

[INTERNATIONAL]

When in Rome...

A new law is coming this year to help decide what law applies in a contract made between parties in different jurisdictions. **Alan Ma** explains the implications for buyers



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The rights and obligations of parties under an international contract depend on which law governs their agreement. Consider the situation in *Print Concept GmbH v GEW (EC) [2001]* where a German firm agreed an exclusive deal to distribute an English manufacturer's air-cooled drying systems.

The contract was made orally and no governing law was agreed. Had German law been chosen, the English manufacturer would have had to pay an indemnity to its customers. This would not have been payable had the contract been governed by the law of England and Wales.

Under the current law, the courts in England and Wales, like any others in the European Union, will decide which law applies by reference to the 1980 Rome Convention. This states that the parties are free to agree the choice of law of the contract between them.

Where no selection has been made or is possible, the law most closely connected to the contract shall apply. Under the 1980 Convention, this is the law of the country of the contract's "characteristic performer". For a goods or services contract, the characteristic performance is the work done under the contract.

In *Print Concept v GEW*, the distribution agreement involved reciprocal obligations other than payment. The Court of Appeal found that Print Concept's obligation under the contract was to use its best endeavours to maximise sales in a German-speaking country. The reciprocal obligation on GEW's

part was to supply products when ordered.

The court ruled that the characteristic performance of the contract was the supply of the products, so the seller was the characteristic performer. The laws of England and Wales applied and no payment from GEW was required.

However, the current rule has been criticised for its uncertainty. As a result, changes have been provided in the new EU Regulation, commonly known as Rome I. So while buyers and suppliers can continue to freely agree on which law should apply, Rome I sets out specific rules to determine the applicable law when no choice of law is made.

The applicable law is defined by reference to different types of contracts including sale of goods/services, franchise and distribution. For each type, Rome I specifies the applicable law, replacing the current characteristic performance rule.

For some types, Rome I simply converts the characteristic performance rule into a fixed rule. For example, a sale contract is governed by the law of the seller and a services contract is governed by the law of the services provider.

However, there are substantial changes in other types of contract. For example, Rome I defines

distribution contracts as governed by the law of the distributor's habitual residence. This means that German law would apply rather than English law in *Print Concept v GEW*.

The application of the law from the supplier's jurisdiction could have both advantages and disadvantages to the buyer.

All parties concerned with international contracts should be aware of the new rule which will apply to contracts concluded after 17 December 2009.

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