



Client Alert
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Rome II compels English court to calculate damages under Spanish law

The English High Court has applied Rome II for the first time in a reported decision (*Jacobs v Motor Insurers Bureau* [2010] EWHC 231 (QB)) reaching the rather disquieting conclusion that Spanish law should be applied to determine the computation of compensation payable to a UK resident under a UK statutory compensation scheme (the Motor Insurers Bureau's scheme for uninsured motorists).

Impact of Rome II

Rome II (more correctly referred to as Council Regulation (EC) No 864/2007) came into effect in January 2009 and binds all EU member states (except Denmark). It is relevant wherever there is a conflict of laws in a commercial or civil situation arising out of a non-contractual obligation. In this case, the conflict of laws arose when the English claimant was injured in Spain when he was struck by an uninsured German driver (resident, at the time of the accident, in Spain).

Although the facts of this case may not be directly relevant, the case does illustrate for the first time how Rome II can often produce an unforeseen outcome, even in common commercial situations. There are reciprocal arrangements in all Member States for compensating those injured by uninsured drivers and the claimant acted correctly in applying to the English scheme for compensation, yet his lawyers were no doubt surprised to discover that they would need a Spanish legal opinion in order to calculate the level of compensation due. The fact that the case came before the English High court suggests that the sum due under Spanish law was somewhat less than that which the claimant would have received under English law.

What should businesses do to mitigate Rome II

(i) At the point of contract

Businesses can - and should - take steps to mitigate the potential uncertainties the impact of Rome II on their non-contractual liabilities (typically torts or delicts such as negligence, misrepresentation or economic torts such as inducing a breach of contract or conspiracy). Whilst its impact cannot be avoided in all situations (explained further below) parties "pursuing a commercial activity" in a "freely negotiated" agreement are, in most situations, where third parties are not thereby affected, able to agree in advance (or, indeed, after the event) which law will apply to determine their non-contractual obligations.

Businesses are therefore advised to consider the wording of their governing law and jurisdiction clauses and, where appropriate, to amend the wording to specify non-contractual as well as contractual obligations. In many situations, existing wording such as "arising out of or in connection with this Agreement" will be sufficient to encompass the type of non-contractual obligations which parties would wish to be determined in accordance with the contractual provisions, but amending the wording to put this beyond doubt is to be recommended.

(ii) During normal operations

The default position or "General Rule" of Rome II states that the governing law applicable to non-contractual obligations will be that of the country - anywhere in the world - where the damage occurs (irrespective of where the event giving rise to the damage occurred and irrespective of where the indirect consequences occurred) unless both of the parties to the dispute were resident in the same country at the time when the damage occurred, in which case the law of that country will apply, unless it is clear that the non-contractual obligation was "manifestly more closely connected" with a different country, in which case the law of that country will apply (the latter in preference to both the General Rule and the law of the country in which both parties were resident).

For certain types of claim or dispute, it is not possible to avoid the impact of Rome II by agreement. In claims involving allegations of unfair competition, restriction of competition, infringement of an intellectual property right, harm to the environment, product liability and unjust enrichment either the General Rule or special rules specific to the particular type of claim will apply - irrespective of any agreement between the parties. Attempts to agree the governing law applicable to non-contractual obligations with consumers or employees are also unlikely to succeed either as a result of domestic legislation designed to protect them which overrules any agreement between the parties (so-called "mandatory laws") or as a result of the fact that they fall foul of the requirement that parties' choice of law be "freely negotiated" - a phrase which is intended by Rome II to give protection to weaker contracting parties.

Where the General Rule applies, it will often be difficult to analyse where the damage occurs on the facts and the analysis may well result in unexpected consequences as, in many situations, it could well be neither the governing law of the countries where the parties are resident nor the country in which they actually incur resulting financial loss.

The impact of the General Rule - and hence, the need to avoid it, where possible, by agreeing the applicable law at the point of contract, is wide-ranging. It not only affects what we would consider to be substantive law (e.g. the constituent parts of a tort), but also issues which are sometimes considered to be more procedural. If Rome II applies to a commercial situation, the governing law of the country where the damage occurs will determine not only the basis and extent of a party's liability, but also factors such as limitations on and exclusions of liability, the existence, nature and assessment of damages, the existence, nature and assessment of any remedy claimed and liability for the acts of another person (employee, agent etc).

Uncertainty prevails as to how far-reaching the application of a Rome II determined applicable law will actually be, particularly as it marks a departure from previous English conflict of law rules. Also, in some aspects (such as the measures which a court may take to prevent or terminate injury or damage) the applicable law must be applied "within the limits of powers confirmed on the court by its procedural law". As, in the *Jacobs* case, the applicable law and jurisdiction may often be different, this could lead to some unintended consequences.

(iii) During pre-contract negotiations

The impact of Rome II is not felt only at the point of contract or confined to specific types of claim. Non-contractual obligations can arise as soon as parties begin to negotiate. Different countries treat pre-contractual negotiations in different ways. Some laws, such as English law, give no or very limited remedy where one party walks away from negotiations without reason at the 11th hour, whereas other laws, such as German law, not only impose obligations of good faith on negotiating parties, but also enable parties to claim reasonable expenses where negotiations are terminated at a late stage without cause.

If parties do not agree at the outset which law will apply to non-contractual obligations arising out of pre-contractual negotiations, Rome II will determine this for them by applying, if it is ascertainable at such an early stage, the law of the contract itself - or the law that would have governed the contract if it had been concluded.

If the law which governs (or would have governed) the contract is unclear or was itself still in dispute, the General Rule of Rome II (described in more detail above) will apply so that, put succinctly, the governing law will be the law of the country in which the damage occurred or, where both parties were resident at the relevant time in the same country, the law of that country or where the circumstances are "manifestly more closely connected" with a different county, the law of that country.

Conclusion

Rome II was introduced with the express purpose of harmonising law and standardising outcomes across Member States for those affected by non-contractual obligations. It has direct effect in all Member States (except Denmark), without the need for implementing legislation. It applies in all commercial and civil circumstances involving a conflict of laws. As we have seen above, its impact is broad and can produce surprising results.

All corporations should ensure that express provision is made for the governing law applicable to non-contractual obligations arising in relation not only to completed contracts, but also to pre-contract negotiations. All corporations and particularly those catering for the needs of or supplying products to consumers, those involved in activities which risk harm to the environment and those who enjoy a dominant or significant share of their market should take steps to understand how the nature and extent of their liability may differ under various applicable laws that might, pursuant to Rome II, be determined as applying to this

future exposure.

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