

European Commission Green Paper on options for European Contract Law COM (2010) 348

ICC

Views of the International Chamber of Commerce by its Commission on Commercial Law and Practice (CLP)

ICC represents business interests worldwide and works to simplify international trade, not least for small and medium sized businesses. The ICC does so in many ways such as establishing international rules, for example Incoterms®, rules on documentary credits and on demand guarantees, by issuing model contracts and other practical contract tools and by influencing legislators and international bodies.

The focus of the CLP Commission is trade business-to-business.

General remarks – the need for an instrument on European Contract Law

Although it is clear that harmonization of European contract law could result in simplification of trade, the differences between contract laws in different countries do not constitute a significant obstacle to cross-border trade between businesses. The problems that do exist are created in some areas by different mandatory rules. But these problems are not a major obstacle. Companies will usually base their contracts on standard terms, either their own or standard terms issued by a branch organisation.

In its Green Paper the European Commission seems to assume that when entering into a cross border contract the business will have to spend time and money in order to know the foreign law, or be dominant enough to be able to impose its own national law. We consider that these assumptions are only partially true. There are a number of standard terms and other contract tools which help companies manage their own contracts without the need of legal assistance in each case. And further, that these tools do not necessarily favour either of the parties. ICC has, for example issued standard terms and model contracts which are fairly balanced between the interests of both parties.

Furthermore the Green Paper does not give enough weight to the UN sales convention (CISG), which should be the law governing cross-border sales both within the EU and between the EU and third countries. The convention has so far been ratified by 76 countries around the world, among them all but four European countries. Although it is limited to business-to-business trade in movables it represents a huge step towards a global sales law. For European businesses it has meant a significant simplification of cross-border trade, both within and outside the EU. If a further level of contract law in general and sales law in particular were to be introduced in the EU, there is a risk that this would complicate rather than simplify the legal situation for European business. We also wish to point out

that ratification of CISG by the remaining EU member states would be a significant step in simplification of the cross-border trade in the EU.

It should also be noted that the UNIDROIT principles already provide an “optional instrument” for business-to-business contracts, and that the freedom to choose the applicable law also means that all available national laws can be seen as “optional instruments”. Furthermore we already have the specifically European PECL rules.

Interpretation, jurisprudence

The Green Paper only briefly mentions the question of interpretation of and jurisprudence regarding a European instrument. There is always a risk that any European instrument is interpreted by users and by the courts on the basis of national legal traditions resulting in different application of the rules. Depending on the legal nature of the instrument the Court of Justice may have jurisdiction to interpret the instrument. The Court of Justice is, however, by nature a constitutional court and its composition and procedure makes it unsuited to dealing with commercial disputes.

Legal nature of an instrument of European Contract Law – the options

Option 1. Publication

The result of the work of the Expert Group should of course be published. We also wish to underline that this does not exclude a later choice of other options. In fact, regardless of whether other options are preferred, publication should be a first step in order to allow all organisations, institutions and persons who have an interest in the project to become familiar with and to digest the results of the work. Publication could also, as has already been seen in respect of the Draft Common Frame of Reference, have quite a large impact on arbitrators, judges, legislators and others who formulate legal rules.

Option 2. A tool box for European legislators

Furthering the coherence of EU laws should clearly be a goal in itself. Provided that the rules are appropriate a tool box as envisaged by option 2 may be helpful in that respect. Option 2 b) ought to be more effective as it binds all the EU institutions. It is important, however, that the tool box is restricted to the questions subject to actual EU legislation. Otherwise it would make the status of any redundant rules very unclear.

Option 3 A recommendation to member states

This option would not seem to offer any advantages as, even if some member states follow the recommendation, it would not provide any uniform rules to be used by companies (or consumers). The legal situation would become more and not less complicated. The comparison in the Green Paper with the present situation in USA is misleading as the differences between the legal systems are much greater between the EU member states than between the states in the US.

Option 4. An optional instrument

As explained in our general remarks above the need for an optional instrument for trade business-to-business is limited. The freedom of contract, the freedom to choose the applicable law, the availability of practical and reasonable standard terms and the wide ratification of CISG are all factors which enable also SME:s to engage in cross-border trade.

An optional instrument could, however, possibly bring some benefit for B2B contracts. But only provided a number of important requirements are met. The rules must be suited for B2B contracts, they must be clear and practical and as far as possible provide legal certainty and freedom of contract. The rules should also override any mandatory national rules within their scope.

If business people and the persons providing legal advice accept that these requirements are met there is a chance that they will choose to apply the European instrument and give it priority over the applicable national law.

In order to make the rules suitable for business-to-business contracts they should, as far as possible, be separated from the rules for consumer contracts. Such a separation will both make the rules materially better adapted for business contracts and will make the rules clearer and more understandable.

In this context we wish to warn against the tendency to argue that protection typically given to consumers should be extended to small and medium sized businesses. Those who do business must operate on the same conditions. Any departure from this principle would create legal uncertainty. Furthermore, the inclusion of such protection in the optional instrument would simply mean that businesses whose trading partners would qualify for protection would be highly unlikely to choose that optional instrument. This does not mean, however, that the freedom of contract can be absolute. Some minimum protection against unreasonable contract terms imposed by a dominant party should be included. But it should not go further than is already generally accepted in European contract law. It must also be noted that a dominant position does not come from the size of the company but from its market position. The size of a company is only one of many factors deciding its market position.

If an optional instrument is to simplify cross-border trade it should also override mandatory national rules within its scope. Otherwise, to the extent that such mandatory rules may create problems, the parties would not be helped by the choice of the optional instrument. This would also be an advantage in relation to other available optional instruments such as the UNIDROIT principles. Formally, an exception may have to be made in relation to overriding mandatory provisions as referred to in article 9 of the Rome I Regulation, but there should not be any risk of such conflicts. Areas in which national mandatory rules create problems in business-to-business contracts are the rules on transfer of ownership and proprietary security interests in movable property, agency, distributorship and franchising contracts.

Finally, the optional instrument should be a tool for all cross-border contracts, within and outside the EU. There is no reason why a German company should use different rules in its relations with a French company and a Swiss one. This means also that a possible optional instrument must

incorporate the UN sales convention (CISG) without attempting to create a further set of rules for international sales.

Option 5. A Directive on European Contract Law

A Directive providing for minimum harmonisation would be unlikely to have positive effects. It would rather risk causing increased complexity. And even in the unlikely case that the member states would accept a Directive with maximum harmonisation, something which seems impossible for B2C contracts, there would probably still be serious problems caused by different interpretation. It is also questionable whether such a Directive would be a proportionate measure.

Option 6. A Regulation on European Contract Law

In view of the fact that different contract laws are not a serious obstacle to cross-border trade, such a Regulation would not be a proportionate measure.

Option 7. A Civil Code Regulation

This option is not realistic and would not be a proportionate measure.

Scope of application of the instrument

The scope that the instrument should have depends, of course, on the option that is chosen. Our comments refer to option 4, the optional instrument.

Provided that the rules for business-to-consumer contracts and those for business-to-business contracts fulfil the necessary requirements, providing suitable and practical and giving legal certainty, there is no reason to exclude either area. As we have underlined, however, these requirements are unlikely to be met unless the rules are separated as far as possible.

There does not seem to be any reason to exclude application of the optional instrument in domestic contracts. Businesses wishing to streamline their contracts by having the same rules in domestic and international contracts should be allowed this opportunity.

The Green Paper mentions the possibility to limit the application of the instrument to online transactions. We would strongly advise against this, at least for business-to-business contracts. The material rules should not be dependent on the means used for entering into contracts.

Material scope of the instrument

The instrument should cover the most central parts of the contract law, dealing with all questions that are common to different types of contracts, mainly corresponding to the subjects covered in Books II and III of the DCFR. A future European instrument should also include rules for specific types of contracts that are frequent in cross-border trade. But it would be better at this stage to limit the instrument to general rules. The need for and the possibility to create practical uniform rules should be carefully evaluated for each separate type of contract, and specialists in each field must be involved in this process. To give one example: the specific rules that are now contemplated are not suited for wholesale market transactions.

Conclusions

Even if differences in contract law are not a serious obstacle to cross-border trade in the EU, more common rules would simplify trade. In this respect an optional instrument might have positive

results. If these are to be realised, however, the optional instrument must be of very high quality both as to content and presentation. The rules must be, and must by users be seen to be suitable for the contract in question, clear and providing legal certainty. In order to achieve this rules for business-to-business contracts should be separated as far as possible from those intended for consumer contracts.

It is also important that the introduction of a European instrument of contract law does not complicate trade with countries outside the EU, a consideration which is largely overlooked in the Green Paper. This means, for example, that sales between businesses should be governed by the UN convention on sales contracts.