



International Chamber of Commerce

*The world business organization*

## Position Paper



Prepared by the ICC Commission on  
**Commercial Law and Practice**

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# ICC Position on the European Commission proposal for a regulation on a Common European Sales Law

### Highlights

- Perspective of the ICC Commission on Commercial Law and Practice
- B2B sector
- Increased legal uncertainty
- The role of the Convention on the International Sale of Goods

## ICC position on the European Commission proposal for a regulation on a Common European Sales Law

### Background

ICC represents business interests worldwide and works to simplify international trade, not least for small- and medium-sized businesses (SMEs). The ICC does so in many ways, such as by establishing international rules, including the Incoterms<sup>®</sup> rules and 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 ICC, primarily through its Commission on Commercial Law and Practice (CLP Commission), was involved at an early stage in the discussion about European contract law and the Common Frame of Reference and commented on it from the viewpoint of businesses actually involved in the field.

The ICC 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 focus of the ICC CLP Commission is business-to-business trade. Accordingly, the following position paper concerns **"business-to-business" (B2B) transactions**.

### 1. The perspective of the ICC Commission on Commercial Law and Practice

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 ICC with its majority of SMEs, safeguarding freedom of contract is paramount. The fact that freedom of contract is a fundamental principle of civil law in all European legal systems 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.

Obstacles arise 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 that 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 ICC, this is inappropriate and should be avoided.

In order to prevent excessive interference of mandatory rules in B2B contracts, we strongly suggest that consumers and SMEs should not automatically be treated in the same way with regard to their vulnerability in business transactions. While it is true that parties to a B2B contract will not necessarily be in an equally strong position, it does not follow from this that the weaker party to the contract should be treated like a private consumer. Furthermore, an SME is not automatically the weaker party when dealing with a larger company - the bargaining power of a company is due not only to its size, but also to other factors, primarily its position in the marketplace, for example as a technology leader.

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

The ICC sees no need for the creation of an optional European Sales Law with regard to B2B cross-border sale contracts. In particular, the wide experience of the members of the ICC CLP Commission in advising firms provides no confirmation whatsoever that SMEs are being hindered significantly in their cross-border business activities or that firms are deterred from

engaging in cross-border trade altogether as a result of the different legal systems that exist in Europe. Since this assumption appears to be the Commission's main rationale in proposing a Common European Sales Law, it is ICC's view that 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 ICC has pointed out that the difference among European systems of contract law is not a significant 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 individually-negotiated contracts or standard contracts and general terms and conditions of business relatively easily.

The European Commission has pointed to surveys in which traders have listed different national laws as an obstacle to cross-border trade. But it is only natural that business people, when asked whether different national laws are a problem, will reply that, yes, it would be easier if all countries had the same laws. In our experience this does not, however, mean that they in practice refrain from cross-border trade for this reason. This is also basically the case for SMEs. However, it is true that it is 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 transactions. Thanks to freedom of contract it is possible for businesses to work with standard contracts. In this respect, 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 standard terms and model contracts of the ICC, which help companies manage their own contracts without the need of legal assistance in each case.

### **3. Increased legal uncertainty due to Common European Sales Law and 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 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 both B2B and business-to-consumer (B2C) transactions 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 ICC CLP Commission, that is not the case.

Increased legal uncertainty due to the application of an additional optional instrument (and its coexistence with the existing European legal systems) would in turn significantly increase transaction costs for SMEs: among other costs, we would expect to see a strong increase in demand for legal advice from businesses.

### **4. The role of the Convention on the International Sale of Goods (UN CISG)**

The need for a Common European Sales Law in the context of B2B cross-border sale contracts also seems highly doubtful given the existence of the UN Sales Law (CISG), which is already a useful "optional instrument" that provides the parties considerable freedom of contract. It is unclear to what extent the Commission expects an additional optional instrument to bring greater benefits than the already-used CISG. In our view, another instrument comparable to the CISG would cause confusion for those contemplating cross-border

transactions, since new differentiation and/or demarcation issues will arise, and thus create new requirements for advice. B2B trade would benefit much more from ratification of the CISG by the few EU member states that have not yet done so than from the introduction of an additional “optional instrument”.

## 5. Comments on the material rules of the proposed regulation

At this stage we will not provide any detailed comments on the proposed material rules. But we wish to underline that, if the Common European Sales Law nevertheless were to apply to B2B transactions, it would need to be revised. Here we will point to only some of the rules that would need amendment, such as those on prescription, the pre-contractual duty to provide information, the contents of contracts, and unfair exploitation.

### Summary

For B2B cross-border sale contracts, 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 the national level instead.

Standard contracts and the application of the CISG play an important role in the largely smooth operation of cross-border contracts between businesses. In this respect, EU-wide ratification of the CISG would create further benefits. The introduction of an additional optional instrument like the Common European Sales Law, on the other hand, would risk creating a high level of legal uncertainty for many years, including through inconsistent practice by the courts of various Member States, thus resulting in greater demand for advice and higher transaction costs.

# The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the last century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rules-setting, dispute resolution and policy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC enjoys a close working relationship with the United Nations and other intergovernmental organizations, including the World Trade Organization, the G20 and the G8.

ICC was founded in 1919. Today it groups hundreds of thousands of member companies and associations from over 120 countries. National committees work with their members to address the concerns of business in their countries and convey to their governments the business views formulated by ICC.



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