

## **A New EU Contract Law - Possibilities for Small Business**

*Although the precise text remains subject to change, it is very likely that a new EU wide sales law will be enacted in the near future. Although this has been the subject of a significant amount of criticism from various quarters, this article looks at some of the potential commercial benefits for SMEs, as well as identifying certain potential drawbacks.*

### **Background**

Any business which sells goods has to choose a national law which will govern the contract (if no choice is made there are rules which determine which law applies). So if you are a UK-based website you might choose English and Welsh law in your terms and conditions, even if you are selling goods to a customer in France.

The EU Commission believes that this prevents customers shopping around within the EU or buying goods from websites in other EU member states. There is a proposal to address this by bringing into force an optional EU contract law which will be the same in all EU member states. This means that if a business wants to sell to a customer in another member state they can choose to use the new law.

On 11 October 2011, the EU published a proposal for 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](http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf)

A separate article available on our website considers the likely status of the new law, its potential impact and the timetable for implementation. This article can be accessed [here](#).

### **Implications for SMEs**

Given that the precise text of the CESL is still subject to change, our general guidance to businesses at the moment (particularly those who currently trade cross border within the EU or who are considering doing so) is that whilst it is important to be aware of the CESL and the opportunities which it presents, it is perhaps too early to focus on the detail of the legislation.

For certain businesses the CESL may be attractive and offer strategic benefits, for example:

- Particularly for businesses based around e-commerce, this may be a useful tool to drive sales and to expand their business into markets which they had previously ignored.
- Using the CESL will require some initial implementation costs, however depending on the nature of the business concerned those initial costs need not be prohibitively expensive. Whilst, on its face, the CESL is very different to English domestic sales law, most of the concepts in the CESL are reflected in whole or in part in domestic rules. For example, one of the aspects of the new law which has attracted a significant degree of criticism is that it imposes a general duty of good faith, and a general duty to co-operate. English law does not recognise general duties of this nature in contracts for the sale of goods. However, it does have certain specific rules which partially reflect those principles (for example the rules about misrepresenting goods or services, or about contracts being entered into under duress). Furthermore, we suspect that most business people will not have a problem complying with these duties in practice.
- To an extent some of these set up costs will be mitigated by the fact that consumers in any EU Member State will be able to access the text of the relevant law, and certain of the ancillary documents which are required, in official translations in their home language published by the EU and which a business will be able to use at no extra cost.
- For those businesses dealing with consumers, there is a distinct advantage as the CESL currently provides for a uniform set of consumer protection rules (for example rules about how long a consumer has to return goods and what standard the goods need to be in), regardless of where the consumer is based. This is different from the current position where, unless a business takes legal advice on the level of consumer protection in the consumer's home state, they can never be completely certain about exactly what rules apply to EU consumers as the exact rules differ from member state to member state.
- Finally, particularly if the CESL becomes a popular and common way of doing business within the EU, early adopters of this law may have a significant competitive advantage.

Whilst there are undoubtedly positive aspects to the introduction of the CESL, it is by no means a panacea for tackling all the problems and blockages which SMEs face when considering cross-border sales. For example, the position in relation to enforcement is still unclear. It is certainly helpful that parties in different states who contract using the CESL would have a clear idea of what their mutual rights and obligations are, but if this is not coupled with practical enforcement mechanisms this could be of limited use when the other party defaults.

Large parts of the CESL are drafted in a relatively simple and clear way. Generally this is helpful, however there are certain provisions where this does give rise to concerns. For example, the current draft contains a provision whereby a party can avoid a contract if at the time the contract was made, they were “...in economic distress or had urgent needs, was improvident, ignorant, or inexperienced.....and the other party knew or could be expected to

*have known this and...exploited the first party's situation by taking an excessive benefit or unfair advantage".*

One can see how an attempt could be made to use this provision unfairly to try and get out of a contractual obligation, particularly if the case was heard before a local court likely to be sympathetic to a domestic party raising the issue.

The CESL also imposes a reasonably high level of formality in terms of notifications and information which needs to be provided, particularly to consumers. In the case of online sales the requirements as currently drafted are likely to require several separate notifications and opt-ins and would probably require changes in the way online transactions are carried out.

Finally, as well as possible legal implementation costs, businesses would also need to bear in mind that changes might be required to their own internal arrangements. For example, they may need to update their record keeping systems to differentiate between those contracts entered into on the basis of English law, and those under the CESL.

However, many of these problems are likely to be addressed before the final law comes into force.

## **Conclusion**

The introduction of the CESL is potentially an exciting development for SMEs who already trade cross border within the EU, or are considering expanding their sales into other EU member states. At the moment it is impossible to predict what the effect the introduction of the CESL will have on the single market project and how many businesses are likely to take it up. Whilst using the CESL will no doubt pose practical challenges and, at least initially, have cost implications, for many businesses it could offer significant commercial advantages and certainly it is something which all SMEs need to be aware of.

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