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LEGAL INFORMATION NEWSLETTER

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We are pleased to provide you with the new issue of our legal information newsletter.

Topical legal questions are discussed and those related to issues that you might encounter.

We hope that you will find it of interest.

We would welcome any comment you might have.

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**REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION ON THE LAW APPLICABLE ON NON-CONTRACTUAL OBLIGATIONS (Rome II)**

European Union Treaty, Article 65(b)  
Regulation (EC) No. 2157/2001  
Regulation (EC) No. 44/2001  
Regulation (EC) No 1791/2006  
Directive No. 95/46/EC

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**INTRODUCTION** – On 22 July 2003, the European Commission proposed a Regulation applicable to non-contractual obligations [COM(2003) 427 final].

This initial proposal was modified in February 2006 to take account of certain amendments adopted by the European Parliament.

On July 11, 2007, the European Parliament and the Council of the European Union approved the Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations, commonly known as “Rome II”.

The aim of this Regulation, which shall enter into force on January 11, 2009, is to harmonize the Member States' conflict-of-law rules in the field of non-contractual obligations such as for instance accidents caused by defective products, unfair competition acts, intellectual property infringements, violation of the environment and damages following a road accident.

The purpose is not to harmonize Member States' actual law, but to harmonize the rules by which the law applicable to an obligation is determined. In this Regulation, "Member State" means all the Member States with the exception of Denmark.

**SCOPE OF THE REGULATION** – The Regulation shall apply to situations involving a conflict of laws regarding non-contractual obligations in civil and commercial matters (arising out of a tort or delict and out of an act other than a tort or delict), with the exception of internal revenue, customs or administrative matters. The following matters are also excluded:

- Issues of family law (all obligations arising out of family relationships or relationships having comparable effects, including those relating to matrimonial property regimes and maintenance obligations);
- non-contractual obligations arising out of successions;
- non-contractual obligations arising under negotiable instruments (bills of exchange, cheques, promissory notes, etc.);
- questions relating to the liability of partners, management bodies and persons responsible for carrying out the statutory audits of accounting documents of a company, for the debts of a company, association or other body corporate or incorporate, provided they are subject to specific rules of company law or other specific provisions applicable to such persons or bodies;

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- non-contractual obligations arising from trusts created voluntarily and evidenced in writing;
- non-contractual obligations arising out of nuclear damage;
- non-contractual obligations arising in connection with the liability of the State for acts done in the exercise of public authority;
- violations of privacy and of personal rights by the media
- evidence and procedure, without prejudice to other provisions of the Regulation.

According to Article 15, the law applicable to non-contractual obligations under this Regulation shall govern in particular:

- (a) The basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
- (b) the grounds for exemption from liability, any limitation of liability and any division of liability;
- (c) the existence, the nature and the assessment of damage or the remedy claimed;
- (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;
- (e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;
- (f) persons entitled to compensation for damage sustained personally;
- (g) liability for the acts of another person;
- (h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

To be noticed is that, under the principle of universal application, the conflict-of-laws rules in the proposed Regulation are aimed at both the law of Member States and non-Member Countries, that means that any law

specified by this Regulation shall be applied whether or not it is the law of a Member State.

**TORTS/DELICTS** – As a general rule that Article 4 sets forth - unless otherwise provided for in the Regulation - the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the Country in which the damage occurs 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.

However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same Country at the time when the damage occurs, the law of that Country shall apply.

Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a Country other than that indicated in the above provisions, the law of that other Country shall apply.

A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

**PRODUCT LIABILITY** – Without prejudice to the above mentioned provision addressing the situation that both the liable person and that sustaining damage have their habitual residence in the same Country, the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

(a) The law of the Country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that Country; or, failing that,

(b) the law of the Country in which the product was acquired, if the product was marketed in that Country; or, failing that,

(c) the law of the Country in which the damage occurred, if the product was marketed in that Country.

However, the law applicable shall be the law of the Country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the Country the law of which the previous mentioned rules are applicable.

Even in product liability cases, where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a Country other than that indicated by the previous rules, the law of that other Country shall apply.

A manifestly closer connection with another Country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

#### **UNFAIR COMPETITION AND ACTS RESTRICTING FREE COMPETITION –**

According to Article 6 of the Regulation, the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the Country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

Where an act of unfair competition affects exclusively the interests of a specific competitor, the mentioned general rule that Article 4 sets forth shall apply.

Instead, the law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the Country where the market is, or is likely to be, affected.

When the market is, or is likely to be, affected in more than one Country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seized, provided that the

market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises. Where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, she/he can only choose to base her/his claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.

The above provision of law may not be derogated from by an agreement among the concerned parties.

**ENVIRONMENTAL DAMAGE –** The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to the general rule of Article 4, unless the person seeking compensation for damage chooses to base his or her claim on the law of the Country in which the event giving rise to the damage occurred.

#### **INTELLECTUAL PROPERTY RIGHT INFRINGEMENT –**

The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the Country for which protection is claimed.

In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right (for instance a CTM registration), the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the Country where the act of infringement was committed.

The law applicable under this Article may not be derogated from by an agreement of the concerned parties.

**INDUSTRIAL RELATIONSHIPS –** Save for the general rule of Article 4, the law applicable to a non-contractual obligation in

respect of the liability of a person in the capacity of a worker or an employer or the organizations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the Country where the action is to be, or has been, taken.

**UNJUST ENRICHMENT** – If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.

Where the law applicable cannot be determined on that basis and the parties have their habitual residence in the same Country when the event giving rise to unjust enrichment occurs, the law of that Country shall apply.

Where the law applicable cannot be determined on the above basis, the law of the Country in which the unjust enrichment took place shall apply.

Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a Country other than that indicated through the application of the above rules, the law of that other country shall then apply.

**NEGOTIORUM GESTIO** – If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that non-contractual obligation, that contractual obligation shall be governed by the law that governs that relationship.

Where the law applicable cannot be determined on the above basis, and the parties have their habitual residence in the same Country when the event giving rise to the

damage occurs, the law of that Country shall apply.

Where the law applicable still cannot be determined on the above basis, the law of the Country in which the act was performed shall apply.

Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person is manifestly more closely connected with a Country other than that indicated, through the above mentioned criteria, the law of that other Country shall apply.

**CULPA IN CONTRAHENDO** – *Culpa in contrahendo* for the purposes of the Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law.

It should include the violation of the duty of disclosure and the breakdown of contractual negotiations.

To be noticed is that Article 12 covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract.

This means that if, while a contract is being negotiated, a person suffers personal injury, the general rule of Article 4 or other relevant provisions of the Regulation should apply.

The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.

Where the law applicable cannot be determined on such basis, it shall then be:

(a) The law of the Country in which the damage occurs, 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 occurred; or

(b) where the parties have their habitual residence in the same Country at the time when the event giving rise to the damage occurs, the law of that Country; or

(c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a Country other than that indicated in points (a) and (b), the law of that other Country.

**FREEDOM OF CHOICE** – The parties may agree to submit non-contractual obligations to the law of their choice:

(a) By an agreement entered into after the event giving rise to the damage occurred;

or

(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a Country other than the Country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other Country which cannot be derogated from by agreement.

Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law,

where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

**RULES OF SAFETY AND CONDUCT** - In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

**DIRECT ACTION AGAINST THE INSURER OF THE PERSON LIABLE** – The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.

**SUBROGATION** – According to provision of Article 19, where a person (the creditor) has a non-contractual claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether, and the extent to which, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

**JOINT & SEVERAL LIABILITY** – If a creditor has a claim against several debtors who are jointly and severally liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the question of that debtor's right to demand compensation from the other debtors shall be governed by the law applicable to that debtor's non-contractual obligation towards the creditor.

**FORMAL VALIDITY** – A unilateral act intended to have legal effect and relating to a non-contractual obligation shall be formally valid if it satisfies the formal requirements of the law governing the non-contractual obligation in question or the law of the Country in which the act is performed.

**BURDEN OF PROOF** – The law governing a non-contractual obligation under this Regulation shall apply to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

Acts intended to have legal effect may be proved by any mode of proof recognized by the law of the forum or, if unilateral, by any of the laws referred to in the previous mentioned rule under which that act is formally valid, provided that such mode of proof can be administered by the forum.

**HABITUAL RESIDENCE** – For the purposes of the Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

For the purposes of the Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.

**EXCLUSION OF RENVOI** – The application of the law of any Country specified by the Regulation means the application of the rules of law in force in that country other than its rules of private international law.

**STATES WITH MORE THAN ONE LEGAL SYSTEM** – Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a Country for the purposes of identifying the law applicable under this Regulation.

A Member State within which different territorial units have their own rules of law

in respect of non-contractual obligations shall not be required to apply the Regulation to conflicts solely between the laws of such units.

**PUBLIC POLICY OF THE FORUM** – The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

**CONCLUSIONS** – In May 2007, after four years of negotiations, the *European Parliament* and the *Council*, meeting in the *Conciliation Committee*, had approved a Regulation harmonising the rules concerning the law applicable to non-contractual obligations ("Rome II").

The aim of this measure is to ensure that courts in all the Member States apply the same law in the event of cross-border disputes in matters of tort/delict, thus facilitating the mutual recognition of court decisions in the EU.

The Rome II rules aim to strike a reasonable balance between the interests of the alleged perpetrator of the damage and the victim.

The Regulation adopts the solution applied in the majority of Member States and establishes a general rule that the law of the Country in which the damage occurs (for example, the law of the place a road accident took place) will apply, unless the parties both have their habitual residence in another Country, in which case the law of that Country will apply.

A number of specific rules for the commonest specific torts/delicts such as product liability, environmental damage, anti-competitive practices apply.

Regarding the highly controversial question of media violations of privacy, the co-legislators chose to exclude them from the scope of the Regulation but called on the *Commission* to present a detailed study by the end of 2008.

Article contributed by Mr. Riccardo G. Cajola, LL.M.