

A New EU Contract Law – Just a matter of time?

Developments towards a new EU-wide sales law are gathering pace and it looks as though the question is now when, rather than if, it will come into force. Quite apart from the groundbreaking legal changes this will entail, from a commercial point of view all SMEs, and any other businesses which deal with consumers and who trade within the EU, need to be aware of the proposed changes.

Background

On 11 October 2011, the EU published a detailed proposal for a regulation of the European Parliament and Council on a Common European Sales Law ("CESL"). The proposal can be downloaded here:

http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf

The EU has been considering for some time how to unblock barriers in the single market and reduce the frictions which impose cross-border transaction costs and other obstacles for SMEs. An overview of the initiatives in this area is available [here](#), and an article on previous developments in relation to the CESL is available [here](#).

The Commission's adoption of the recent proposal is a concrete step forward and makes absolutely clear that the EU's preferred route for implementing reform in this area is to have a new 28th contract law for the sale of goods and digital content, sitting alongside the existing 27th commercial laws of the various Member States.

Status of the new law

The new CESL would be a rather complicated hybrid. As it would not regulate every single aspect of a commercial transaction, it would need to be supplemented where relevant by applicable domestic law (for example, on the question of whether a contract can be considered illegal because of the nature of the goods being sold).

So, for example, if a French business sold goods to an English consumer and both parties elected that the CESL would apply, the provisions of the CESL would apply to the exclusion of all other provisions of French/English commercial law, save for those falling outside the scope covered by the CESL.

The CESL would be voluntary rather than mandatory, and would only apply where both parties consented to this.

Furthermore, it is intended that the CESL will only be capable of applying to certain types of transaction (although this may change over time), namely:

- Contracts between a business (of any size) and a consumer
- Contracts between businesses where at least one of the businesses involved is an SME. However, for CESL purposes an SME is defined as a business employing less than 250 people and having an annual turnover of EUR 50m or less/a balance sheet of EUR 43m or less. Given these relatively high thresholds we suspect the majority of business to business transactions will be capable of being governed by the CESL.

It is not intended that the CESL be used for purely domestic contracts (i.e. where the parties are all based in the same EU member state), and for the time being the CESL will not apply to contracts for the supply of services, except where that service contract is related to the sale of goods or digital content.

Timetable

Although the EU legislative procedure still has some way to run there is a clear determination within the EU for this to be implemented as soon as possible and in any event by the end of 2012, the 20th anniversary of the creation of the internal market.

Some of the key features of the current proposal and possible strategic benefits for businesses are discussed [here](#).

Further change

However, given that this proposal still has some way to go before it becomes law, there will almost certainly be changes of varying degrees of significance as the proposal has already met with a significant degree of criticism and opposition from various parties.

The criticisms relate to various areas, including technical legal arguments about whether the EU has sufficient legislative competence to pass a measure in the way in which it is envisaged, the more detailed aspects of how the CESL would work in practice, and also policy arguments about whether the CESL is really necessary and how much of a positive impact it will have in practice set against the costs of developing and implementing it.

General Guidance

Our general guidance to businesses at the moment is that all businesses should be aware of the forthcoming introduction of the CESL, and be mindful of the opportunities which it presents and if desirable begin strategic planning for this. However, it is perhaps a little too early to focus on the detail of the legislation.

Whilst the detail will undoubtedly change, it is clear that there is a strong political will within the various bodies of the EU to make this happen and that a CESL in some form will be a reality in the short to medium, rather than long, term. As the CESL is set out in an EU

Regulation (rather than a Directive), once the Regulation comes into force there will be no requirement for separate domestic implementing legislation.

We will continue to publish updates on this as and when the process advances.

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