B J Macfarlane & Co

United Kingdom: Rome II
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Article by Leila Woollam

The Rome Convention (last updated 1980) provides that in the EU, and in the absence of an express choice of law clause, a contract will be governed by the law of the country with which it is most closely connected. It sets out a number of presumptions which apply to determine that "closest connection". The intention was to ensure that parties to cross-border disputes within the EU would each apply the same law, thus promoting certainty and discouraging forum-shopping. However, national courts have been interpreting the "closest connection" test in increasingly different and sometimes partisan ways, thus defeating the purpose of the convention itself. There has also been rising concern that the overriding mandatory application of certain provisions of the Rome Convention can, on occasion, displace a clearly drafted choice of law clause.

Rome I and Rome II convert the Rome Convention into EC Regulations and provide an updated and standardised set of rules to determine the applicable law.

Rome II came into force on January 11th 2009. It applies to non-contractual obligations and therefore impacts liability insurers as it will apply to tortious disputes, the enforcement of judgments, and environmental issues. Denmark has opted out of Rome II.

Prior to Rome II, the principle applied throughout the EU was that the applicable law is that of the place where the harmful act was committed. The applicable law is now that of the place where the damage occurs or is likely to occur, regardless of the place where the harmful act giving rise to the damage occurs, and need not be in the EU. This general rule is subject to certain exceptions, including when

- The damage is more closely connected with another forum
- The party liable and the party suffering both have their domicile in the same country
- The parties have agreed on a particular law to govern their non-contractual obligations (Article 14)

Article 14 is the most significant provision since it allows parties to agree on a law governing their non-contractual obligations. Under English law to date, such agreements have not been recognised. There are two issues to note, however

- Parties will be bound by that choice of law, should a dispute arise, and there is a risk that the law of the place where the damage occurs could be more favourable
- Parties to a contract cannot bind third parties, and a claimant suing a defendant insured cannot be forced into the law chosen between insured and insurer.

Another word of warning is that Article 12 provides that irrespective of whether a contract is actually concluded, the governing law applicable to non-contractual obligations is the law that would have applied had the contract been entered into. Again, this is very different to the prior position as English law rarely recognises pre-contractual obligations where no contract is concluded. So parties may find that where a governing law clause is included in a draft agreement, they are bound by that choice of law regarding their non-contractual liabilities even where no contract is finalised.

Rome I comes into force on December 17th 2009 and applies to contractual regulations. It standardises the "closest connection" tests in the Rome Convention. The notable change it will introduce is that notwithstanding an express choice of law made by the parties, should the provisions of the chosen law be illegal under the laws of the country where the contract is performed, the latter set of laws will take precedence. This change has been hotly resisted in some quarters and it remains to be seen how it will be implemented.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Specific Questions relating to this article should be addressed directly to the author.

House Of Lords Reinforces "Without Prejudice" Protection (Speechly Bircham LLP)

The Ofulue & Anor v Bossert case considered whether a without prejudice letter sent in prior proceedings could be brought before the court in subsequent proceedings between the parties.

The Thin Blue Line (Barlow Lyde & Gilbert LLP)

Alex Buckley, Luke Buckley and Simon Buckley v Chief Constable of Thames Valley Police, Court of Appeal (2009) was an appeal by the claimants from a first instance decision dismissing their claims for wrongful arrest by the defendant's officers.

Kennedys Scores Significant Success Against Irwin Mitchell On Costs Where Settlement Figure Was Only Marginally Higher Than Much Earlier Part 36 Offer (Kennedys)

Kennedys and its client Carillion scored a major success recently at Sheffield County Court against a claimant represented by Irwin Mitchell.

Execution Of Documents At A "Virtual" Signing Or Closing (Stephenson Harwood)

In R (on the Application of Mercury Tax Group Limited and another) v HMRC [2008] EWHC 2721 (Admin) the Court held that the final form of a deed was invalid where the signature pages on an incomplete draft had been transferred to execute a later amended version.

Competing Jurisdiction Clauses - Appeal (Stephenson Harwood)

In (1) UBS AG (2) UBS Securities LLC v HSH Nordbank AG [2009] EWCA Civ 585 the Court of Appeal, in agreeing with the decision of the High Court that the proper jurisdiction for proceedings to be brought was New York, found that it was necessary to construe a jurisdiction clause in the light of the transaction as a whole

"Pay As You Go" Principle In SIV Insolvencies - Appeal (Stephenson Harwood)

In Golden Key Ltd (In Receivership) [2009] EWCA Civ 636 the Court of Appeal had to construe the complex documents governing the relationship between a structural investment vehicle and its noteholders.

Court Of Appeal Holds That Credit Hire Costs Can Be Recovered (Kennedys)

A lawyer from Kennedys’ Liability Division was present when the Court of Appeal gave judgment this morning in the appeals of “Copley v Lawn” and “Maden v Haller”. The key issue in dispute was mitigation of loss in credit hire claims.

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