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"My colleague and I spent three days in Paris visiting the sights and drinking *bouteilles de vin*"

If you aren't *au fait* with governing law, you may be giving *carte blanche* to the foreign company you're working with – and that would be a *faux pas*

About 15 years ago I went on a business trip to Paris. While it sounds glamorous, the purpose was to attend a data room. It wasn't a modern-day data room, which requires just a laptop, internet connection and multi-factor authentication to visit, and you can come and go as you please. This was more like a less fun version of an escape room, where you're trapped in an underground chamber and not allowed to leave until you've decoded all the paper documents within.

We'd been sent there in connection with the purchase of a French firm. We were acting for the purchaser, who wanted to review the target company's contracts, to check they weren't going to expose it to significant risks – if, for example, the sale could trigger the termination of key contracts, or if it would be tied in to long-term agreements with unreasonable costs. Some French lawyers had been in the data room for a while, and had discovered a lot of English-language contracts, so they had shipped us over from London to review them.

We arrived at the data room on our first day and surveyed what lay ahead. There were many contracts to review. I picked one. Being a wily lawyer, rather than starting at the beginning and working my way through, I skipped to the end, where the governing law clause usually is. *"The provisions shall be governed and interpreted in accordance with the laws of Ontario."* That's in Canada, isn't it? I'm an English lawyer, so this one isn't for me.

I selected another contract: Ontario law, too. One by one, we went through the contracts that had been set aside for us, to discover that they were all governed by the laws of Canada. Yes, they were in the English language, but they weren't governed by English law. English lawyers weren't needed to review them; Canadian lawyers were.

So, as it turned out, it was a rather glamorous trip after all. My colleague and I spent three days in Paris visiting the sights and drinking *bouteilles de vin*.

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"We discovered that the contracts were all governed by the laws of Canada"

Why care about governing law?

The challenge started several hundred years ago as the foundations of common law were forming from decisions of the courts. These started to evolve into modern-day contract law in the 19th century, with famous cases such as *Adams v Lindsell* (1818). The courts have since decided thousands of cases that help us to interpret contracts. The common law is supplemented with legislation addressing particular issues, such as implied or unfair terms.

At least, this is the case in England and Wales. In many other European countries, there's a Civil Code: legislation clearly defining the main principles of contract law. Other common law countries (such as the US or Canada) may have started based on English law, but have since diverged with their own cases and statutes.

All this means that contracts may be written and interpreted very differently depending on which law applies. If there's a dispute, the courts use the governing law to work out the parties' obligations and whether there has been a breach. And this isn't just about interpretation of the express words written in the contract. It includes determining what other terms may be implied into the contract, or which terms may be unenforceable and therefore struck out.

BELOW Contracts often include a clause about governing law

Which law applies?

Many jurisdictions permit the parties to choose which country's law will govern their contract. The court will then interpret the contract in line with the chosen law (which may be different to the laws of the court's country). In the UK, this choice is given by rules deriving from the EU's *Rome I* Regulation.

So it's common for a contract to specify the chosen law. As not all countries may respect such provisions, it's worth checking for unfamiliar jurisdictions. Last year I was reviewing a contract with a party in Uruguay, and my client wanted it to be governed by English law. Uruguay has only recently passed a law that allows the parties to choose this.

If no governing law is specified, there are rules for working out which law applies. Under *Rome I*, for a consumer contract it would be the law of country where the consumer is resident; for a B2B services contract, it's where the service provider is resident.

Of course it's not quite as simple as that, as some types of contract may be excluded from the rules (such as, under *Rome I*, arbitration agreements), and some laws cannot be overridden by a choice of law (including, under *Rome I*, protections given to consumers and employees). In addition, issues connected to the contract may be subject to different laws, such as data protection laws (which depend on where the parties are established) and intellectual property laws (which depend on where the intellectual property subsists). There's also a *Rome II* Regulation that determines applicable law for some non-contractual matters.

Plus there's the question of which country's courts (or other forums) have jurisdiction to hear a case relating to the contract or other matter. This requires us to look at the rules for choice of jurisdiction.

Pulling myself back from these complexities and the inevitable confusion they lead to, I'm going to focus on the main law governing a contract, as chosen by the parties.

Let's play a game

Sometimes it's fun not to skip ahead to the governing law clause, but to guess what law applies from the way a contract is drafted. I'm going to give you some clues about four mystery contracts, based on some I've seen recently. Your mission is

to identify the governing law, and escape from my article.

Mystery Contract A

- **Clue 1:** Long sentences with lots of synonyms: *"You agree not to reproduce, duplicate or copy any information, data, content, materials, products (including software) or services…"*
- **Clue 2:** Archaic language: *"The supplier hereby agrees it shall forthwith not use the herein-afore-after-mentioned deliverables."*
- **Clue 3:** CAPS LOCK KEY SEEMS TO HAVE GOT STUCK WHILE DRAFTING THE LIABILITY PROVISIONS.

Write your answer here:

The correct answer is: the laws of a state of the US (in this case Illinois).

Wordy sentences with seeming repetition can evolve from not wanting to miss out anything where words have slightly different meanings, and are potentially interpreted differently depending on the context. Archaic language also still remains in some English-law contracts, but we appear to have done better at modernising in general.

The stuck caps lock key derives from the need to ensure provisions that exclude liability are sufficiently conspicuous to be enforceable.

Mystery Contract B

- **Clue 1:** Unable to understand it as it's written in Dutch.

Write your answer here:

The answer is: probably governed by the laws of the Netherlands or Belgium. Best to double-check given my Paris experience.

Mystery Contract C

- **Clue 1:** Nicely structured, not too long or complex, clear drafting and easy to understand.
- **Clue 2:** Parties must act reasonably, follow reasonable instructions and take reasonable steps to achieve the goals.
- **Clue 3:** OBEP brand appears in the header.

Write your answer here:

The correct answer is: the laws of England and Wales.

English-law contracts often use the word "reasonable" a lot. To determine what actions a reasonable person would take, we look to 100-year-old case law and consider what the "man on the Clapham omnibus" would do in a similar situation.

Mystery Contract D

- **Clue 1:** Distinct lack of requirements to act "reasonably"; instead the parties must act with "due diligence".
- **Clue 2:** Keeps using the "§" symbol, particularly when referring to legislation.
- **Clue 3:** Unusual phrasing or language, but you can't quite put your finger on what you would say instead: *"Approval shall not be untimely withheld."*

Write your answer here:

The correct answer is: a European country with a Civil Code. In this case, the contract was governed by Polish law, which has a concept of "due diligence". Other European countries (such as Germany) may have statutory requirements of "good faith".

The unusual wording may be because the contract was drafted by someone whose first language is not English, or it has been translated from another language.

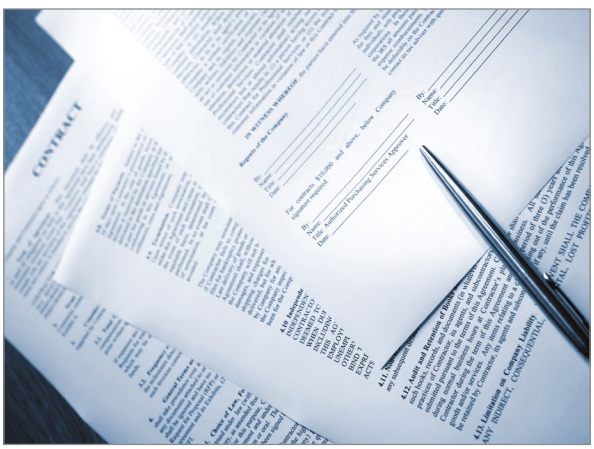
Changing the governing law

Governing law should be considered at the start of the contract process; ideally before putting pen to paper, as it will determine how it is drafted, and who is best placed to draft it. Often, parties select it based on where the parties are located, the capabilities of in-house lawyers, consistency with other contracts, or what they are most comfortable with based on previous experience.

But what if the parties don't agree? My client asked me to review a contract with a new developer in Lithuania. The supplier sent its standard terms, which were governed by the laws of Lithuania. Having read what I've said so far in this article, you may well say to me that Lithuanian law should remain, as the terms had been drafted with that in mind. But it was better commercially for my client for the contract to be governed by English law. So one of the early points of negotiation was to change the governing law, recognising the need to amend the terms to reflect differences in contract law and practice.

ABOVE **A trip to Paris is never wasted, even if my legal services aren't required**

"Slipping in a new governing law as a last-minute change may be precarious"



BELOW **If no governing law is specified, there are rules for working out which law applies**

Slipping in a new governing law as a last-minute change may be more precarious. I recently spent a couple of weeks drafting an agreement for a company, and it now seemed ready for signature. I received an email with a new version with one tiny amendment: the "laws of England and Wales" had been changed to the "laws of Norway" in the governing law clause. Such a small tweak could change the entire interpretation of the agreement. The options at that stage were: take the risk on interpretation, seek advice from a Norwegian lawyer (and delay signature), or change it back to England and Wales.

Contracts or wine

If a contract is governed by laws other than England and Wales, it doesn't necessarily mean that us English-and-Welsh-law-qualified lawyers become useless. We can still advise on English law issues connected with the contract (such as data protection, intellectual property and consumer rights), and may give insights on other legal and practical implications of the terms. But there are limitations to our review, including potential differences in the effect of the provisions between the governing law and English law.

By complete coincidence, I received a request this week to review a contract governed by the laws of Ontario, Canada. Sadly, I was not the right lawyer to carry out the review, but I knew just what to do; I cracked open a bottle of French wine and settled down for a drink.

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