



21 November 2008

## GUIDANCE NOTE: ROME II REGULATION AND CHOICE OF LAW CLAUSES<sup>1</sup>

**Summary:** The Rome II regulation governing choice of law by EU courts in non-contractual matters (e.g., tort) takes effect on 11 January 2009. Rome II allows parties to specify in relevant agreements the law that would apply to such actions. Although these matters are never free from doubt, the European High Yield Association recommends that members take immediate advantage of the opportunity to specify in debt capital markets transaction agreements and loan documents that the law that would govern the contract would also apply to non-contractual causes of action.

**Model language:** “This Agreement **and any non-contractual obligations arising out of or in connection with it** shall be governed by and construed in accordance with [applicable] law”.

**Discussion:** Regulation 864/2007 on the law applicable to non-contractual obligations replaces the various laws of EU Member States (excluding Denmark) with a uniform rule to determine the law that would apply to a non-contractual dispute. Absent a contractual provision designating a particular body of law, Member State courts will (with some exceptions not relevant here) look to the law of the country where the damage occurs.<sup>2</sup>

Members commonly include choice of law clauses to govern the contractual aspects of a dispute (e.g., breach of a warranty). Broadening the scope of the provision to include non-contractual disputes (e.g., a cause of action that arises out of a breach of a representation) will attain some certainty that the law of a chosen jurisdiction will apply regardless of the legal basis of the action, and will avoid litigation over the issue of applicable law.

The price of certainty is flexibility. Operation of the clause could deprive parties of the ability to forum shop post hoc. For example, a situation could arise where a member may seek to claim against an issuer under a more favourable law because the member finds itself defending an action by an investor (or other third party) under such a law. Given that this contingency cannot be identified with any certainty at the time an agreement is executed, we expect that members will prefer the legal certainty that agreeing applicable law in advance will afford.

Members should be aware that the specification of a governing law with regard to non-contractual causes of action may not be effective with respect to trust deeds and documentation relating to bearer securities because they appear to fall outside the scope of Rome II.

Although Rome II does not take effect until 11 January 2009, the EHYA recommends that members begin including the language immediately as the regulation covers events giving rise to damage which occur from 20 August 2007. In addition, contracts entered into prior to

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<sup>1</sup> This is a summary of the regulation and several key issues that we believe may be of interest to you. It should not be relied upon as legal advice.

<sup>2</sup> Most Member States (including the UK) currently look to the law of the country where the harmful act was committed.



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January 2009 will, in many cases, remain operative beyond the effective date of the regulation.

Questions about the regulation or the model language may be directed to Lorraine Charlton, General Counsel of the European High Yield Association at [lcharlton@sifma.org](mailto:lcharlton@sifma.org), or by telephone on +44 (0)20 7743 9304.