European Office

Position Paper on the European Commission proposal for a Regulation concerning a Common European Sales Law

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Introduction

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I. General position of the VDMA on the proposal by the European Commission

1. The VDMA

The German Mechanical Engineering Federation (VDMA) is the largest federation representing the mechanical engineering industry in Europe. Its approximately 3,100 German and international member companies - mainly small and medium enterprises (SMEs) - have a total of approximately 948,000 employees in Germany (December 2011) and turnover of 187 billion euro (2011). The mechanical engineering industry is characterised by a large number of SMEs. About 86% of VDMA members are SMEs - according to the EU definition - two-thirds of them even employ fewer than 100 persons.

The VDMA, which represents an extremely export-oriented industry - export share in the German mechanical engineering sector is approximately 76 per cent; of that, approximately 44 per cent is exported to EU countries - is often contacted by companies concerning issues with other jurisdictions. Within the legal department of VDMA two experts work on issues of international law and give general guidance to member companies in relation to transactions with customers from other countries. Moreover, the VDMA is closely involved in the preparation of standard contracts for cross-border transactions, which are published by its European umbrella association ORGALIME, and in the development of standard contracts by the International Chamber of Commerce (ICC).

The VDMA was involved at an early stage in the discussion about European contract law. Representatives of VDMA member companies have supported the work of academics working on the Common Frame of Reference as members of the "CFR-network" and commented on it from the viewpoint of businesses actually involved in the field.

The VDMA was also represented in the "key stakeholder sounding board", which discussed the text of the draft European Contract Law with the expert group set up by the Commission.

The following position paper concerns - in accordance with the VDMA's role as a representative of the engineering industry - “business to business” (B2B) transactions.

2. The perspective of the engineering industry

The principle of freedom of contract applies to transactions between businesses. Unlike consumer law, there is generally no need to protect one party in a particular way. Therefore, in relation to the Common European Sales Law too, a clear distinction needs to be made between the Sales Law on B2B transactions and consumer law. For the mechanical engineering industry with its majority of SMEs, safeguarding freedom of contract is paramount. Thanks to freedom of contract as a fundamental principle of all European civil law systems, businesses can conduct

cross-border commercial transactions based on self-negotiated contracts or standard contracts and general terms and conditions of business relatively easily.

Obstacles arise only when the freedom of contract is breached by mandatory legal provisions. This has happened more and more frequently in the recent past, often when mandatory legal provisions which were created for consumer transactions were applied indiscriminately to commercial transactions (for example, as part of the German Act on Terms and Conditions). In the view of VDMA, this is inappropriate and should be avoided.

In this regard, we explicitly suggest that consumers and SMEs should not automatically be treated in the same way with regard to their vulnerability in business transactions. It is true that inherently, the parties to a B2B contract are not necessarily in an equally strong position. However, it does not follow from this that the weaker party to the contract should be treated like a private consumer. A party to a contract which is the weaker party in one business relationship may be the stronger one in a different business relationship. In addition, an SME is not automatically the weaker party - the bargaining power of a company is measured not only by its size, but also by its position in the marketplace, for example as a technology leader.

3. No need for a Common European Sales Law in the B2B sector

The VDMA sees no need for the creation of an optional European Sales Law. In particular, our practice in advising firms provides no confirmation whatever that SMEs are being hindered significantly in their cross-border business activities or even deterred from engaging in such activities altogether as a result of the different legal systems that exist in Europe. Since this assumption is the Commission's main rationale in proposing a Common European Sales Law, the Commission's approach to this proposal is based on a false premise.

Since the start of the Commission's European contract law initiative, the VDMA has pointed out that the difference between the systems of contract law is fundamentally not a problem for cross-border trade in B2B transactions. The fact that in all the legal systems in Europe, freedom of contract is the determining principle of contract law means that businesses can conduct cross-border commercial transactions based on self-negotiated contracts or standard contracts and general terms and conditions of business relatively easily.

In our experience, the different national legal systems do lead in very rare cases, to mechanical engineering deals with a foreign country falling through. This is also basically the case for SMEs. However, it is true that it is much more difficult for SMEs to cope with different legal systems and complex legal issues due to their limited financial and human resources. Nevertheless, it can be observed that SMEs are also able to do business abroad and are not deterred from entering into deals. Thanks to freedom of contract, for example, it is possible for businesses to work with standard contracts. Contract law differs significantly from other fields of law, such as company law, where businesses are bound by the forms of legal entity created by the legislator, and the diversity of national forms of legal entity does indeed cause problems for SMEs. In contract law, companies can rely on tried and tested tools

such as the ORGALIME standard contracts for cross-border transactions, or the standard contract clauses of the ICC. In particular, the ORGALIME delivery terms and the ORGALIME delivery and installation terms and conditions provide valuable assistance.

4. Continued legal uncertainty due to Common European Sales Law - but higher transaction costs

We fear that a new, additional optional sales law instrument will considerably increase legal uncertainty, rather than reducing it as the Commission intends. Contract law is inherently a legal matter that requires a great degree of interpretation. What is more, the draft text of the Common European Sales Law works with many undefined legal concepts and the coexistence of rules for B2B and B2C may lead to demarcation difficulties. Accordingly, it will take decades for case law on European contract law to become established. Even then, it can be anticipated that the courts of the individual Member States, which are imbued with the application of their national sales law, will interpret the Common European Sales Law in divergent ways. This might be acceptable if such a tool were actually necessary. As shown, in the view of the engineering industry, that is not the case here.

Due to the continuing legal uncertainty in the application of an additional optional instrument (and its coexistence with the existing European legal systems) it is to be feared that the transaction costs for SMEs will not only not be reduced, but instead increased significantly. In any case, we expect a strong increase in demand for advice from businesses.

5. The role of the Convention on the International Sale of Goods (UN CISG)

The need for a Common European Sales Law also seems highly doubtful, since the UN Sales Law (CISG) is already a useful “optional instrument”, which leaves the parties considerable freedom of contract. In this context, therefore, the question arises of the extent to which the Commission expects an additional optional instrument to bring greater benefits than the CISG which is already in use, and how the relationship between the two instruments should look. In our view, another instrument comparable to the CISG, would cause confusion for those trying to do business, since new differentiation and/or demarcation issues will arise, and thus create new requirements for advice.

6. Summary

For the B2B sector, a Common European Sales Law is not expected to generate any added value. Businesses have no need of an alternative “second” contract law system: at present, in cross-border trade between businesses, there are no significant difficulties, as long as the national legal systems start out from the principle of freedom of contract. Where this is not the case (e.g. due to the excessive content control in the German law on general terms and conditions), remedial measures should be created at national level instead.

Standard contracts as well as the application of the UN CISG play an important role in the largely smooth operation of cross-border contracts between businesses. With the introduction of an additional optional instrument like a Common European Sales Law, on the other hand, it is to be feared that a high level of legal uncertainty will prevail for many years, and inconsistent practice by the courts will occur in the Member States, thus resulting ultimately in greater demand for advice and higher transaction costs.

II. Comments on individual provisions

1. Period of prescription, Article 179 et seq.

Basically, the proposal for a regulation provides for two periods of prescription of different lengths. The short period of prescription under Article 179, paragraph I, is two years. The long period of prescription under Article 179, paragraph II, is ten years. It is unclear to what the short period of two years and the long period of ten years will apply. The short prescription period begins on the date when the creditor becomes aware of his rights and entitlements. That would mean, for example, in the case of a warranty that such entitlements in respect of latent defects may only start to run years after the delivery of goods. Whether the ten-year period of prescription would then constitute a maximum period would require a fundamental clarification.

Furthermore, we are critical of the provisions in Articles 181 and 182, according to which after a suspension, a further period of six months (in the case of a lawsuit without a judgement) or twelve months (in the case of unsuccessful negotiations out of court) is allowed. These periods can considerably prolong the prescription periods.

According to Article 186, the possibility of shortening both periods of prescription to a maximum of one year does exist. In this regard, it is not clear whether this is possible even as part of General Terms and Conditions. This does not change the fact that the above arrangements for suspension do significantly prolong the periods of prescription.

Moreover, the question of the cut-off period of two years referred to in Art. 122, paragraph II, is also unclear.

2. Other specific problems

a. Article 9:

We consider extending the scope of the sales law to services that may, for example, be associated with the purchase of goods to be unwelcome. On the one hand, the fundamental issue of definition arises again, i.e. when a “related service” is involved. On the other hand, service contracts have content that is different from the supply of goods. Therefore, these two areas should not be covered by a single law, but - if at all - then separately.

b. Article 23:

The duty to disclose information is far too unclear and also too far-reaching. It is not apparent what “any information concerning the main characteristics of the goods to be supplied” means. Since a breach of the duty to disclose information entails an obligation to pay compensation pursuant to Article 29, paragraph 1, this clause is particularly dangerous.

c. Article 51:

We are critical of the right to challenge a contract on grounds of “unfair exploitation”. There is a high risk that ultimately contracts could be challenged on the grounds that the contesting party was ignorant or inexperienced, and the other party should have known this.

d. Article 52:

In addition, the periods for challenging a contract are too long, especially the one-year period in case of “unfair exploitation”. Furthermore, there is no maximum time limit, because the time limits start running from the date of awareness of the relevant reasons for challenging the contract.

e. Article 69:

Public statements, including an advertisement, according to this article, will in principle become part of the contract, unless the other contracting party could not rely on them. Article 31 deals with this matter in the opposite manner. According to this article, “A proposal made to the public” (i.e. even an advert) “is not a binding offer, unless the circumstances of the specific case indicate otherwise”.

The rule-exception relationship is exactly the opposite: According to Art. 31, an advertisement is generally not legally binding, whereas under Article 69 however, the opposite is the case. The two items ought to be brought into line.

f. Moreover:

For the rest, the new contract law contains many blanket terms that require interpretation, which will ultimately not contribute to dependable contracts and therefore to legal certainty.

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