gestio and culpa in contrahendo

Unjust enrichment: Article 10

At common law, the choice of law rule for restitution/ unjust enrichment is not entirely settled. The preferred view is that the starting point is the law of the place of the enrichment, although this can be displaced if another law can be shown to more appropriate.

Rome II provides a cascading choice of law rule for unjust enrichment claims. Article 10(1) provides that where the unjust enrichment claim concerns an existing relationship between the parties, such as one in contract or tort, that law will apply to the unjust enrichment claim. Where the law cannot be determined in accordance with Article 10(1), Article 10(2) provides that where the parties have their habitual residence in the same country when the event giving rise to the enrichment occurred, the law of that country shall apply. Where the law cannot be determined in accordance with either Article 10(1) or (2), the applicable law will be the law of the country where the enrichment occurred: see Article 10(3).

Article 10(4) provides an escape clause in circumstances where it is clear that the claim is manifestly more closely connected with a country other than that identified by the Article 10 (1),(2) or (3).

Much of the difficulty in this area will stem from the characterisation of claims, particularly of equitable claims. For example, whilst it is reasonably clear that a knowing receipt claim should be characterised as restitutionary, the characterisation of a claim for the recovery of a bribe is much more difficult.

Negotiorum Gestio: Article 11

The concept of *negotiorum gestio* essentially relates to agency without authority and the extent to which that non-authorized agent is entitled to payment for the benefit he has bestowed on the recipient/ principal. This is a concept recognised by many continental systems but not by English law. It is closely related to unjust enrichment.

The rules are in substance the same as those for Article 10.

Culpa in contrahendo: Article 12

Culpa in contrahendo (fault in the formation of contract) is concerned with pre-contractual liability. Unlike many continental systems,

English law does not have a general principle of *culpa in contrahendo*. There is, for example, no general duty of good faith in contractual negotiations. However, some English causes of action will fall within the scope of Article 12, where they relate to the negotiation of a contract: for example, negligent or fraudulent misrepresentations.

Article 12(1) provides that the applicable law will be the law that was (or would have been) applicable to the contract which was being negotiated. Where this cannot be ascertained, Article 12(2) provides a cascade of choice of law rules almost identical to Article 4 (law of the place of damage and law of the place of common habitual residence), as well as an escape clause.

Choice of law clauses: Article 14

Rome II gives parties a (limited) option of choosing the applicable law to their non-contractual obligation.

Article 14(1)(a) allows all parties to choose their law by an agreement entered into after the event giving rise to the damage has occurred. This provision is only likely to have limited practical significance.

Much more important is Article 14(1)(b) which allows a pre-event choice of law where all the parties are pursuing a commercial activity and the choice of law agreement has been 'freely' negotiated. What will constitute a freely negotiated agreement is likely to be source of debate. Simply including a choice of law clause in a standard form agreement is, however, very unlikely to satisfy the requirement that the choice of law agreement be freely negotiated.

In all cases, any agreement needs to be expressed or demonstrated with reasonable certainty and will not prejudice the rights of third parties. The agreement need not, however, be in writing.

Commercial parties will need to consider the scope of choice of law clauses and whether they

are wide enough to encompass a non-contractual as well as contractual choice of law.

What does the applicable law govern?

The scope of the applicable law is very wide. Article 15 sets out the issues to be governed by it including: liability (together with exemptions from, limitations of and division of); vicarious liability; limitation; assignability of claims; and the existence, nature and assessment of damage. This last item represents a significant change in the law.

In *Harding v Wealands* the House of Lords held that the assessment of damages in tort was for the law of the forum (*lex fori*). In providing that assessment of damage is to be governed by the applicable law, Rome II has the effect of reversing this decision. That much is clear. However, a number of issues remain unresolved. For instance, Rome II only provides for law or rules to apply but much of the process of assessment of damages in the various Member States is determined not by law or rules but by practice. Furthermore, the distinction between substance and procedure is still difficult and is preserved: see Article 1.3 which provides that Rome II does not apply to procedure and evidence. Are tariffs or discount rates procedure or not? These issues will arise for determination now that Rome II is in force. What does seem clear, however, is that courts in different countries will still arrive at different conclusions as to quantum even if they are, in theory, applying the same underlying law.

Rome II preserves a residual role for laws other than the applicable law in a variety of other ways. Article 17 maintains the current position under English law and provides for account to be taken of the rules of safety and conduct applicable wherever the event which gave rise to the damage occurred. Article 16 provides that mandatory rules of the forum shall be applied irrespective of the applicable law and Article 26 permits a court to refuse to apply the applicable law determined by Rome II if it would be manifestly incompatible with public policy. The precise interaction between the applicable law and other laws remains to be seen.

Conclusion

By adopting common choice of law rules for non-contractual obligations within the EU and widening the scope of the applicable law, Rome II should reduce the incentive for forum shopping. Nevertheless, the new rules are likely, at least in the short term, to lead to considerably more uncertainty.

As always, issues as to jurisdiction and choice of law should be identified and dealt with at the earliest possible stage to enable any potential benefit to be obtained.

DISCLAIMER:

No liability is accepted by the authors for any errors or omissions (whether negligent or not) that this article may contain. The article is for information purposes only and is not intended as legal advice. Professional advice should always be obtained before applying any information to particular circumstances.

About the authors



Charles Dougherty BA (Oxon) BCL (Oxon)

CALL 1997

Direct line +44 (0)20 7822 1262

E-mail cdougherty@2tg.co.uk

Charles specialises in commercial law, in particular conflict of laws, insurance and reinsurance work and commercial fraud. He is a former law lecturer and management consultant.

Charles has extensive experience of dealing with disputes as to jurisdiction and applicable law. Notable reported cases in the area include *Harding v Wealands* [2007] 2 AC 1, *Hornsby v Rumic* [2008] EWHC 1944 and *Hulse v Chambers* [2001] 1 WLR 2386. He is a contributor to, and assistant editor of, *European Civil Practice* (Sweet & Maxwell, 2nd ed).

He is recommended in Chambers & Partners for Insurance & Reinsurance and Travel and in Legal 500 for Professional Negligence, Insurance & Reinsurance and Civil Fraud. He has been called to the Bar of the British Virgin Islands.

"Incredibly switched-on"; "really knows his subject" (Chambers & Partners 2009)



Marie Louise Kinsler BA (Cantab)

CALL 1991

Direct line +44 (0)20 7822 1267

E-mail mlkinsler@2tg.co.uk

Marie Louise has recently returned to Chambers after an extended break at home with her children. Before that she had built up a substantial practice in commercial and common law. She has returned to practise in that area. She has a particular interest in claims with an international element where she can use her knowledge of EU law and private international law.

Since her return she has been instructed as junior counsel in the Court of Appeal in *AXA v Norwich Union* [2007] EWHC 1046 (Comm) concerning the interpretation of the Road Traffic Act by reference to the European Motor Directives. She appeared in the Court of Appeal in October 2008 in *Cooley v Ramsey* – a case concerning the jurisdiction of an English court in relation to an accident abroad. She is currently instructed in *McCall v Poulton* [2008] EWCA 1313 in which the Court of Appeal has referred a number of questions to the ECJ concerning the scope of the *Marleasing* principle and direct effect. Apart from her career in Chambers she has taught European law at Cambridge University and spent some time as a professional support lawyer in the EU and Competition Law Group at Linklaters. She contributed to *European Civil Practice* (Sweet and Maxwell, 2nd ed).

Full CVs are available at www.2tg.co.uk