

# A SHORT INTRODUCTION TO

## ROME II

A Practical Guide from the 2TG Commercial and Private International Law Group

Summer 2018

## Introduction

There are now three regimes governing the applicable law in tort and some other non-contractual claims: (a) Regulation (EC) 864/2007 ("Rome II"), from 11 January 2009 as considered below; (b) the Private International Law (Miscellaneous Provisions) Act 1995 ("the Act"), where "the acts or omissions giving rise to a claim" occurred on or after 1 May 1996; (c) prior to this date English common law applies, specifically the double actionability rule.<sup>1</sup> The most important regime in practice is Rome II, which this Guide focuses on.

In respect of contractual obligations, Regulation (EC) 593/2008 on the law applicable to contractual obligations ("Rome I") applies. The respective scope of Rome I and II, which can give rise to difficult issues, is considered briefly in this Guide.

### Scope: How, when, where and to what does Rome II apply?

#### How?

Rome II is an EU Regulation and is, therefore, directly applicable in the UK. Although there was no need for implementing legislation – as inconsistent legislation is disapplied – in fact domestic Regulations were introduced to remove inconsistencies.<sup>2</sup> Rome II is interpreted in accordance with general principles of interpretation for EU legislation and a reference to the Court of Justice of the European Union ("CJEU") can be made by Courts at all levels.<sup>3</sup>

<sup>1</sup> For a recent application of the double actionability rule see: *Athanasios Sophocleous & Others v Secretary of State for the Foreign and Commonwealth Office and another* [2018] EWHC 19 (QB). Note that it is, as at 24 May 2018, subject to an appeal.

<sup>2</sup> The Law Applicable to Non-contractual Obligations (England, Wales and Northern Ireland) Regulations 2008: SI 2008/2986 which entered into force on 11<sup>th</sup> January 2009.

<sup>3</sup> The Treaty of Lisbon repealed Article 68 of the Treaty Establishing the European Community which restricted references in certain cases.



Charles Dougherty QC  
[cdougherty@2tg.co.uk](mailto:cdougherty@2tg.co.uk)  
+44 (0)20 7822 1262



Marie Louise Kinsler QC  
[mlk@2tg.co.uk](mailto:mlk@2tg.co.uk)  
+44 (0)20 7822 1267



Ruth Kennedy  
[rkennedy@2tg.co.uk](mailto:rkennedy@2tg.co.uk)  
+44 (0)20 7822 1192

### When?

Rome II applies to events giving rise to damage which occurs after 11<sup>th</sup> January 2009. In straightforward claims such as those arising from an accident the temporal scope of Rome II is now clear: it applies to accidents after 11<sup>th</sup> January 2009<sup>4</sup>. However, there is still some uncertainty where the event giving rise to the damage and the damage are separated in time, for example, cases involving product liability or 'long-tail' personal injury such as mesothelioma. In such cases the event giving rise to the damage has to be identified which is not always easy. In *Allen and others v Depuy International Ltd* Stewart J held that in a product liability context (hip implantation) the date of manufacture was the "event giving rise to the damage" for the purposes of Rome II.<sup>5</sup>

### Where?

Rome II applies in all proceedings brought in the UK, whether the conflict of law situation arises in relation to a Member State of the EU or another country: see Article 3. For example, Rome II would apply to proceedings brought in England in relation to an accident in Australia. The fact that there is no connection with the EU, other than that the proceedings are brought in a Member State, is irrelevant.

Rome II does not as such apply to resolve choice of law questions arising between the various jurisdictions in the United Kingdom. Regulations have been introduced to extend the application of Rome II to cover such cases.<sup>6</sup>

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<sup>4</sup> See Case C-412/10 *Homawoo v GMF Assurances* [2011] E.C.R. I-11603.

<sup>5</sup> [2014] EWHC 753 (QB); [2015] 2 W.L.R. 422. In the competition infringement context Barling J found that the question of what is a relevant "event" would have to be decided in due course, indicating that the answer is not obvious: *Deutsche Bahn AG and others v MasterCard Incorporated and others* [2018] EWHC 412 (Ch).

### To What?

Rome II applies in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters: see Article 1(1).<sup>7</sup> There has been considerable academic debate about where to draw the line between contractual obligations (governed by Rome I), and non-contractual obligations (governed by Rome II). This issue is now arising in practice. In *C-359/14 Ergo v If P&C Insurance*<sup>8</sup> a tractor pulling a trailer overturned in Germany due to the driver's negligence and caused damage to a third party's property. The insurer of the tractor paid compensation to the third party and sought contribution from the insurer of the trailer. The CJEU gave some guidance as to the respective scope of Rome I and II, distinguishing contractual obligations which are 'freely consented to by one person towards another' from non – contractual obligations as 'ensuing from damage'. The Court accordingly held that Rome II applied to the contribution claim between insurers as the claim was non-contractual.

Determining whether a particular obligation falls within Rome I or II requires careful consideration of the nature of the obligation under the relevant national law in the context of the CJEU jurisprudence – both on choice of law and on jurisdiction where a similar (although not identical) issue has been the subject of numerous judgments.<sup>9</sup> Although in many cases whether a claim falls within Rome I or II will not be significant, there are instances where it can be critical. For example, as the scope for choice of law agreements in Rome II is tightly circumscribed, characterising a

<sup>6</sup> The Law Applicable to Non-contractual Obligations (England, Wales and Northern Ireland) Regulations 2008: SI 2008/2986

<sup>7</sup> Article 1(1) and 1(2) set out various exceptions and express exclusions from Rome II.

<sup>8</sup> See judgment of 21 January 2016

<sup>9</sup> The relevant wording in the Brussels I Recast Regulation distinguishes between "matters relating to tort" and "matters relating to contract".

claim as non-contractual may avoid the application of a choice of law clause.<sup>10</sup>

## Brexit

The current proposal in circulation under the guise of the European Union (Withdrawal) Bill, is for Rome II (and Rome I) to be incorporated into domestic law upon exit. If this is the case, then subject to definitional issues (for example, changing references in the regulations from "member state" to "relevant state"<sup>11</sup>) then the status quo will be maintained so far as the applicable law rules are concerned. Issues regarding jurisdiction, however, are more complicated as a framework between the UK and the EU and other states is necessary for recognition and enforcement of judgments. This will have to be addressed as part of the negotiations with the EU.

## The choice of law rules for Tort

Chapter II contains the choice of law rules for tort. Article 4 is entitled "General rule"<sup>12</sup> and comprises three elements: a general principle, an exception and an escape clause.

### **The general principle: Article 4(1)**

The general principle is that the applicable law will be the law of the country in which the damage occurs or is likely to occur – *lex loci damni*: see Article 4(1).<sup>13</sup> Any role for the law of the country in which the event giving rise to the damage occurred or in which the indirect consequences of an event occurred is specifically excluded.

<sup>10</sup> See, for example, C-274/16 *flightright GmbH v Air Nostrum Lineas Aereas del Mediterraneo SA*, Judgment of 7 March 2018; *Committeri v Club Mediterranee SA* [2016] EWHC 1510 (QB); *XL Insurance Company SE v AXA Corporate Solutions Assurance* [2015] EWHC 3431 (Comm); and C-191/15 *Verein für Konsumenteninformation v Amazon EU Sàrl*, Judgment of 28 July 2016 on the applicable law in injunction cases.

<sup>11</sup> A sample Statutory Instrument posted by the Government makes this change.

The general rule focuses on the distinction between direct and indirect damage. This distinction is familiar from the CJEU's case law on Article 7(2) of the Judgments Regulation. In that context, the CJEU has drawn this distinction and only gives a determining role to direct damage: see Case C-364/93 *Marinari* [1995] ECR I-2719. In C-359/14 *Ergo v P&C Insurance* the CJEU has confirmed that overall consistency of approach as between the various EU Regulations which make up the private international legal scheme is important so the jurisprudence on the Brussels Regulation will be relevant at least as a starting point.<sup>14</sup>

Article 4(1) presents few problems in a straightforward personal injury case. The country in which the injury was sustained, i.e. where the accident took place, will generally be the country in which damage occurs: see Recital 17 of Rome II.<sup>15</sup> This will be so even where the tortious act (eg. negligent servicing of a car) has occurred in a different country. Furthermore, the fact that the victim subsequently suffers ongoing consequences in another country should not be relevant.

Working out where the damage occurred can be more difficult outside of the personal injury context. For example, in damage to cargo claims in shipping cases, it may be very difficult to ascertain where the damage actually occurred. Where the claim is for economic loss which is not consequent on personal injury or damage to tangible property, the place of damage should normally be the place where the direct economic loss was suffered but identification of the place is not always straightforward.<sup>16</sup>

<sup>12</sup> Articles 5-9 provide for specific cases: product liability, unfair competition, environmental damage, intellectual property and industrial action.

<sup>13</sup> Damage includes damage likely to occur: see Article 2(3)(b).

<sup>14</sup> See judgment of 21 January 2016 at [43] and [44].

<sup>15</sup> Note that this accords with the general rule under the Private International Law (Misc Provisions) Act 1995.

<sup>16</sup> See Case C-220/88 *Dumez France v Hessische Landesbank* [1990] E.C.R I-49; Case C-375/13 *Kolassa, v Barclays Bank plc*, Judgment of 28 January 2015; Case C-352/13 *CDC v Akzo Nobel*

Cases involving indirect victims or damage have given rise to some difficulty under Rome II. However, in Case C-350/14 *Lazar v Allianz SpA*,<sup>17</sup> the CJEU has clarified that claims by persons other than the direct victim (for example, dependents in fatal claims) will generally be governed by the law of the place of the accident.<sup>18</sup>

#### **The exception for common habitual residence: Article 4(2)**

The general principle is displaced where the Claimant and the person claimed to be liable share a common habitual residence at the time when the damage occurs. A similar concept is found in the conflicts rules of a number of Member States and, indeed, in England in the "cocoon" cases<sup>19</sup> under the Act. However, it should be noted that Article 4(2) is a rigid rule and the only scope for argument is whether there is in fact common habitual residence. If there is, it automatically displaces the law applicable under Article 4(1).

In applying the concept of habitual residence for Article 4(2), the relevant person is the one "claimed to be liable", which may not be the named Defendant. It was held by Slade J in *Winrow v Hemphill* [2014] EWHC 3164 (QB) that, in a road traffic accident, it is the habitual residence of the alleged tortfeasor, and not of his insurer, with which the court is concerned.<sup>20</sup> On the other side of the equation, the relevant person is the one "sustaining damage" which may not always be the named Claimant.<sup>21</sup>

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*and others*, Judgment of 21 May 2015; and C-191/15 *Verein für Konsumenteninformation v Amazon EU Sàrl*, Judgment of 28 July 2016.

<sup>17</sup> Judgment of 10 December 2015.

<sup>18</sup> The Court of Appeal's finding on consequential loss in *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665; [2016] 1 WLR 1814 is inconsistent with *Lazar*. However, the Supreme Court concluded that all claims arising out of the accident are governed by Egyptian law as the law of the place of the accident, which is consistent with *Lazar*.

<sup>19</sup> Cocoon cases are cases where all the relevant parties are from a country other than that where the accident occurred and

#### **The "escape clause": Article 4(3)**

If it is clear that the tort is manifestly more closely connected with a country other than that indicated by Article 4(1) or (2), the law of that country will apply: see Article 4(3). This Article is in similar terms to s.12 of the Act although some commentators have questioned whether the standard of "manifestly" is higher than that of "substantially" under the Act. Although Article 4(3) specifically refers only to pre-existing relationships, such as contracts, being relevant to the assessment, all the circumstances of the case fall to be included in the Article 4(3) assessment, including where the accident or damage occurred, any common habitual residence and the consequences of the tort.<sup>22</sup>

The burden for showing that the law which would otherwise be applied has been displaced under Article 4(3) is on the party asserting that this is the case.<sup>23</sup> In *Fortress Value Recovery Fund I LLP v Blue Skye Special Opportunities Fund LP* [2013] EWHC 14 (Comm) Flaux J suggested that Article 4(3) is only to be used on an exceptional basis and noted that the Explanatory Memorandum refers to the "centre of gravity of the tort."

In *Marshall v Motor Insurers' Bureau* [2015] EWHC 3421 (QB), the argument (based on the strict wording of Article 4) that Article 4(3) could not be used to return to the law indicated by Article 4(1), but displaced by 4(2), was rejected. The underlying rationale for the result in that case appears to have been that the escape clause could be used to

there is no material connection between the tort and the place where it occurred. For example, *Edmunds v Simmonds* [2001] 1 WLR 1003 is a cocoon case.

<sup>20</sup> The same conclusion was reached in *Jacobs v Motor Insurers' Bureau* [2011] 1 All ER 844.

<sup>21</sup> For example, in a fatal accident or other secondary victim claim.

<sup>22</sup> See *Winrow v Hemphill and Ageas Insurance Ltd* [2014] EWHC 3164 (QB) at [43] and [50].

<sup>23</sup> *Ibid.* [42].

ensure that a single applicable law applied in multi-party cases to all claims arising from the same facts.

## Special rules

Articles 5-9 of Rome II lay down special choice of law rules relating to torts in certain specific contexts: product liability, unfair competition, environmental damage, intellectual property and industrial action. It is beyond the scope of this short guide to consider these special rules.

We consider briefly the specific rules for other non-contractual obligations.

### **Unjust enrichment: Article 10**

At common law, the choice of law rule for restitution/ unjust enrichment is not entirely settled. The preferred view is that the starting point is the law of the place of the enrichment, although this can be displaced if another law can be shown to more appropriate.

Rome II provides a cascading choice of law rule for unjust enrichment claims. Article 10(1) provides that where the unjust enrichment claim concerns an existing relationship between the parties, such as one in contract or tort, that law will apply to the unjust enrichment claim. Where the law cannot be determined in accordance with Article 10(1), Article 10(2) provides that where the parties have their habitual residence in the same country when the event giving rise to the enrichment occurred, the law of that country shall apply. Where the law cannot be determined in accordance with either Article 10(1) or (2), the applicable law will be the law of the country where the enrichment occurred: see Article 10(3).

Article 10(4) provides an escape clause in circumstances where it is clear that the claim is manifestly more closely connected with a country

other than that identified by the Article 10 (1), (2) or (3).

Much of the difficulty in this area stems from the characterisation of claims, particularly of equitable claims. For example, whilst it is reasonably clear that a knowing receipt claim should be characterised as restitutionary, the characterisation of a claim for the recovery of a bribe is much more difficult. In *Banque Cantonale de Genève v Polevent Limited* [2015] EWHC 1968 (Comm) Teare J considered the potential overlap between Article 4 and Article 10. The Defendants sought to argue that the claim in restitution arose out of the tort/delict of fraud and therefore the governing law was that of the place where the damage occurred, in this case Geneva. Teare J considered that as the claim for restitution was made in tort and unjust enrichment the applicable provision is Article 10.

### **Negotiorum Gestio: Article 11**

The concept of negotiorum gestio essentially relates to agency without authority and the extent to which a non-authorized agent is entitled to payment for the benefit he has bestowed on the recipient/ principal. This is a concept recognised by many continental systems but not by English law. It is closely related to unjust enrichment.

The rules are in substance the same as those for Article 10.

### **Culpa in contrahendo: Article 12**

Culpa in contrahendo (fault in the formation of contract) is concerned with pre-contractual liability. Unlike many continental systems, English law does not have a general principle of culpa in contrahendo. There is, for example, no general duty of good faith in contractual negotiations. However, some English causes of action will fall within the scope of Article 12, where they relate to the negotiation of a contract: for example, non-



disclosure, negligent or fraudulent misrepresentations.<sup>24</sup>

Article 12(1) provides that the applicable law will be the law that was (or would have been) applicable to the contract which was being negotiated. Where this cannot be ascertained, Article 12(2) provides a cascade of choice of law rules almost identical to Article 4 (law of the place of damage and law of the place of common habitual residence), as well as an escape clause.

### **Contribution claims**

The traditional position in English law is that contribution claims could be brought under the Civil Liability (Contribution) Act 1978 regardless of the applicable law: see *Arab Monetary Fund v Hashim and Others (No 9)*.<sup>25</sup> However, whether this is good law is open to question - even for claims brought outside of the scope of Rome II.<sup>26</sup>

In Rome II cases, Article 20 makes it clear that at least where the original defendant has already satisfied the claim of the underlying claimant, the applicable law of any contribution claim will be that of the underlying substantive claim. There is some doubt as to the position where the underlying claim has not been satisfied. For claims falling outside the restricted ambit of Article 20 there are a number of possible options for a choice of law rule. The most likely is that Article 20 will be applied by analogy but alternatively the contribution claim could be treated as one of unjust enrichment, or Article 15(b) of Rome II on the division of liability might be found to apply. Alternatively, the contribution claim could be viewed as one in tort and the general rule under Article 4 could be applied.<sup>27</sup> Pending a judgment clarifying this issue,

<sup>24</sup> See, for example where Article 12 is mentioned in *Kingspan Environmental Ltd v Borealis A/s* [2012] EWHC 1147 (Comm.)

<sup>25</sup> The Times Law Reports, 11 October 1994. Confirmed obiter in *Kapetan Georgis* [1998] 1 Lloyd's Rep 352; *Petroleo Brasileiro SA v Mellitus Shipping Inc* [2001] EWCA Civ 418

the law in this important area continues to be uncertain.

### **Choice of law clauses: Article 14**

Rome II gives parties a (limited) option of choosing the applicable law of their non-contractual obligation.

Article 14(1)(a) allows all parties to choose their law by an agreement entered into after the event giving rise to the damage has occurred. This provision is only likely to have limited practical significance.

Much more important is Article 14(1)(b) which allows a pre-event choice of law where all the parties are pursuing a commercial activity and the choice of law agreement has been 'freely negotiated'. What constitutes a freely negotiated agreement is frequently the source of debate (see for example the judgment of Carr J in *Pan Oceanic Chartering Inc v UNIPEC UK Co Ltd* [2016] EWHC 2774 (Comm)). Simply including a choice of law clause in a standard form agreement is very unlikely to satisfy the requirement that the choice of law agreement be freely negotiated.

In all cases, any agreement needs to be expressed or demonstrated with reasonable certainty and may not prejudice the rights of third parties. However, the agreement need not be in writing.

Commercial parties will need to consider the scope of choice of law clauses and whether they are wide enough to encompass a choice of law for non-contractual as well as contractual obligations. In *Bashanov v Fosman* [2017] EWHC 3404 (Comm) Daniel Toledano QC (sitting as a Deputy High Court Judge) found, obiter, that a clause stating "all

<sup>26</sup> See *Cox v Ergo Versicherung AG* [2014] UKSC 22 where the Supreme Court considered the scope of "mandatory rules" in English private international law – albeit in the specific context of the Fatal Accidents Act 1976.

<sup>27</sup> See *XL v AXA* [2017] EWHC 3383 (Comm) where these various possibilities were canvassed and considered.

agreements between us would have to be made under and resolved under English jurisdiction" did not mean that the parties had agreed that non-contractual obligations would also be governed by English law.

### **What does the applicable law govern?**

The scope of the applicable law is very wide. Article 15 sets out the issues to be governed by it including: liability (together with exemptions from, limitations of and division of); vicarious liability; limitation<sup>28</sup>; assignability of claims; and the existence, nature and assessment of damage. This last item represents a significant change in the law.

In *Harding v Wealands* the House of Lords held that the assessment of damages in tort was for the law of the forum (lex fori under common law and the Act). In providing that assessment of damage is to be governed by the applicable law, Rome II had the effect of reversing this decision. In *Wall v Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138; [2014] 4 All ER 340 the Court of Appeal clarified a number of issues that had been left unresolved by the wording of Article 15. First, the Court held that the question of which expert evidence could be adduced to ascertain the amount of damages was a matter for English law (even though the damages would be assessed as a matter of French law in accordance with Article 15(c)). The method of proving any relevant opinion was a matter of "evidence and procedure" within the meaning of Article 1(3) of Rome II and therefore the law of the forum applied. Second, the Court of Appeal found that the applicable law referred to in Article 15(c) included not only black letter rules but also judicial conventions and practices such as tariffs, guidelines or formulae used in practice by foreign judges in the calculation of damages. The Court of Appeal found that the judge should have an informed

view of what a French judge would regard as an appropriate starting point which, by definition, would include having regard to conventions and practices as well as strict legal rules.

What is clear is that courts in different countries may still arrive at different conclusions as to quantum even if they are, in theory, applying the same underlying law.

Issues relating to specific aspects of quantification in cross-border claims continue to arise in practice. These include important issues such as the proper approach to multipliers for calculating future loss which is yet to be determined. The proper approach to claims for interest is another difficult area. In *AS Latvijas Krajbanka (In Liquidation) v Vladimir Antonov* [2016] EWHC 1679 (Comm) Leggatt J distinguished between a right to interest available under the substantive applicable law and the discretion available to a court in England by virtue of the procedural provision of s. 35A of the Senior Courts Act. In the circumstances, he found that under Rome II any award of interest was governed by Latvian law in accordance with Article 15. He therefore could not make an award of interest for the period prior to judgment for any Rome II claims because that remedy was not available under Latvian law.

Rome II preserves a residual role for laws other than the applicable law in a variety of other ways. Article 17 maintains the current position under English law and provides for account to be taken of the rules of safety and conduct applicable wherever the event which gave rise to the damage occurred. Article 16 provides that mandatory rules of the forum shall be applied irrespective of the applicable law and Article 26 permits a court to refuse to apply the applicable law determined by Rome II if it would be manifestly incompatible with

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<sup>28</sup> Insofar as limitation periods are concerned, and how they interact with CPR 17.4, see *Vilca v Xstrata Ltd* [2018] EWHC 27 (QB).

public policy. The precise interaction between the applicable law and other laws will inevitably give rise to difficulty and the balance which will be struck by the courts remains to be seen.

## Conclusion

While it has been almost a decade since Rome II came into force, interesting (and difficult) legal issues are continuing to arise in practice - including fundamental questions as to the scope and application of Rome II. In many cases there is little direct authority to assist and arguing the points requires specialist and creative legal thinking, drawing on analogies from other areas of private international law.

As always, issues as to jurisdiction and choice of law should be identified and dealt with at the earliest possible stage to enable any potential benefit to be obtained.

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# ABOUT THE AUTHORS



Charles Dougherty QC  
[cdougherty@2tg.co.uk](mailto:cdougherty@2tg.co.uk)  
+44 (0)20 7822 1262

## Charles Dougherty QC

Charles is a commercial silk who specialises in insurance & reinsurance, commercial fraud, professional negligence, product liability and private international law. He has huge experience of dealing with complex high-value commercial claims, often with a cross-border element. He is particularly sought out for his private international law expertise. He is recommended in Chambers UK as a leading silk for commercial litigation, professional negligence, commercial fraud, product liability, travel and insurance claims.

*"Go-to specialist for jurisdictional and conflict of laws issues"; "A barrister with a superb intellect, who has the ability to grasp and analyse issues incredibly quickly"; "An excellent advocate who is fantastic at thinking on his feet"; "A fantastic barrister who engages well with people and is thoughtful and clear"; Chambers UK 2018*



Marie Louise Kinsler QC  
[mik@2tg.co.uk](mailto:mik@2tg.co.uk)  
+44 (0)20 7822 1267

## Marie Louise Kinsler QC

Marie Louise has a specialist practice, focusing on private international law and EU law issues in a wide variety of claims including commercial law, product liability, environmental law, human rights and personal injury. She is frequently brought into large cases to deal with issues of jurisdiction, choice of law and related procedural issues including enforcement of judgments and limitation. She has a particular reputation for appellate work involving novel points of law. Recently she has appeared in 3 cases in the Supreme Court raising conflict of laws issues (*Brownlie v Four Seasons*, *Moreno v MIB*, *Iraqi civilians v MOD*) and she regularly appears in the Court of Appeal.

*"At the forefront of complex jurisdictional issues; she's right at the top of her game; she's steely, indefatigable and someone who just never gives up; she is always looking for new angles; superb on anything to do with EU law or any case with a foreign element". Chambers UK*



Ruth Kennedy  
[rkennedy@2tg.co.uk](mailto:rkennedy@2tg.co.uk)  
+44 (0)20 7822 1192

## Ruth Kennedy

Ruth is a commercial practitioner with specialist expertise in cases involving private and public international law. She is frequently instructed in cases involving disputes about jurisdiction or applicable law in a commercial context. Ruth has been involved in high profile and complex litigation concerning conflict of law issues, including assisting Marie Louise Kinsler QC on *Ministry of Defence v Iraqi Civilians* [2016] UKSC 25. During her time as a Judicial Assistant to the Master of the Rolls (for the legal year 2016/2017) she worked on *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA and others* [2016] EWCA 1267, the first appeal from the Financial List, which concerned the correct interpretation of Article 3(3) of the Rome Convention.

# CONTACT US



Lee Tyler  
Senior Clerk  
[lt Tyler@2tg.co.uk](mailto:lt Tyler@2tg.co.uk)  
+44 (0)20 7822 1203



Paul Cray  
Deputy Senior Clerk  
[pcray@2tg.co.uk](mailto:pcray@2tg.co.uk)  
+44 (0)20 7822 1208



Leanne Taylor  
First Junior Clerk  
[ltaylor@2tg.co.uk](mailto:ltaylor@2tg.co.uk)  
+44 (0)20 7822 1204



Oliver Gillen Smith  
Second Junior Clerk  
[ogs@2tg.co.uk](mailto:ogs@2tg.co.uk)  
+44 (0)20 7822 1205

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# FIND US

## Address

2 Temple Gardens  
London EC4Y 9AY

## Telephone

+44 (0)207 822 1200

## Fax

+44 (0)207 822 1300

## Tube

Temple (Circle & District)  
Blackfriars (Circle & District and Thameslink rail)

## DX

134 Chancery Lane

## Rail

Blackfriars  
City Thameslink

2 Temple Gardens, London EC4Y 9AY  
Tel +44 (0)20 7822 1200  
Fax +44 (0)20 7822 1300  
[clerks@2tg.co.uk](mailto:clerks@2tg.co.uk)  
[www.2tg.co.uk](http://www.2tg.co.uk)

