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**ROME REGULATION ON THE  
APPLICABLE LAW TO  
NON-CONTRACTUAL OBLIGATIONS**

**(ROME II)**

**REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT  
AND OF THE COUNCIL**

**of 11 July 2007**

- The first act within the EU and previously within the EC regulating non-contractual liability in the area of conflict of laws.
- Rome II was the first established community legislation dealing with the applicable law, one year before the adoption of Rome I.

## **SCOPE OF APPLICATION**

1. **MATERIAL:** International non-contractual obligations in civil and commercial matters
2. **PERSONAL:** Erga omnes
3. **TEMPORAL:** Events giving rise to damage which occur after its entry into force
4. **TERRITORIAL:** Territory of the EU Member States

## ARTICLE 1. MATERIAL SCOPE

- **Apply to:**
  1. Situations involving a **conflict of laws**
  2. Non-contractual obligations
  3. Civil and commercial matters
- **Not apply to:**
  1. Revenue
  2. Customs
  3. Administrative matters
  4. Liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)

### ***ACTA IURE IMPERII***

This exclusion is also laid down in Article 1 (1) of Brussels I bis Regulation.

### RECITAL 9

“Claims arising out of *acta iure imperii* should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation.”

## Concept of “non-contractual obligations”

- The interpretation of the concept has to be carried out **autonomously from any national legal system.**

### RECITAL 11

“The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law rules set out in this Regulation should also cover non-contractual obligations arising out of strict liability.”.

- It has to be **coherent with** the interpretation of respective terms in the **Brussels I Regulation** (Brussels I bis Regulation).

### RECITAL 7

“The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and the instruments dealing with the law applicable to contractual obligations.”.

Under Article 5 of Brussels I (Article 7 of Brussels I bis) courts must distinguish between contractual and non-contractual obligation to determine which state’s courts have jurisdiction over a case: those of the place of performance (for contractual obligations) or those at the place of injury (for non-contractual obligations).

In making this distinction **the ECJ defined the term** “non-contractual” as “an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a contract within the meaning of Article 5 (1)” (*C-189/87, Kalfelis v. Schroder*).

- **A negative definition** of non-contractual obligation was adopted by the ECJ:

**it covers all** (civil and commercial) **obligations not covered by the notion of “contractual obligations”**.

- To be precise, the phrase “tort, delict or quasi-delict” in the Brussels I bis Regulation is to be understood as covering a situation in which there is no obligation freely assumed by one party towards another (*C-26/91 Handte v. Traitements Mécano-Chimiques des Surfaces*) – **a positive definition**.
- **Article 2 (1) of the Rome II** states that it includes :
  - the obligations arising out of a tort or delict, and those resulting from unjust enrichment, *negotiorum gestio* (agency without authority) or *culpa in contrahendo* (pre-contractual liability).
  - The Regulation also covers non-contractual **obligations that are likely to arise**.
- The concept should be **complementary** to the substantive scope of the Rome I Regulation:

An obligation cannot at the same time be contractual and non-contractual in nature.

## EXCLUSIONS

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- non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations;
- non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;
- non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
- non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;
- non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily;
- non-contractual obligations arising out of nuclear damage;
- non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

The Regulation **do not apply to evidence and procedure**, without prejudice to Articles 21 and 22.

#### ARTICLE 21

“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.”.

#### ARTICLE 22

“1. 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**.

2. Acts intended to have legal effect **may be proved by any mode of proof** recognised by the law of the forum or by any of the laws referred to in Article 21 under which that act is formally valid, provided that such mode of proof can be administered by the forum.”.

**ARTICLE 3. PERSONAL SCOPE**

**UNIVERSAL APPLICATION**

**ERGA OMNES**

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



## ARTICLE 31. TEMPORAL SCOPE

### APPLICATION IN TIME

- Date of entry into force

The Regulation applies to

**events giving rise to damage which occur**

**after**

**11 January 2009**

According to **Article 31** of Rome II, the Regulation applies to events giving rise to damage which occur after the Regulation's entry into force.

### **What is the date of entry into force?**

Since in the case of Rome II this is not stipulated by the Regulation itself, the date of entry into force is twenty days after publication in the Official Journal.

The Regulation was published on 31 July 2007 and thus **entered into force on 20 August 2007**. So tortious event must be on or after 20.8.2007.

But **Article 32 provides** that this Regulation shall apply from 11 January 2009.

How to resolve this contradiction?

The doctrine gave some solutions and explanations, but fortunately we also have the CJEU judgement (*C- 412/10, Deo Antoine Homawoo v. GMF Assurances SA*)

Articles 31 and 32 of Regulation (EC) No 864/2007 must be interpreted as requiring a national court to apply the Regulation **only to:**

- events giving rise to **damage occurring after 11 January 2009**
- the date on which the proceedings seeking compensation for damage were brought or the date on which the applicable law was determined by the court have no bearing on determining the scope *ratione temporis* of the Regulation.

## **TERRITORIAL SCOPE**

Territory of the EU Member  
States

- **United Kingdom**
- **Denmark**

### RECITAL 39

“In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, **the United Kingdom and Ireland are taking part in the adoption and application of this Regulation.**”.

### RECITAL 40

“In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, **Denmark does not take part in the adoption of this Regulation, and is not bound by it or subject to its application.**”