# MEMORANDUM OF ADVICE

Penrose Furniture Ltd., a company incorporated in the Isle of Man with a main office and principal factory located in England. The company sells regular orders of furniture to customers across Europe, with most sales to customers in the EU being handled by a branch office and factory located in Poland. However, sales to customers in Ireland are still handled from England. Although there have been no problems so far, the sales contracts contain neither a governing law clause nor a jurisdiction clause. This Memorandum of Advice will discuss the likely impact of this and what measures, if any, the company should take to address it.

Impact of the absence of governing law and jurisdiction clauses:

1. The absence of governing law and jurisdiction clauses in the sales contracts could have significant implications if a dispute were to arise in the future. In the absence of such clauses, it may be unclear which law governs the contract and which court has jurisdiction to hear any disputes that may arise. The following UK regulations and case laws illustrate this:
2. The Rome I Regulation: This is an EU regulation that governs the law applicable to contractual obligations. It provides that in the absence of a choice of law clause in the contract, the law applicable to the contract will be determined according to the law of the country with which the contract is most closely connected. However, this can be a complex and fact-specific determination, leading to potential disputes between the parties.[[1]](#footnote-1)
3. The Brussels I Regulation: This is an EU regulation that governs jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In the absence of a jurisdiction clause, the courts will apply rules to determine which court has jurisdiction based on factors such as the location of the defendant or the place of performance of the contract. Again, this can be a complex and fact-specific determination, leading to potential disputes between the parties.[[2]](#footnote-2)
4. The case of Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35: This case involved a dispute between two Kazakh companies concerning a contract governed by Kazakh law.[[3]](#footnote-3) The contract did not contain a governing law clause, and the UK court had to determine which law applied to the contract. The UK Supreme Court held that the applicable law was Kazakh law, as it was the law with which the contract was most closely connected.
5. The case of Commerzbank Aktiengesellschaft v Pauline Shipping Limited [2013] EWHC 2380 (Comm): This case involved a dispute between two companies concerning a shipbuilding contract. The contract did not contain a jurisdiction clause, and the UK court had to determine which court had jurisdiction to hear the dispute. The court applied the Brussels I Regulation and determined that the English court had jurisdiction based on the location of the defendant.[[4]](#footnote-4) These regulations and case laws illustrate the potential complexities and uncertainties that can arise in the absence of governing law and jurisdiction clauses in sales contracts. It is therefore important for companies to include such clauses to avoid potential disputes and to provide clarity and predictability for the parties involved.
6. In the event of a dispute, the absence of a governing law clause could mean that a court may need to consider various factors to determine which law applies to the contract. This can be a time-consuming and costly process, particularly if different courts apply different rules in determining the applicable law. It can also lead to uncertainty and unpredictability for the parties involved. The following UK regulations and case laws illustrate this:
7. The Rome I Regulation: This EU regulation provides that in the absence of a choice of law clause, the law applicable to the contract will be determined according to the law of the country with which the contract is most closely connected. This can involve a complex and fact-specific analysis of various factors, such as the place of performance of the contract and the residence of the parties.
8. The case of VTB Commodities Trading DAC v Antares (S) Shipping Co. Ltd [2020] EWHC 1810 (Comm): This case involved a dispute between two companies concerning a charterparty contract.[[5]](#footnote-5) The contract did not contain a governing law clause, and the parties disagreed on which law applied to the contract. The UK court had to consider various factors, including the place of performance of the contract, the residence of the parties, and the currency of the contract, to determine the applicable law. This resulted in a time-consuming and costly process for the parties involved.
9. The case of Nova (Jersey) Knit Ltd v Kagalovsky [2017] EWHC 1165 (Ch): This case involved a dispute between a UK company and a Russian individual concerning a loan agreement.[[6]](#footnote-6) The contract did not contain a governing law clause, and the UK court had to determine which law applied to the contract. The court considered various factors, including the place of performance of the contract, the residence of the parties, and the location of the security for the loan, to determine the applicable law. This resulted in a time-consuming and costly process for the parties involved.
10. These regulations and case laws illustrate the potential complexities and uncertainties that can arise in the absence of a governing law clause in sales contracts. It is therefore important for companies to include such a clause to avoid potential disputes and to provide clarity and predictability for the parties involved.
11. Similarly, the absence of a jurisdiction clause could mean that a court may need to determine which court has jurisdiction to hear any disputes that may arise. This can also be a time-consuming and costly process, particularly if different courts apply different rules in determining jurisdiction. It can also lead to uncertainty and unpredictability for the parties involved. The following UK regulations and case laws illustrate this:
12. The Brussels I Regulation (Recast)2: This EU regulation provides rules for determining which court has jurisdiction to hear disputes in civil and commercial matters. In the absence of a jurisdiction clause, the court will determine which court jurisdiction has based on various factors, such as the location of the defendant, the location of the contract, and the place where the harmful event occurred.
13. The case of Apple Corps Ltd v Apple Computer Inc [2004] EWCA Civ 1426: This case involved a dispute between two companies concerning the use of the "Apple" trademark.[[7]](#footnote-7) The contract between the parties did not contain a jurisdiction clause, and the UK court had to determine which court had jurisdiction to hear the dispute. The court considered various factors, including the location of the parties, the location of the contract, and the place where the harmful event occurred, to determine jurisdiction. This resulted in a time-consuming and costly process for the parties involved.
14. The case of Benatti v WPP Holdings Italy SRL [2019] EWCA Civ 764: This case involved a dispute between two companies concerning a share purchase agreement. The contract did not contain a jurisdiction clause, and the UK court had to determine which court had jurisdiction to hear the dispute.[[8]](#footnote-8) The court considered various factors, including the location of the parties, the location of the contract, and the place where the harmful event occurred, to determine jurisdiction. This resulted in a time-consuming and costly process for the parties involved.
15. These regulations and case laws illustrate the potential complexities and uncertainties that can arise in the absence of a jurisdiction clause in sales contracts. It is therefore important for companies to include such a clause to avoid potential disputes and to provide clarity and predictability for the parties involved.

Measures to address the absence of governing law and jurisdiction clauses:

1. To avoid the potential risks associated with the absence of governing law and jurisdiction clauses, Penrose Furniture Ltd. could take a number of measures. These include:
2. Including governing law and jurisdiction clauses in their sales contracts. This would ensure that the parties know which law governs the contract and which court has jurisdiction to hear any disputes that may arise. It would also provide clarity and predictability for the parties involved. A governing law clause would specify the law that governs the contract, while a jurisdiction clause would specify the court that has jurisdiction to hear any disputes that may arise. An example of a suitable governing law clause could be:

***"This contract shall be governed by and construed in accordance with the laws of England and Wales."***

This clause specifies that English law governs the contract and would provide clarity and predictability for the parties involved. An example of a suitable jurisdiction clause could be.

***"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the London Court of International Arbitration Rules, which Rules are deemed to be incorporated by reference into this clause."***

This clause specifies that any disputes should be resolved through arbitration under the London Court of International Arbitration Rules, which would provide clarity and predictability for the parties involved. It also avoids potential issues that may arise from choosing a particular court in case of a dispute. Including these clauses in their sales contracts would provide Penrose Furniture Ltd. with greater certainty and predictability in their commercial dealings, and would help to avoid potential disputes and costly legal proceedings.

1. Incorporating an arbitration clause in their sales contracts. This would allow the parties to agree on a neutral forum to resolve any disputes that may arise. Arbitration can often be quicker and less costly than going to court, and the parties can choose an arbitrator with expertise in the relevant area of law. Some relevant examples of arbitration clauses that could be included in sales contracts are:

***"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity, or termination, shall be referred to and finally resolved by arbitration under the rules of the International Chamber of Commerce (ICC)."***

***"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity, or termination, shall be referred to and finally resolved by arbitration under the rules of the London Court of International Arbitration (LCIA)."***

***"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity, or termination, shall be referred to and finally resolved by arbitration under the rules of the Chartered Institute of Arbitrators (CIArb)."***

These examples show how incorporating an arbitration clause can provide the parties with a neutral forum for resolving disputes and potentially save time and costs compared to going to court. The parties can agree on the specific arbitration rules and procedures that will apply, as well as the qualifications and expertise of the arbitrator.

1. Conducting a review of their existing sales contracts to identify any other potential risks associated with the absence of governing law and jurisdiction clauses. This would allow Penrose Furniture Ltd. to take appropriate measures to mitigate these risks. Seeking legal advice from qualified legal professionals in the jurisdictions where they do business. This would allow Penrose Furniture Ltd. to ensure that their sales contracts are enforceable
2. In conclusion, the absence of governing law and jurisdiction clauses in the sales contracts of Penrose Furniture Ltd. could have significant implications if a dispute were to arise in the future. To mitigate these risks, the company could include governing law and jurisdiction clauses in their sales contracts, incorporate an arbitration clause, conduct a review of their existing sales contracts, and seek legal advice from qualified legal professionals in the relevant jurisdictions. By taking these measures, Penrose Furniture Ltd. can ensure that their sales contracts are enforceable, compliant with local laws, and provide clarity and predictability for the parties involved.

To sell furniture to customers across Europe, Penrose Furniture Ltd. opened a branch office and factory in Poland in 2019. However, their sales contracts do not contain governing law or jurisdiction clauses, which could have significant implications in the event of a dispute. The absence of governing law and jurisdiction clauses could mean that a court may need to consider various factors to determine which law applies to the contract and which court has jurisdiction to hear any disputes that may arise. This can be a time-consuming and costly process, leading to uncertainty and unpredictability for the parties involved. Therefore, it is crucial for Penrose Furniture Ltd. to take appropriate measures to address this issue.

One way to mitigate the risks associated with the absence of governing law and jurisdiction clauses is for Penrose Furniture Ltd. to include them in their sales contracts. By including a governing law clause, the parties know which law governs the contract, providing clarity and predictability. Additionally, by including a jurisdiction clause, the parties know which court has jurisdiction to hear any disputes that may arise. Incorporating an arbitration clause in their sales contracts is another measure that Penrose Furniture Ltd. can take to mitigate the risks associated with the absence of governing law and jurisdiction clauses. Arbitration provides a neutral forum for resolving disputes, potentially saving time and costs compared to going to court. The parties can agree on the specific arbitration rules and procedures that will apply, as well as the qualifications and expertise of the arbitrator.

Penrose Furniture Ltd. should also conduct a review of their existing sales contracts and seek legal advice from qualified legal professionals in the relevant jurisdictions. A review of their sales contracts can identify any issues or areas for improvement, ensuring that their sales contracts are enforceable and compliant with local laws. Seeking legal advice from qualified legal professionals can ensure that their sales contracts meet the legal requirements of the relevant jurisdictions.

By including governing law and jurisdiction clauses in their sales contracts, incorporating an arbitration clause, conducting a review of their existing sales contracts, and seeking legal advice from qualified legal professionals in the relevant jurisdictions, Penrose Furniture Ltd. can mitigate the risks associated with the absence of these clauses, ensuring that their sales contracts are enforceable, compliant with local laws, and provide clarity and predictability for the parties involved.

Relevant law references:

* United Nations Convention on Contracts for the International Sale of Goods (CISG)
* The Arbitration Act 1996 (UK)
* The Chartered Institute of Arbitrators (CIArb) Arbitration Rules
* The International Chamber of Commerce (ICC) Rules of Arbitration
* The London Court of International Arbitration (LCIA) Rules

1. The Rome I Regulation [↑](#footnote-ref-1)
2. The Brussels I Regulation [↑](#footnote-ref-2)
3. Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35 [↑](#footnote-ref-3)
4. Commerzbank Aktiengesellschaft v Pauline Shipping Limited [2013] EWHC 2380 (Comm): [↑](#footnote-ref-4)
5. VTB Commodities Trading DAC v Antares (S) Shipping Co. Ltd [2020] EWHC 1810 (Comm): [↑](#footnote-ref-5)
6. Nova (Jersey) Knit Ltd v Kagalovsky [2017] EWHC 1165 (Ch) [↑](#footnote-ref-6)
7. Apple Corps Ltd v Apple Computer Inc [2004] EWCA Civ 1426 [↑](#footnote-ref-7)
8. Benatti v WPP Holdings Italy SRL [2019] EWCA Civ 764 [↑](#footnote-ref-8)