

# Corporate Legal Alert

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## Non-contractual obligations and governing law – what should your agreement cover?

**From 11 January 2009, a new EU Regulation, known as Rome II, changes the law governing non-contractual obligations in the EU. This alert discusses those changes.**

### Background

Before 11 January 2009, in the UK the question of which law applied to non-contractual obligations (for example torts such as claims for misrepresentation and negligence) was not subject to EU rules. The applicable law would generally be the law of the country in which the event(s) constituting the tort occurred.

Rome II (EU Regulation (EC) No. 864/2007 on the Law Applicable to Non-Contractual Obligations) changes the rules that determine the law applicable to non-contractual obligations. Rome II came into force on 20 August 2007 and applies in all EU member states other than Denmark (which has opted out of Rome II) from 11 January 2009.

Rome II relates to non-contractual obligations. It does not relate to the question of which law applies to claims arising out of contractual relations – which has been the subject of EU rules since the 1980s, with courts in the EU member states applying a single set of rules to determine the applicable law for those claims.

## What has changed? The general rule

Under Rome II, the general rule is that the applicable law is now the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurs (Article 4(1)).

There are a number of exceptions to this general rule, for example:

- (a) if the person claimed to be liable and the person sustaining the damage are both habitually resident in the same country at the same time when the damage occurs, then the law of that country will apply (Article 4(2)); and
- (b) where it is clear that the tort is “manifestly more closely connected” with another country, then the law of that other country will apply (Article 4(3)).

There are also specific exclusions from the Rome II regime, set out in Article 1(2), including bills of exchange and other negotiable instruments.

## Breaking new ground

Significantly, Article 14 allows parties to a contract to agree to submit non-contractual obligations to the law of their choice. Therefore, in addition to choosing the law that will apply to the contract and disputes arising under the contract, the parties will also be able to choose the law that will apply to regulate any non-contractual disputes arising between them. Contracting parties may wish to rely on Article 14 by extending the governing law clause in their agreement to include an express reference to any non-contractual obligations arising out of or in connection with the agreement.

Rome II also provides that the law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract (whether or not the contract was actually concluded) will be the law that applies to the contract, or the law that would have applied had the contract been entered into (Article 12(1)). Where the applicable law cannot be determined on this basis, further tests are set out in Article 12(2) to determine the governing law.

## When to take advantage of the new law?

Whether or not parties should extend their governing law clause to refer to non-contractual obligations depends on the circumstances of the particular case. Various factors should be taken into account, including the choice of jurisdiction in the contract (which may be foreign) and whether or not that jurisdiction is exclusive. To state the obvious, the courts of non-EU states will not generally (or necessarily) give effect to Rome II.

If the law governing the contract is English law and the UK courts are to be given jurisdiction, then it still does not follow that the governing law clause should automatically be extended to refer to non-contractual obligations. It may well be advantageous for the parties to stipulate that English law is to apply also to non-contractual obligations as this would achieve an element of certainty. Also, the parties may wish to achieve consistency between the law applying to contractual and non-contractual disputes. However, bear in mind that in some cases stipulating a choice of law for non-contractual disputes which are, after all, unforeseeable, may be disadvantageous to one or other (or both) of the parties.

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