**Conflict of laws: tort**

This element introduces you to key principles in determining which country's laws govern a tortious dispute.

**Introduction**

In this element, we are concerned with the question of which country's laws will apply to determine a **tortious** dispute specifically. There is a different and equivalent element which is concerned with contractual disputes.

**Relevant legislation**

Prior to Brexit, the majority of tortious disputes were governed by Regulation 864/2007 which is referred to as the Rome II Regulation ('Rome II'). At the end of the post-Brexit transition period on 31 December 2020 Rome II was adopted into English law, with minor amendments, by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019 and the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020.

Accordingly, the relevant law is, broadly, the Rome II Regulation. In this element we use the term 'Rome II' to refer to the regulation as amended and retained in the law of England and Wales, and article references are references to this amended Rome II.

Note that:

1 There are some areas of law which are excluded from Rome II (Article 1);

2 Rome II only applies to events giving rise to damage which occurred on or after 10 January 2009;

3 There are special provisions in Rome II for product liability, unfair competition, environmental damage, infringement of intellectual property and industrial action.

These exclusions and special provisions are not addressed in this element.

[Diagram showing key elements of determining the applicable law in a tort scenario. The diagram is marked "we will explore the elements of this diagram on the following pages".

The diagram is as follows:

1 Have the parties **validly** chosen which law should apply?

If yes: That country's law will apply

If no then…

2 Do the claimant and defendant habitually reside in the same country?

If yes: That country's laws apply

If no: Apply the law of the country in which damage occurs

Whether applying the habitual residence rule or the 'country in which damage occurs' rule, there is a final question…

3 Tort “manifestly more closely connected” with another country?]

**The parties' choice**

Firstly, the parties are free to choose which country's law will apply (Article 14).

If the agreement is entered into **after** the event giving rise to the tortious damage, then this choice will be effective.

If the agreement is entered into **before** the event giving rise to the tortious damage, then this choice will only be effective if both parties are pursuing a commercial activity and freely negotiated the choice of law

The choice can be express, for example, in a contractual term between the parties, or choice can be 'demonstrated by… the circumstances of the case'.

**Parties resident in the same country**

A company's habitual residence is where its 'central administration' is. For a natural person acting in the course of business, it is where that person's principal place of business is.

So in the absence of choice, if the claimant and defendant both reside in the same country, then that country's laws will apply – even if the damage happened in a different country (Article 4(2)).

Where there is no valid choice and the claimant and the defendant do not reside in the same country, the applicable law is that of the country in which the damage occurs – not where the event giving rise to damage occurs, nor where indirect consequences might occur (Article 4(1)).

In cases of personal injury or damage to property, the country in which the damage occurs is very likely to be the country where the injury was sustained or where the property was damaged.

**General rule – law of the country where the damage occurs**

Where there is no valid choice and the claimant and the defendant do not reside in the same country, the applicable law is that of the country in which the damage occurs – not where the event giving rise to damage occurs, nor where indirect consequences might occur (Article 4(1)).

In cases of personal injury or damage to property, the country in which the damage occurs is very likely to be the country where the injury was sustained or where the property was damaged.

**Article 4(3) – manifestly more closely connected**

Even if the applicable law has been determined under Article 4(1) or 4(2), the court will apply a different country's law if the tort is manifestly more closely connected with that other country. It is to be expected that this provision will not be used lightly as otherwise it could introduce great uncertainty into the operation of Rome II.

**Example**

IFL is a company incorporated and with its central administration in England and Wales. It grows and sells vegetables. The crops are grown in Belgium and sold to a Dutch supermarket chain. Payment is to be made in Pounds Sterling, into IFL’s English bank account.

IFL hires a company with its central administration in France called Haulage SA (‘Haulage’) to deliver its goods to the supermarket chain. Haulage sub-contracts its obligations to another French company, Transportation SA (‘Transportation’), a company which also has its central administration in Paris).

One of Transportation’s drivers collects a large consignment of frozen produce from IFL’s Belgian farm. Whilst in Belgium and before crossing into the Netherlands, he accidentally turns off the refrigeration units in the lorry. Whilst subsequently driving through the Netherlands, the goods defrost and become unusable.

IFL has commenced proceedings against Transportation in negligence in relation to the damaged goods.

Which country’s laws is the English court most likely to apply to the dispute?

On these facts, there is no choice of law

The claimant resides in England and Wales. The defendant resides in France. They do not habitually reside in the same country…

…and so the law of the country in which the damage occurs applies. The Netherlands was the place where the damage occurred (ie the goods defrosted and became unusable) even though the event giving rise to the damage occurred in Belgium (turning off the refrigeration units) and most of the indirect consequences of the tort are arguably going to be suffered in England (eg failure to get paid by Dutch supermarket) – Dutch law applies.

The tort is not manifestly more closely connected with another country – there are relevant considerations pointing towards French, English or Dutch law, so the initial conclusion that Dutch law applies is not displaced.

**Summary in relation to conflict of laws: tort**

- Rome II applies to events giving rise to damage which occur on or after 10 January 2009.

- There are special provisions in Rome II for product liability, unfair competition, environmental damage, infringement of intellectual property and industrial action – not covered in this element.

- After the tortious event, parties are free to choose which country's laws apply to their dispute.

- Before the tortious event, parties are free to choose which country's laws apply to their dispute only if both pursuing a commercial activity and the choice is freely negotiated.

- In the absence of choice, if both parties habitually reside in the same country, that country's laws apply.

- Otherwise, the law of the country in which damage occurs applies.

- Conclusions reached via these routes (not by the 'choice' provisions) can be displaced if the tort is 'manifestly more closely connected' with another country.