

EXECUTIVE NOTE

THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS (SCOTLAND) REGULATIONS 2008 (S.S.I. 2008/404)

The above instrument is proposed to be made in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 (c.68). The instrument is subject to negative resolution procedure.

Policy Objectives

The instrument has two purposes. The first is to implement in relation to Scotland Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 (“Rome II”), which will come into operation on 11 January 2009. This Regulation lays down uniform choice of law rules in relation to non-contractual obligations in civil and commercial matters. The instrument amends existing legislation, namely the Private International Law (Miscellaneous Provisions) Act 1995 and the Prescription and Limitation (Scotland) Act 1993, so that they will not apply to cases that fall within the scope of Rome II.

The choice of law rules in Rome II will apply principally in the context of proceedings in cases of delict, for example claims for personal injury and damage to property. It will also apply to certain other types of proceedings, for example claims relating to unjust enrichment. These uniform rules identify the law to be applied by national courts in determining cases that have a cross-border dimension. An example of such an international case would be where the parties live in different member states and the alleged delict has taken place in a third member state. The objective of the rules is to increase legal certainty within the EU by ensuring that national courts within the EU apply the same national law to cross-border cases.

The instrument disapplies the current statute law which is inconsistent with Rome II. Although under Community law Rome II will supersede this domestic law, it is desirable explicitly to disapply the latter so that the statute book is consistent with this new development in Community law.

The second purpose of the instrument is to bring the choice of law rules for cases between domestic jurisdictions, as opposed to cases between a UK jurisdiction and another State, into line with those in Rome II. Under Article 25(2) of Rome II Member States are not obliged to apply Rome II rules to such cases. However, in order to maximise consistency between the choice of law rules in this area and avoid undesirable complexity, Article 4 of the instrument extends, the Rome II rules to internal cases of the kinds covered by the Regulation.

A number of types of cases are excluded from the scope of Rome II and thus from this instrument. These include non-contractual obligations arising from family law, matrimonial property regimes and company law.

Regulations equivalent to this instrument have been made by the UK Government in relation to England and Wales, and Northern Ireland. These will come into force on the same day as this instrument.

Consultation

Consultation and stakeholder input into the negotiations on the Rome II proposal was extensive, and included Scottish stakeholders. The Scottish Executive participated in formulation of, and endorsed, the UK Government's negotiating position, the key points of which were accommodated in the final outcome of the negotiations. In particular, the controversial area of defamation and related claims was excluded from the scope of Rome II and accordingly remains subject to the existing common law.

Subsequent consultation took place on the extension of the rules in Rome II to "internal" UK cases. The UK Government's Standing Committee on Private International Law, which comprises leading judicial, academic and practitioner experts in this technical area of the law and includes Scottish representation, endorsed this extension on the basis that it would be desirable from the point of view of practitioners, courts and ordinary citizens to have a single regime for all cross-border cases, rather than having one set of rules for intra-UK cases and another for cases between the UK and other EU Member States. This was also the conclusion of Scottish stakeholders who were consulted by the Scottish Government. No further consultation was conducted as regards the rest of the regulations given their minor and technical nature.

Financial Effects

The instrument is not expected to have any significant financial effects on the Scottish Executive, local government or business.

Scottish Executive
4 December 2008