

WHEN IN ROME, DO AS THE ROMANS DO:  
THE ROME II REGULATION IS NOW IN EFFECT

February 5, 2009

To Our Clients and Friends:

On January 11, 2009, the “Rome II” Regulation – formally titled “Regulation (EC) No 864/2007 on the Law Applicable to Non-Contractual Obligations” – took effect. Rome II applies to all EU member states and, in cases of conflict, preempts member states’ national law.

Rome II establishes conflict of law rules for cases of tort/delict, unjust enrichment, or *culpa in contrahendo* that cross member state lines. For example, if a German mining company engages in blasting operations in the Italian Alps, causing an avalanche in the French Alps that injures a group of English tourists, Rome II regulates whether the injury law of Germany, Italy, France or the United Kingdom applies. This preliminary determination is important because there are major differences among EU member states as to both liability and damages. In the past, however, determining which state’s law to apply was complex and uncertain. Rome II was designed to overcome that complexity and uncertainty.

The general rule of Rome II is that “the law of the country in which the damage occurs” is the applicable law, “irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur” (Article 4(1)). In the avalanche example above, the laws of France would apply because the injury took place in France. It is not determinative that the blasting operations (“the event giving rise to the damage”) occurred in Italy; that the victims would likely face medical bills (“the indirect consequences of that event”) in the UK; that the injurer is German; or that the victims are English. Rome II focuses on the site of the injury. This rule is known as *lex loci delicti* or *lex loci damni*.

However, Rome II’s general rule does not apply in every circumstance.

First of all, parties are, in most cases, entitled to opt out of both the general rule and the exceptions listed below by agreement. That is, two parties can agree – either before an injury takes place or afterwards – to submit their dispute to the law of their choice. However, parties cannot opt out of certain mandatory laws, including those governing cases of unfair or restricted competition and cases involving intellectual property.

Second, Rome II does not apply at all to cases involving breach of contract; defamation (or other issues relating to privacy or personality); marriages, family, wills, trusts and estates; or instances, where the government has caused injury in the course of exercising governmental

authority. An effort is underway to extend Rome II to cases of defamation, but no EU legislation on the matter has been established at this time.

Third, Rome II makes exceptions to the general rule in a number of particular circumstances. These exceptions are sufficiently numerous and complex that it is advisable to check with counsel about any particular activity, both to determine *whether* the general rule or an exception applies and *how* the general rule or exception applies. Stated briefly, however, the major exceptions are:

- Where both victim and injurer habitually reside in the same country, the law of that country generally applies.
- Where the victim and injurer have a pre-existing relationship – as when they are preparing to conclude a contract with one another or when they already have a contractual relationship separate from the injury – the law governing that pre-existing relationship generally applies.
- In cases involving product liability, determining the applicable law involves a combination of multiple factors, particularly where the product was marketed. Generally, if the product was marketed in the victim’s country of residence, that country’s law applies.
- In cases involving unfair competition, the law of the country in which consumers’ or competitors’ interests are affected applies. In cases involving restrictions on competition, the law of the country in which the market is affected generally applies.
- In cases involving environmental damage, a plaintiff may elect to have applied *either* the law of the country in which the damage occurred (the general rule) *or* the law of the country in which the event giving rise to the damage occurred.
- In cases involving intellectual property rights, the law of the country where protection is sought generally applies (*lex loci protectionis*).
- In cases involving labor disputes, such as a strike, the law of the country in which the industrial action takes place generally applies.
- Finally, a court has the discretion not to follow the general rule (although most of the exceptions must be followed) in special cases where an injury or wrongdoing is “manifestly more closely connected” with a country other than the one in which the damage occurred. This is typically described as “escape clause” – that is, a provision

courts can invoke where rigid application of the rules would result in some serious or obvious injustice.

Again, please note that the above list is not comprehensive.

At this time, the crucial question of how courts will apply Rome II remains to be seen. Some commentators have criticized Rome II for excessive rigidity. They point out that such rigidity often leads to unfair or unjust outcomes in particular cases. They also note that courts, when faced with the prospect of unfair or unjust outcomes, will often find creative ways of applying a regulation to avoid such outcomes. Thus, there is a degree of uncertainty as to what Rome II will mean in practice.

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Please do not hesitate to get in touch with us with any questions.

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