20 August 2012

AmCham EU's Position Statement on a Common European Sales Law

Introduction

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the initiatives of the European Commission aimed at strengthening the internal market and easing cross border transactions. From this perspective, AmCham EU supports the Commission's intention to improve the quality and coherence of European contract law in the framework of the better regulation agenda.

However, we believe that further work needs to be undertaken with regard to the Proposal for a Regulation introducing an optional Common European Sales Law (also referred to as CESL)[1] to ensure that the proposed rules are to effectively deliver the promised benefits to consumers and business of all sizes. We therefore look forward to working with the European Parliament, Council and Commission to develop the proposed text into a workable and equitable instrument that will drive cross-border consumer transactions.

AmCham EU members consider that, as it stands, the proposal would create greater legal uncertainty and confusion with respect to the current legal framework. We are foremost concerned with the scope of the proposal, its relationship with other relevant rules and in particular Article 6 of the Rome I Regulation,[2] and the high level of consumer protection. The current proposal in its present form is highly complex and difficult to work with it in commercial practice.

1. The Common European Sales Law shall only apply to business-to-consumer relations

AmCham EU believes that with the appropriate adjustments the proposed Common European Sales Law could provide increased legal certainty for business-to-consumer contracts in cross-border situations. It could in fact act as the desired stimulus for cross-border trade and become a blue-print for such contracts internationally.

[1] Proposal for a Regulation of the European Parliament and the Council on a Common European Sales Law, COM (2011) 635 final, 2011/2084 (COD), Brussels 11.10.2011.
[2] Rome I Regulation refers to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, which governs the choice of law in the European Union. Article 6 concerns consumer contracts.

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AmCham EU members, however, do not consider that the proposed regulation should be applied to business-to-business contracts because it does not provide any visible added value and threatens contractual freedom. We question the fact that the disparity of national laws is causing significant obstacles to cross-border trade between businesses - be they large multi-nationals or small local businesses. We therefore would like to see further independent proof that this is the case. Moreover, the bargaining powers between businesses are fundamentally different to those of business-to-consumers relationships, hence both regimes should be kept separated. Adopting a one-size-fits-all approach to both business-to-consumers and business-to-business regimes is not appropriate in light of the fundamental differences between the context of such transactions. A paramount importance should finally be given to the freedom of contracting in this area, as businesses require flexibility to adapt contracts to the nature of their trade.

AmCham EU would therefore like to see the option for Member States to make the Common European Sales Law available for business-to-business contracts removed from the text. Similarly, the default rules that allow businesses to use the Common European Sales Law when selling to SMEs should also be deleted. It would otherwise lead to different standards among business-to-business contracts.

Article 3 should be made clearer. The trader has the sole right to make the option of the Common European Sales Law available in business-to-consumer relations.

The scope of the proposal should also be clarified on the inclusion of services within its remit.

2. The Common European Sales Law needs to be fully in line with the consumer *acquis*

The interaction between the Consumer Rights Directive and the Common European Sales Law proposed regulation is key. This Directive is a fundamental element of the business-to-consumer contractual framework in Europe. Therefore, any piece of legislation on the Common European Sales Law must be aligned with the Directive and should not contradict or seek to reverse concepts found in the Directive.

AmCham EU members understand that a certain level of protection is necessary for consumers to find it worthwhile to opt into the Common European Sales Law. However, the level of consumer protection proposed in the Common European Sales Law is not balanced and will in fact discourage business from adopting the Common European Sales Law.

At the same time, the need to obtain a separate explicit statement from the consumer (Article 8.2) for conclusion of a contract under the CESL may discourage traders to offer such a regime. Moreover, consumers would be unable to establish the fundamental differences between rules applicable under

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national law, with which they are often unfamiliar, and rules applicable under the optional regime, in the absence of professional legal advice.

Most notably, the proposal allows an extensive period of time for termination on the grounds of non-conformity and has an open-ended provision for payment for use. The definition of what constitutes an unfair contract term is unclear and the list of unfair contract terms that are considered per se unfair is too broad. This non-exhaustive list illustrates that the extensive rights granted to consumers under the Common European Sales Law are likely to hinder the application of the instrument on a broad scale. Interestingly enough, this list was included in the present proposal despite the fact that the recent Consumer Rights Directive did specifically exclude it for lack of support. It is not clear why something that was disregarded for being inadequate in a similar context is now being re-introduced.

Article 64 may be a deterrent for businesses to choose the European Sales Law as any term that would be unclear would be interpreted in favour of the consumer. A more balanced approach is therefore also required here.

Under Article 103 (e) the Commission opens the 'Pandora box' by introducing conformity criteria in the following wording "*as the buyer may reasonably expect to receive*". This wording is also ambiguous and allows for varied interpretations. In its present form it will allow consumers to make unjustified claims. It should therefore be deleted.

The consumer should neither be allowed to make unlimited use of the goods before return or replacement. Consumers should be liable to pay for any use that would cause a damage or loss to the good. The Commission should therefore adapt the following wording of Article 114: "(2) *The buyer is not liable to pay for any use made of the replaced item in the period prior to the replacement, except any loss of damaged directly caused by this use*."

Finally, AmCham EU welcomes the consistency of this proposal with the provisions related to digital content adopted in the framework of the Consumer Rights Directive. The proposal rightly points out that many forms of digital content supply and related service provision are also in the scope of the E-commerce and/or Services Directives.

3. The relationship between the Common European Sales Law and Rome I Regulation is not clear

The relationship and coherence between the Common European Sales Law and the Rome I Regulation remains rather unclear. Article 6(2) of Rome I establishes that consumers cannot be deprived of the benefits of their domestic consumer protection law. However, it is not clear whether this provision is superseded by the proposed Common European Sales Law.

AmCham EU does not see a great merit in the arguments put forward by the Commission and is afraid that businesses are vulnerable to the judicial

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discretion of the Member States' national courts when faced by a case involving the CESL. The CESL regulation needs to ensure its primacy over substantive national law in order to avoid this legal uncertainty.

4. The EU Sales Law creates legal uncertainty without any real harmonisation benefit

Given the complex nature of the text and its optional provisions, there is a high risk of legal uncertainty due to the differences in interpretation at the Member State level. National courts are likely to have a different interpretation of new concepts.

AmCham EU welcomes the idea of introducing a database of European and national judicial decisions relating to the interpretation of the provisions of the Common European Sales Law as a means to ensure coherence among the 27 Member States. However, this will not be sufficient to reduce the legal uncertainty derived from different interpretations at Member State level and references to the European Court will be time consuming and unavoidable.

The proposed regulation on the CESL does not cover all aspects of contractual relations. Therefore, national law provisions will still be necessary to achieve full coverage of all contract terms. This will discourage business from opting to use it and therefore greatly undermines the added value of the proposal altogether. In addition, traders will still have to face costs from the need of interpretation of this second regime even despite the fact that the aim is to reduce these costs when trading cross-border.

A number of provisions on a more technical level are burdensome to businesses and/or consumers:

- For example, a Member State may require that certain contractual information is made available in their language. Thus, each trader using the Common European Sales Law will have to comply with the individual linguistic requirements of each Member State. At the same time perhaps the greatest barrier to cross border trade, the lack of reliable postal services, is not addressed by this proposal.

- The inclusion of the Common Law principles of 'good faith' and 'fair dealing' in Article 2 will prove confusing for businesses and consumers from all other European legal traditions.

- The fact that the trader bears the burden of proof on information requirement (Article 21) can be a deterrent to opt for this regime. At least, the Commission should include a rule on reversal of the burden of proof at under certain conditions.

- This provision in Article 31(3) of a Definition of Offer could lead to difficulties in common law countries where stating a price in advertising does not constitute an offer to sell at that price. There are

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adequate requirements in consumer law that protect the consumer from unfair and misleading transactions. Provided that the consumer is aware of the price before the contract is completed should be sufficient.

- Article 44(3) establishes that the trader can withhold the reimbursement until he receives the goods back. However it should be made clear that the seller should have the time and opportunity to accurately check the product before reimbursement to assess any damage or loss caused by the consumer. In paragraph (4), concerning off-premises contracts, the term "by their nature" should be defined in a note to determine which are the goods that can be returned by post or not.

- Considering pre-contractual statements as automatically included as contract terms as found in Article 69 provides legal insecurity for traders and could be a deterrent to offer this regime

- The notion of "grossly unreasonable" determination of the price found in Article 74 is ambiguous in its present and could create issues in interpretation. The concept should be clarified.

5. Conclusion

Overall, AmCham EU welcomes the initiative of the European Commission to improve the quality and coherence of European contract law. However, an optional European Common Sales Law, as the proposed regulation currently stands, would lead to another layer of legislation, with the corresponding complexity and legal uncertainty.

Moreover the proposal remains insufficient to attain a suitable degree of harmonisation of contract law in the EU as companies will still need to rely on national law and the new regime, in particular for aspects falling outside the scope of the regulation.

We urge the European Institutions to carefully re-assess the proposed regulation for the Common European Sales Law and its potential impact. Particular attention needs to be devoted to its interaction with other EU laws such as the consumer *acquis* and the Rome I Regulation. We look forward to working further on the details to fine-tune the proposal and achieve true added value for business and consumers and the society as a whole.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate U.S. investment in Europe totalled €1.4 trillion in 2009 and currently supports more than 4.5 million jobs in Europe.

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