

# The rebirth of Rome

*The impact of the recent Rome Regulations on the law of obligations, examined by Alan Gourgey QC and Philip Hinks*



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**'2009 marks the end of the role of English private international law in choice of law for contract and tort, and the dawn of a European, and uniform, era.'**

This year marks a seismic shift in the English private international law of obligations. By the end of this year, the choice of laws rules for the entire law of obligations will no longer be a matter of English private international law. Obligations, whether they arise in contract, tort or on any other non-contractual basis, and whether or not the obligations are owed by or to a person resident in the EC, will have been placed on a European footing. This is all the result of regulations spawned from the Rome Convention.

Regulation 864/2007 [2007] OJ L199/40 on the law applicable to non-contractual obligations (Rome II) came into force on 11 January 2008 and, under Article 31, is applicable to events giving rise to damage occurring after that date. Regulation 593/2008 [2008] OJ L177/6 on the law applicable to contractual obligations (Rome I) will apply to contracts entered into after 17 December 2009 (Article 28). As EC Regulations, both Rome I and II are directly applicable and no UK legislation is required to bring them into effect. Further, as EC Regulations, both Rome I and II will be subject to interpretation by the ECJ by way of Article 234 references. 2009 marks the end of the role of English private international law in choice of law for contract and tort, and the dawn of a European, and uniform, era.

This article does not seek to provide an all-encompassing commentary on the provisions of the Rome Regulations. In truth, many of the provisions of the Regulations' predecessors, the Rome Convention on the Law Applicable to Contractual Obligations 1980, given the force of English law under the Contracts (Applicable Law) Act 1990 and Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (the 1995 Act), have been

replicated to a greater or lesser extent. Rather, this article addresses what are anticipated to be the major changes brought about by the Regulations.

## **Rome I: the law applicable to contractual obligations**

Articles 3 and 4 of Rome I retain the erstwhile division between rules applicable to cases where contracting parties have expressly or impliedly chosen a law to govern their agreement, and those applicable to circumstances in which no such choice is discernible. The parties' freedom to choose the applicable law is considered by the draftsmen to be one of the cornerstones of choice of law rules in contract (see recital 11) and the inclusion in an agreement of exclusive choice of court (or choice of arbitral seat) clauses will continue to be taken into account as one of the factors determining whether a choice of law has been 'clearly demonstrated' within Article 3(1).

The initial proposal that contracting parties should be entitled to subject their agreement to a non-national system of law, be that a religious or secular code, has not found its way into the final text. Parties remain able to subject their relationship to non-national laws by way of incorporation into an agreement formally governed by a national applicable law, provided that the conditions of incorporation required by that national law have been satisfied, and provided that the provisions to be incorporated are sufficiently ascertainable to enable the court seised of the matter to identify precisely what has been incorporated. This enables parties to agree, for example, to subject their contract to Sharia law or Jewish law; see *Beximco Pharmaceuticals Ltd & ors v Shamil Bank of Bahrain EC* [2004], where the Court of Appeal considered

that the applicable law of a contract governed by English law was 'subject to the principles of the Glorious Sharia'a'.

The rules on choice of law in the absence of an express or implied agreement have been extrapolated and thereby greatly improved. Article 4(2) of the Rome Convention presently provides a generic presumption that such agreements are governed by the law of the habitual residence of the contract's characteristic performer. Article 4(1) of Rome I breaks this rule down into a series of presumptions that are applicable to specific contractual arrangements (including contracts for the sale of goods, provision of services, franchise agreements, and distribution agreements), with Article 4(2) of the Regulation replicating Article 4(2) of the Convention where a contract does not fall within any of the particular presumptions set out in Article 4(1), or where that contract would fall within a number of such presumptions. Under the Rome Convention, difficulties have been encountered in determining the performance that is characteristic of the contract for choice of law purposes. The new presumptions will address these difficulties by, in effect, identifying the characteristic performance by reference to the type of contract in issue. So, for example, in a contract for the sale of goods, the Regulation presumes the law of the place of the habitual residence of a seller; whereas in a distribution contract, the law of the place of habitual residence of the distributor is presumed to apply.

Finally, Article 4(3) provides member states' courts with an escape clause, enabling the application of a different law 'where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country' other than that selected by the presumptions. Under the corresponding provision

of the Rome Convention, the English courts have vacillated in terms of the weight to be afforded to the presumptions and the circumstances in which it is permissible to disapply those presumptions in favour of another law (see *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH* [2001]).

It is thought that the addition of the word 'manifestly' to Article 4(3) was intended by the draftsmen to restrain the circumstances in which the presumptions of choice are rebutted in favour of a different law, thereby securing the Regulation's objective of providing legal certainty about the law applicable to contractual relationships. However, whether effect is given to this (supposed) intention of the ECJ remains to be seen. Advocate General Kokott in *Gambazzi* [2009] doubted that it made 'any discernible change'.

Under the provisions of the Rome Convention, a chosen law does not affect the application of the mandatory rules of the forum. Under Article 9(1) of Rome I these are defined as rules, respect for which:

... is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation.

For example, the prohibition of exclusions from liability for death and personal injury under s2 of the Unfair Contract Terms Act 1977 have been conserved in Article 9(2) of Rome I. Further, the Regulation's inclusion of Article 9(3), which allows the court to give effect to the mandatory rules of the law of the place where performance of the contract is to be rendered, and where performance would be unlawful as a result of such rules, removes the present state of confusion about the nature of the rule in *Ralli Bros v Compania Naviera Sota y Aznar* [1920]. When Rome I applies, the court will be empowered to subject an agreement to the provisions of the law of the place of performance which render that performance illegal.

One final change to note: under Article 12(1)(e) of Rome I, the law selected by the Regulation will govern the consequences of nullity of the contract. This departs from the present position under the Rome Convention where consequences of nullity belong

to the law of restitution, and where the relevant choice of law rules are those applicable to restitution rather than those applicable to contract. There is uncertainty whether, following the coming into effect of Rome I, the restitution of benefits pursuant to a finding that a contract is void will be a matter for Rome I, or for those provisions of Rome II which deal with choice of law in unjust enrichment. This uncertainty is, however, most likely academic, since Article 10(1) of Rome II would operate to subject such a claim in unjust enrichment to the (putative) law of the contract, thereby bringing Rome I into play.

### Rome II: the law applicable to non-contractual obligations

As stated above, Rome II has been in force since January of this year. It applies to 'non-contractual obligations' in civil and commercial matters, a concept which is much wider than torts and which is to be given an autonomous interpretation (see recital 11) for the purposes of the Regulation. It will cover, for example, claims for misrepresentation, unjust enrichment and unfair competition.

Article 1(2) sets out a list of matters excluded from the scope of the Regulation, one notable item being:

... non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

In the English courts, claims falling within this exception will be dealt with by the 1995 Act to the extent that it applies, and by the common law to the extent that it does not.

Under s11(1) of the 1995 Act the general rule was that the applicable law was the law of the country in which the events constituting the tort or delict in question occurred. This state of affairs was unsatisfactory for a number of reasons. The identification of the *lex loci delicti commissi* was uncertain where the component elements of the tort were spread over several countries. Further, and on a more practical level, the application of this rule gave rise to a problem of circularity in that, until a law had been selected to govern the tort in question, it was difficult to know what law to use to ascertain the constitutive elements of that tort.

Rome II adopts a more acceptable and user-friendly approach. Article 4(1) sets out the general rule that the

## Key dates

- Rome I on the law applicable to contractual obligations will apply to contracts entered into on or after 17 December 2009.
- Rome II on the law applicable to non-contractual obligations came into force on 11 January 2008 and is applicable to events giving rise to damage occurring after that date.

law applicable to a non-contractual obligation arising from a tort or delict will be the law of the country in which the damage occurs: the *lex loci damni*. However, this general rule is subject to displacement where both claimant and defendant have their habitual residence in the same country when the damage occurs, Article 4(2) selecting the law of that country instead. An escape clause has been inserted in Article 4(3), empowering the court to apply the law of a different country where it is clear from all the circumstances of the case that the tort or delict is manifestly more closely connected with that country. Finally, Rome II contains novel provisions (discussed below) allowing parties to choose the applicable law.

As was the position under s9(5) of the 1995 Act, Article 24 of Rome II excludes the operation of *renvoi*, with the result that the law selected by the Regulation is the law in force in a particular country, subject to the exclusion of that country's own private international law rules.

Aside from the general rules contained in Article 4, Articles 5 to 9 set out special choice of law rules for non-contractual obligations arising from product liability, unfair competition, environmental damage, infringement of intellectual property rights and industrial action. Of these special rules, only those relating to unfair competition and the infringement of intellectual property rights may not be derogated from by agreement of the parties (Articles 6(4) and 8(3)).

These aside, Article 14 provides that the law selected by the Regulation to govern non-contractual obligations may be displaced by the parties to the claim agreeing to the application of a law of their choice. This marks a radical departure from life under the 1995 Act. The choice of law agreement may be entered into after the events giving rise to the damage have occurred, or, where all the parties are pursuing a commercial activity and the choice of law agreement was freely negotiated, before those events have occurred. Thus it is open to parties entering into a contract governing a commercial activity to agree, as a term of the contract, that a claim in tort by one of them against the other will be governed by the same law as that governing the contract, or even by another country's law.

The choice must be express or demonstrated with reasonable certainty by the circumstances of the case. Where all the relevant elements are located in a country other than the one whose law has been chosen by the parties, that choice will not prejudice the application of provisions of the law of that other country which may not be derogated

## Conclusion

Few will shed a tear at the death of the English private international law of obligations. The Rome Regulations are to be welcomed for their clarity. They will undoubtedly remove certain conflicts within the English private international law of obligations. For example, there has

*The parties' freedom to choose the applicable law is considered by the draftsmen to be one of the cornerstones of choice of law rules in contract.*

from by agreement, nor the application of mandatory provisions of Community law in force in that country, if it is a member state.

Rome II applies to non-contractual obligations, not torts alone. Chapter III of the Regulation therefore provides choice of law rules for obligations arising from unjust enrichment, *negotiorum gestio* (intervention in another's affairs) and *culpa in contrahendo* (pre-contractual dealings). Choice of law in unjust enrichment has finally been placed on a legislative footing. Since the coming into effect of the Regulation, claims for unjust enrichment will be governed by the law applicable to the relationship between the parties, if such a relationship exists; otherwise by the law of the parties' habitual residence; otherwise by the law of the country in which the enrichment took place, under Article 10.

An escape clause is retained in Article 10(4) for cases which are manifestly more closely connected to another law. The same cascading provision has been included in Article 11 to regulate choice of law in *negotiorum gestio*, save that Article 11(3) specifies the law of the country of performance in place of that of enrichment. Obligations resulting from dealings between the parties prior to contract are, by virtue of Article 12(1), governed by the law of the (putative) contract, with Article 12(2) providing solutions where that law cannot be determined. This provision brings claims founded on misrepresentation within the scope of Rome II, and will generally subject such claims to the (putative) law of the contract, a matter for Rome I.

been uncertainty about whether claims for misrepresentation are to be properly characterised as claims founded on contract or tort before the insertion of such claims into our respective choice of law machines. As set out above, such claims are now dealt with by Rome II.

Further, under certain circumstances English law accepts a claimant's ability to bring concurrent claims in contract and tort. In *Base Metal Trading Ltd v Shamurin* [2005] the Court of Appeal held that there is nothing in the Rome Convention to prevent a claimant from framing a claim in tort rather than contract if it is advantageous to do so. Irrespective of the position of English law on these points, it is anticipated that following the coming into force of both Regulations, a particular obligation is unlikely to be treated as giving rise to concurrent claims with differing applicable laws. The final say on this and all other questions of interpretation will lie with the ECJ rather than with the English courts. This may not be the rebirth of the Roman Empire but it is certainly the further expansion of a European empire. ■

*Base Metal Trading Ltd v Shamurin*  
[2005] 1 WLR 1157

*Beximco Pharmaceuticals Ltd & ors v Shamil Bank of Bahrain EC*  
[2004] EWCA Civ 19

*Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH*  
[2001] 1 WLR 1745

*Gambazzi*  
[2009] EUECJ C-394/07

*Ralli Bros v Compania Naviera Sota y Aznar*  
[1920] 2 KB 287