

Choice of law

Back to basics

Choice of law

What is "choice of law" and what is not



- It's **not** about **jurisdiction** – it's distinct for jurisdiction
- Determines which country's **substantive law** applies to a dispute
- Common in **cross - borders** litigation and Personal injury litigation

Choice of law

What is in your client's best interest!



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Choice of law and Brexit

Prior to Brexit, the rules applicable to governing law for contractual and non-contractual obligations were set out in the Rome instruments – Rome I and Rome II.

Post Brexit, these rules have been retained by being adopted into U.K. law as “U.K. Rome I” and “U.K. Rome II”, so that the same rules are applicable. This means that the courts in the U.K. and EU 27 apply broadly the same rules and the parties’ express choice of governing law should be upheld and applied.

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Rome I Regulation (EC) (No 593/2008): contractual obligations

Applies to:

- Consumer contracts
- Employment contracts
- Commercial contracts

Article 3 - Party autonomy - The primary rule is that parties are free to choose the law governing their contract.

Article 4 – In the absence of choice - The contract is governed by the law of the country with which it is most closely connected, which is **usually law of the service provider's habitual residence** (Article 4.3).

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Rome II Regulation (EC) (No 864/2007): Non-contractual obligations including tort /delict

Applies to:

“events giving rise to damage” which occurred on or after 11 January 2009.

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Article 4

The basic rule which is set out of **Article 4 (1)** is that “ *Unless otherwise provided for in this 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 if 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 the event occur*”.

Article 4(1) draws a **distinction** between “**the law of the country where the damage occurs**”, and “**the country in which the event giving rise to the damage occurred**”.

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Article 4 (2) - If both parties are **habitually resident** in the same country, that law applies.

“However, where the person claims to be liable and the person sustaining damages both have their habitual residence in the same country at the time when the damage occurs, the law of the country shall apply.”

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Article 4 (3) (escape clause) - If the case is **manifestly more closely connected** with another country, the court can apply that law instead.

“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 paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular in a pre-existing relationship between the parties, such as a contract that is closely connected with the tort/ delict in question”.

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Article 4



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Rome II - Practical Points

1. Consider choice of law at an early stage.
2. Always identify:
 - where did the damage occur
 - where parties are habitually resident
 - is there any pre-existing relationship
 - what is in your client's best interest- you may have a choice about where to raise proceedings but less flexibility about which law applies
3. Rome II governs **substantive law** only (liability, causation or heads of claim).
4. Matters such as **procedure and evidence** are NOT governed by Rome II. They are always governed by the law of the forum court, ex. in Scotland, we may still apply foreign law on liability and damages but follow Scottish procedural rules.
5. **Wrong choice of law may affect the limitation period, heads of claim/quantum, and eventually prospects of success!**

Thank you! Enjoy your lunch!

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