



## Rome II - Non contractual disputes

### Introduction

A new European Regulation governing non-contractual international disputes came into force in January 2009. The "Rome II Regulation" (864/2007/EC) is intended to help Courts decide on the applicable law for an international dispute. It is important to recognise that contractual disputes can have associated non-contractual disputes and that the rules governing the applicable law are complicated. Parties to international contracts can now avoid uncertainty about related non-contractual disputes by stating a governing law to cover both contractual and non-contractual disputes.

### Scope

The "Rome Convention" sets out the rules determining the applicable law for contractual disputes. It will be replaced at the end of the year by the "Rome I Regulation". The objective of both the Rome I and Rome II Regulations is to standardise the rules by which the applicable law is determined. Jurisdiction, the venue where a case is heard, is determined by different rules including the "Brussels Regulation".

Non-contractual obligations include torts such as negligence plus other less obvious areas like unjust enrichment. This could be important in banking, insurance, fraud and personal injury cases. There are some specific exclusions from the scope of the Rome II Regulation such as privacy, including cross border Data Protection Act claims, rights relating to personality and defamation.

### Two important changes

#### 1. The General Rule

Until now the general rule for determining the applicable law for a claim made in tort was that the place where the harmful act was committed gave rise to the applicable law. The new starting point is that the applicable law for non-contractual disputes will be determined on the basis of where the damage occurs or is likely to occur regardless of the country or countries in which the acts giving rise to the damage occurred. The general rule can be displaced where the claimant and defendant both have their habitual residence in the same country at the time that the

damage occurred or where it is clear from all the circumstances of the case that the tort is manifestly more closely connected with a country other than that indicated by the general rule.

There are special rules for product liability claims, unfair competition claims, IP infringement, environmental damage, industrial disputes and unjust enrichment.

#### 2. Agreeing Governing Law in Contracts

Prior to the entry into force of the Rome II Regulation parties were not able to agree the applicable law for their non-contractual disputes. Now, parties have freedom to choose the applicable law either by an agreement entered into after the event giving rise to the damage occurs or in advance. It will only be possible to agree in advance where both parties are pursuing a commercial activity and their agreement is freely negotiated. That means that in business to consumer contracts you cannot agree in advance that tortious claims will be governed by English Law. However for business to business contracts on non-standard terms, parties can agree the place where any dispute will be resolved, the law that applies to the contract and the law that will apply to any claims arising outside the contract.

### The steps to take now

It is always good practice to include in contracts a governing law and jurisdiction clause. Now, for all new international arrangements entered into, parties will need to consider extending the scope of that clause to cover non-contractual claims arising between the parties as well as contractual ones. For existing long term relationships, it may be worth considering a variation or contractual amendment to cover such non-contractual claims.

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