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B2B and B2C clauses and general terms (conditions) in contracts: a viewpoint from the Italian companies

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LEGAL AFFAIRS

B2B and B2C clauses and general terms (conditions) in contracts: a viewpoint from the Italian companies

Abstract

The CESL could be completed by a “toolbox”: a set of transparent and fair clauses and “well-balanced” standard contractual terms (standard clauses and contracts), translated into all official languages, will encourage new players all across the EU market as well as reinforcing competition, extending the range of choices available for consumers.

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The Italian Chamber of Commerce Union represents all companies from every trade sector – about 6,100,000 in total. In 2011, SMEs accounted for 94.6% of our membership.

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In this respect the CESL could be completed by a “toolbox” which needs to be appropriately based on the subsidiarity principle, notwithstanding the legal authority of Member States in terms of contractual and civil law.

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1. INTRODUCTION

The initiative for a European contract law is aimed at tackling issues related to the single market which are associated, among other causes, with the diverging regulation bodies on the subject. It has been under discussion for several years and, in the wake of the global financial crisis[1], it seems more important than ever to create a consistent system in respect of European contract law with a view to expressing the full potential of the internal market, and contribute to achieving the Europe 2020 objectives.

As a matter of fact, the single market is still fragmented because of many factors, including the failure to apply the legislation in force on the subject; it should also be noted that the diverging national laws with regard to contracts are not the only hindrance for SMEs and consumers in cross-border business activities; there are in fact other problems, most notably language barriers, the differing taxation systems, the issue of online trading reliability, limited broad band access, the digital divide, safety-related issues, the demographic composition of individual Member States, privacy, the lack of a supranational tool for dispute settlement and intellectual property rights, to mention but a few.

The need to eliminate the barriers represented by diverging contract laws is expressly mentioned in the Europe 2020 strategy[2] as well as in several other documents published at EU level, including the European Digital Agenda[3] which provides for optional contract law as one of the main drivers to boost the digital economy, the review of the "Small Business Act"[4] for Europe which is aimed at removing the barriers hindering the growth potential of SMEs, and the “Single market Act”[5] whose underlying idea is to create a legal instrument to facilitate cross-border transactions.

On 3rd May 2011 a group of experts established by the Commission submitted a feasibility study regarding a future initiative on the subject of European contract law**.** While drafting this study, the Commission started consultations with stakeholders and citizens, receiving 120 replies.

On 8th June 2011 the European Parliament adopted a resolution[6] concerning 'policy options for progress towards a European contract law for consumers and business', where it endorsed the possibility of a European optional instrument in the field.

A common European contract law, as outlined in the proposal by the Commission known as “*Common European Sales Law*” (CESL), would prove advantageous for consumers, and more importantly it would contribute to the growth, accessibility and competitiveness of cross-border trading within the single market[7].

[1] Recital a) of the European Parliament resolution on “policy options for progress towards a european contract law for consumers and businesses” of 8 June 2011.

[2] Communication from the Commission, Europe 2020 – A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final version 3.3.2010, page 21.

[3] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – A European digital agenda, COM(2010)245 final version 26.8.2010, pages 13 and 37.

[4] Communication from the Commission to the European Parliament, the Council, Economic and Social Committee and the Committee of the Regions – Review of the "Small Business Act" for Europe, COM(2011)78 final version 23.02.2011, pages 11 and 13.

[5] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Single Market Act – Twelve levers to boost growth and strengthen confidence - “Working together to create new growth”, COM(2011)206 final version of 13.4.2011, pages 14 and 19.

[6] European Parliament resolution of 8 June 2011 on policy options for progress towards a European contract law for consumers and businesses - 2011/2013(INI).

[7] Recital q), of the European Parliament Resolution on “policy options for progress towards a European Contract Law for consumers and businesses”. The European Parliament, therefore, proves to be in favour of measures aimed at reducing the barriers which currently hinder potential cross-border operations in the single market, and

The initiatives undertaken as part of European contract law, however, should take into account national mandatory regulations as well as being consistent with the recent Directive on consumer rights[8] , which will have a significant impact in terms of content and harmonisation level as regards European business trading.

considers that the project related to the common European contract law, together with other measures, could prove beneficial in view of the full implementation of the single market's potential, also because of the substantial benefits from an economic and employment perspective; the Parliament also highlights the economic relevance of SMEs and of artisan businesses for the European economy; it therefore underscores the need to make sure that the principle of "think small first" promoted by the "Small Business Act" initiative is implemented (item 3 of the Resolution, cit.).

[8] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

2. THE CURRENT LEGAL FRAMEWORK FOR B2C AND B2B CONTRACTS

The European Union has made important steps with a view to reducing differences in substantive law, especially with regard to consumer rights, by adopting a set of harmonisation provisions. The latter, however, are unable to regulate the whole life cycle of a contract and therefore do not cater for a professional's need to take into account the contract law system in the country of destination.

In business to consumer (B2C) contracts, the legal framework in the Union has certainly increased the protection level to the advantage of consumers. In spite of the progress made in harmonising national legislations, however, it is clear that in the area of consumer rights and contractual law there are political limitations to the possibility of adopting a fully harmonised approach. This is confirmed by the fact the European Parliament and Council have decided, for the moment, not to change – and in fact nor to introduce into the recently adopted Directive on consumer rights – any provisions regarding illegal contractual clauses or remedies related to consumer goods sales; this means that it is still impossible to introduce legislation in various ways going beyond the basic harmonised rights.

In business to business (B2B) contracts, the scope of the substantive law regulations adopted by the EU is even more limited than in the case of B2C and it covers only a few specific contract law issues. For example, the provision pertaining to counteracting delays in payment harmonises the rules in respect of interest on arrears in case of delays in payment, but still allows Member States to apply more stringent standards.

In June 2011, therefore, the European Parliament approved, with a four-fifths majority, its support to a common optional instrument valid throughout the European Union aimed at facilitating business transactions (option 4 in the European Commission's Green Paper). The Economic and Social Committee, in turn, passed an opinion in favour of a new advanced optional system for contract law.

The Commission's proposal (CESL) actually includes the *acquis communautaire*, even though it is not subject to the minimum levels stipulated therein. Moreover, since its scope is limited to cross-border contracts, it cannot be considered a replacement of the existing *acquis* as a general rule; therefore the need still remains to keep developing regulations to protect consumers using the harmonisation-based approach traditionally applied in this sector.

As a matter of fact, according to CESL, professionals should take into account the possibility of using alternative means for dispute resolution as a speedy and inexpensive way to resolve an issue without resorting to any judicial authority.

3. THE ADVANTAGES FOR BUSINESSES AND CONSUMERS OF A COMMON INSTRUMENT

The Common European Sales Law (CESL) is an “optional legal system” (a.k.a. “28th legal regime” in addition to those of the 27 individual EU Member States), referring not only to transactions between businesses and consumers but also to those between businesses; it is therefore a form of contractual law applicable transversally irrespective of the contracting parties.

Moreover, in order to guarantee actual transparency in negotiations, the European Commission’s proposal dictates that the contracting party should always be informed and agree that the contract is concluded on the basis of the Common European Sales Law system. Such information must be provided, together with a standard information note aimed at helping potential buyers to understand their rights and overcome the uncertainty which prevents many of them from making purchases abroad. Drafted in a clear and concise form, in all official languages of the EU, this information note is expected to be particularly useful for those consumers who generally fail to read the clauses in the contracts they sign because of the latter being either too lengthy or too complicated.

As regards the weaknesses of the Commission proposals, it should be mentioned at the outset that only an “actual” common system (and not merely a set of optional rules) for contract law, which is really identical in all 27 member States would allow professionals to overcome the insurmountable barrier presented by finding one’s way through 27 national contract law systems. So why is it apparently so difficult to choose, without the ambiguity and uncertainty which still exist in the Commission proposal, a legal system for contracts which is the same in all 27 countries?

Only a truly unique system, in force at the same time and directly throughout the European Union could reduce transaction costs for companies which wish to make cross-border sales without having to sustain the well-known costs for legal advice, particularly burdensome for medium sized and even more for small companies.

If it is true that only 9.3% of European companies export within the EU, it means that the European market is still the privilege of a happy few and it is clearly not yet a concrete opportunity for all.

The current status of cross-border business transactions, therefore, is unsatisfactory. One of the barriers to cross-border transactions is the differing legislation among EU Member States. Full harmonisation of European contract law is a goal which needs to be pursued with determination and could put an end to the difficulties encountered at present. This instrument could contribute to better functioning of the single market provided that it guarantees added value for consumers, thanks to a high protection level and that it is able to create opportunities for businesses. Its contents need to be clear, understandable and predictable.

Mention should also be made in this respect of the advantages deriving from a more determined choice in favour of consumers. As a matter of fact, the target should presumably be an equally high level of protection for consumers in all Member States, with a view to ensuring, for example, the possibility, if a product turns out to be detective or in any case if there is a “non conformity”, to choose between the possibility of terminating the contract, or asking for a discount or for the product to be replaced or repaired.

This kind of choice would allow customers, especially in the case of online purchases, to find the best offers within the EU without the uncertainty which today still discourages

many people from buying goods in other Member States. Last but not least, it will be essential to make sure that consumers are informed about their rights in their own language.

4. COMMENTS AND SUGGESTIONS REGARDING THE PROPOSED SYSTEM

The “optional” CESL, however, will be applicable only if both parties agree to it voluntarily and expressly, both in the case of cross-border sales of goods and of contracts pertaining to digital contents, for example music, videos, software or applications for smart phones. If the aim is to make the prospect of drafting a contract in accordance with the “optional” legal system attractive, it will be necessary to offer suitable incentives.

Furthermore, in particular with regard to Italian companies, the latter would certainly be willing to offer their customers a high level of protection, with the freedom to select the remedy of choice; however, limitation periods in case of non conformities should not be too long, as the Proposal on the contrary suggests, nor would companies approve of unduly drafted unfair clause lists which risk making it impossible for businesses, in particular SMEs, to manage their relations with customers.

The experts are doing an excellent job; however, substantial changes are needed before it can be considered an attractive proposal for businesses.

It is thus necessary to clarify that all rights and remedies (in particular as regards the terms to claim non conformities in the goods) are subject to a limitation periods, expressly stating when such term lapses (that is to day, for example, a maximum of two years after product delivery).

Further consideration should be given to the possibility of allowing for compensation if the goods have been used or deteriorated, and – if the products have been used – the possibility of precluding the right of withdrawal, or at least allowing for an indemnity in respect of the use of the goods before withdrawal, in order to prevent what would otherwise be a misuse of the right to protection.

Also with a view to avoiding a distorted use of the remedies introduced for the purpose of protecting buyers, there is no doubt that a clear hierarchy is necessary, in the event of non conformities in the goods, among the different remedies (as in the Sale of consumer goods Directive 1999/44/EC of the European Parliament and of the Council), allowing the seller to choose between repair and replacement, considering the remaining remedies only as a further alternative option. In fact, setting out a hierarchy of remedies in the case of “conformity defects”, seems the most appropriate choice for the current market situation. Leaving the trader free to decide between repair and replacement if a product is detective is reasonable and in line with the current practice. This will prevent situations where, if a defect is easily repairable, the consumer could opt for product replacement or for a direct refund.

Finally, the solution of unilaterally reducing the price gives buyers a prerogative which is normally reserved to judges. Such price reduction, though legitimate, should be the result of an agreement between the parties, of a court decision or of an ADR procedure.

5. DETAILS REGARDING THE STATUS IN LAW OF THE INSTRUMENT

With the Common European Sales Law, the European Commission intends to promote a single set of rules for business-to-consumer and business-to-business negotiations, without requiring that changes are made to legislation in force nationally with regard to contract law.

Within each Member State's national legal system a second set of contractual laws is established which is identical throughout the European Union. This instrument is enforced alongside the pre-existing national legislation on the subject of contracts.

It is a new approach which deserves careful and in-depth study. This is why it may be worth giving more consideration and expressing a few constructive concerns with regard to this project.

The Common European Sales Law is a concrete solution to a problem, but it also constitutes an innovative approach in the sense that, in line with the proportionality principle - though preserving the legal traditions and cultures of Member States -, it leaves business free to apply it or not.

It is, as already mentioned, a system designed for contracts between businesses and consumers (B2C) and between businesses (B2B) where at least one of the parties is an SME; on the other hand, it does not include contracts between consumers (C2C) or between professionals where none of the parties is an SME. The common European sales law leaves Member States free to decide whether to apply the regulation corpus in question also to contracts between businesses, when none of them is a SME.

The system will define the same level of consumer protection for all contract law sectors. This harmonisation is achieved starting from a high level of consumer protection, as an imperative both from a political and legal perspective; it is expected to lead to a homogeneous set of rules, with a view to ensuring that consumers are safeguarded and protected every time the CESL is applied.

The CESL includes provisions regulating contractual issues which have practical relevance throughout the life cycle of cross-border agreements. These questions pertain both to the parties' rights and obligations and to remedies against failure to comply, to obligations pertaining to pre-contractual information, to contract conclusion (including formal requirements), the right of withdrawal and its effects, to the contract being null and void due to errors, fraud or misinterpretation, to the contract's contents and effects, the assessment and effect of any unfair term in contractual clauses, to product return as a consequence of waiver or termination, as well as to limitation periods. It provides for the sanctions to be applied in case of violations of all the rights and duties arising from it. On the other hand, some matters which are of great importance for national law and less relevant in the case of cross-border contracts (such as regulations pertaining to legal capacity, invalidity/illegality or representation and multiple debtors or creditors) are not dealt with by the CESL and will thus still be regulated by national legal systems applicable in accordance with the Rome I Regulation.

A business may choose to apply the system because it wishes to be associated with the level of protection provided, but it is under no obligation to do so.

It is up to the Member State to decide whether it wishes to apply the system with a broader scope. Member States are in fact free to decide whether to make the CESL

applicable also to purely domestic agreements, which would allow businesses operating within the single market to further reduce transaction costs.

The stated purpose of an optional CESL regime is to boost trade and give EU consumers more freedom to choose. The single market is an achievement on the part of the Union, but there are still some barriers to cross-border exchanges represented by the differences between legal systems as regards contracts in the 27 Member States. This makes it complex and costly to sell abroad, especially for small businesses which give up on the cross-border market, to the advantage of a few multinational companies (often from outside Europe); by the same token it discourages European consumers who, due to current economic uncertainties, renounce the advantageous possibility of buying goods and services abroad at lower prices.

This situation, however, could be made even more difficult by a "28th legal regime" which citizens have difficulty in understanding.

According to the European Commission, two of the greatest advantages of the CESL are its being optional and the fact that it is an autonomous and independent instrument. There are, however, some concerns which it is worth highlighting.

As a matter of fact, instead of harmonising national contractual regulations in Member States by imposing changes to domestic laws, the CESL merely adds a further level to the legislation, as part of an already broad and multi-level framework. For business engaged in national and cross-border trading, as well as in the case of long distance and on-premise selling, the CESL risks to increase costs rather than reduce them.

Special concern is caused by the uncertainty regarding the interpretation of the instrument, whose complexity risks making it of limited appeal for businesses (SMEs in particular), as well as for consumers.

The lack of certainty is detrimental for businesses which are not particularly likely to opt for a system still lacking in legal certainty as regards the way in which it will be managed and applied. Furthermore, as underscored by the European Commission, this instrument does not cover all contractual aspects; therefore the parties will still need to rely on national legislation in respect of aspects such as representation, contract invalidity and lack of consent.

The instrument of choice will have a strong impact on the fragmentation existing today. A survey conducted by EUROCHAMBRES (in October 2010) highlights the issue of the fragmentation of the right of the exchange. However, the mere existence of an optional instrument does not guarantee its success: as a matter of fact much will depend on the reactions from the European business world. Having predictable rules is a key factor for businesses in the area of contracts and, for example, it is important to specify which provisions are applied only to B2C contracts and which ones are also extended to B2B relations; in this respect the use of cross references in the regulation might be a source of confusion, thus reducing the appeal of an optional instrument. It is further unlikely that small businesses will have sufficient resources to study this optional instrument and to analyse its impact on contractual relations as opposed to domestic legislation).

It should also be mentioned that some optional instruments for B2B contracts already exist (the Vienna Convention and the UNIDROIT principles) which have already produced interesting outcomes; this is why a further optional legal system in our view was not really necessary. On the contrary, to our mind, it would be appropriate to unify EU regulations on the subject of B2B and B2C contracts; this would increase the possibility for an optional instrument to succeed.

The risk in developing a very high level of consumer protection is that businesses

might not use the instrument and prefer the current approach (refraining from cross-border trading, totally or in part).

Another instrument, in fact, gives another possibility but does not add much value for companies. At the end of the day, it is nothing more than a further rule which SMEs need to take into account from a legal perspective.

It should also be considered that the instrument needs to be technologically neutral, in the sense that the same rules should apply to both online contracts and to traditional offline agreements. The instrument should be applicable to both cross-border and domestic contracts because any difference in regulations might distort competition and create a barrier to having the same set of conditions for all businesses within the single market. Moreover, if there were different rules depending on the method used to enter the contract, this would simply mean a higher administrative burden on the part of businesses.

Finally, since predictability is to be based on the optional instrument providing for a set of comprehensive rules, if the proposed legal system were to prove incomplete, the problem of the applicability of other legal systems would remain: in this case the usefulness of the instrument would be limited.

The risk, in conclusion, is that the CESL proposed today by the European Commission on the one hand might have limited possibility of bringing down these barriers and, on the other side, that it might fail to contribute to the increase in cross-border trading. A braver choice would probably have been more brave.

6. ACCOMPANYING MEASURES

To guarantee the actual application and uniform interpretation of CESL, the Commission's proposal includes some accompanying support measures.

Following suggestions from the European Parliament, businesses, legal experts and consumer organisations, the Commission will be working in close contact with the relevant stakeholders on the drafting on "standard European contract clauses" broken down by business area or trade sector. It might actually prove useful, in the case of professionals wishing to enter cross-border contracts for which the common European sales law has been chosen, to have a standard contract model in all official European Union languages. The stakeholders will be able to contribute by providing the necessary expertise and knowledge of business practices drafting specific contract clauses for their industry, based on initial practical experience in respect of the common European sales law application.

To make sure that the CESL is uniformly interpreted and applied, the proposal also includes the creation of a database accessible to the general public including the decisions by EU and domestic judicial authorities with regard to the interpretation of this instrument. Member States will then be required to inform the Commission about the said decisions without delay.

7. THE PROPOSAL FOR "UNIFORM EUROPEAN CONTRACT MODELS" AND “STANDARD CLAUSES”

Having regard to accompanying measures, with the Resolution approved on 8 June 2011, the European Parliament also called for[9] the creation of "uniform European contract models", translated into all EU languages and associated with an alternative dispute resolution system, to be implemented online, which would have the advantage of being a simpler and more economically advantageous way to improve the single market operation, thus helping businesses (cost reduction taking into account the need for rules with regard to conflicting regulations) and consumers (legal certainty, confidence, high level of consumer protection).

In this respect the CESL could be completed by a “toolbox” which needs to be appropriately based on the subsidiarity principle, notwithstanding the legal authority of Member States in terms of contractual and civil law.

In this case it would be a “toolbox” offering the legal backdrop and the necessary basis for the operation of an optional legal system of a general nature; it would essentially mean introducing a list of standard clauses[10] and standard terms[11] which should be based on an assessment of mandatory national regulations on the subject of consumer protection within, but also beyond, the *acquis communautaire* in force in respect of consumer rights.

It is therefore our opinion that the Resolution of 8 June 2011 by the European Parliament should be welcomed because it acknowledges[12] that, by integrating the optional instrument with a “toolbox” (e.g.: model contracts, standard clauses, standard terms, etc…), clearer information will be available as regards the application of a uniform contract law within the EU; this is expected to help stakeholders (especially SMEs and consumers) better understand their rights and make informed choices when stipulating contracts based on this system, as well as making the legal framework more understandable and less burdensome[13].

It is, indeed, true that the creation of a European contract law based on an optional instrument applicable to various trades is probably an unrealistic goal, in view of the costs and uncertainties associated with the diffusion and acceptance of such a legal model; however, it would be helpful for businesses to have contract models available for their specific sector.

The primary objective of uniform contract law should be guaranteeing legal certainty. Since simplification is also a goal, our suggestion is to develop, based on the regime of the

[9] Item 5 of the European Parliament Resolution on “policy options for progress towards a European Contract Law for consumers and businesses”, cit.

[10] See also the Communication from the European Commission (COM(2010)2020), of 3 March 2010, known as “EUROPE 2020 – A strategy for smart, sustainable and inclusive growth” which reads as follows: “The Commission will propose action to tackle bottlenecks in the single market by […] making it easier and less costly for businesses and consumers to conclude contracts with partners in other EU countries, notably by offering harmonised solutions for consumer contracts, EU model contract clauses and by making progress towards an optional European Contract Law” (pages 21 and 22).

[11] Item 9 of the European Parliament Resolution on **“**policy options for progress towards a European Contract Law for consumers and businesses”, cit, where reference is made to “standard terms and clauses”.

[12] Item 10 of the European Parliament resolution on **“**policy options for progress towards a European Contract Law for consumers and businesses”, cit.

[13] In this respect, see not only the specific competence attributed to Italian Chambers of Commerce by law no. 580/1993 (art. 2, paragraph 2, items h and i), a function recently enhanced also by the amendments made to Legislative Decree 15 February 2010, no. 23; but also by the latest “Code of Tourism” Lgs. D. no. 79 of 23 May 2011 which, in respect of “contracts related to products for long-term holidays and trade and exchange contracts”, expressly mentions in the annexes to the regulation a set of actual information forms for each contract type separate from the contract in order to make it easier for the consumer to withdraw.

28th instrument (translated into all EU languages), European standard contractual models associated with an ADR system, preferably online, which is accessible, user friendly and affordable. These standard contract models are expected to help consumers and businesses better understand their rights and obligations. Standard contractual models should be negotiated between businesses and consumer associations with the collaboration of the European Commission. A large number of such models ought to be developed in order to meet the need for specific contract ecosystems (crafts, tourism, services, trade, real estate). The European Chambers of Commerce might be able to help in this respect.

Finally, it could be worthwhile exploring the possibility of strengthening the protection granted to consumers when purchasing digital contents. It should be mentioned, however, that the latter are more often licensed, rather than sold as commodities. A solution could be, here again, the creation of standard e-commerce contracts, negotiated between consumer associations and businesses with the collaboration of the European Commission.

8. UNFAIR CLAUSE CONTROL

One of the broadest chapters of the CESL is chapter 8, which is dedicated to unfair clauses and includes a list of as many as 34 prohibited clauses. Several similar rules are, in fact, contained in other CESL provisions (for example articles 71, 72, 77 and 167); this makes it practically impossible for businesses wishing to use this 28th legal regime to draw up general contract terms which are fully compliant with the CESL unless they resort to legal advice. It should also be pointed out that the provisions concerning the control of unfair contract terms are only applied to terms not subject to individual negotiation; in other words, the ban should not be applied if the clauses were originally drafted by one party, but then specifically negotiated.

The lists of unfair clauses *tout court* or of alleged misuses (included in articles 84 and 85) are too extensive and risk being excessively cumbersome on the part of businesses deciding to refer to the CESL.

Finally, although it should be considered unacceptable to extend the checks on illegal contractual clauses also to clauses contained in individually negotiated terms, it is necessary to strengthen the control on the misuse of standard contractual clauses. The development of the latter, in fact, is expected to prevent any uncertainty as regards unfair clauses.

CONCLUSIONS

Contracts are essential for sales between businesses and to consumers. Their purpose is to make the parties' agreement official and they can cover a wide range of matters, including the sales of goods and the rendering of related services, such as repair or maintenance.

Businesses operating within the single European market use a variety of contract types, regulated by several national contract laws. The co-existence of 27 different regulation bodies at national level may lead to additional transaction costs, legal uncertainty for businesses and lack of confidence on the part of consumers. It may discourage consumers and businesses from buying and trading at cross-border level.

European institutions should therefore be aware of the drafting of an optional legal instrument with a set of transparent and fair clauses and "well-balanced" standard contractual terms (standard clauses and contracts), translated into all official languages, will encourage new players all across the EU market as well as reinforcing competition, thus actually extending the range of choices available for consumers overall.

For this purpose it will be necessary not only to make available to all potentially interested parties and stakeholders (including national judicial authorities) all information in respect of the existence and operation of this European legal instrument for contract law, but also to make sure that civil law jurisdiction is effectively functioning.

ANNEX

THE ITALIAN EXPERIENCE WITH MODEL CONTRACTS AND CLAUSES

The model contracts, according to the Italian jurisprudence, are preventive tools that are put in place to avoid problems between consumers and businesses. Through the 580/1993 law, Chambers of Commerce are given the task to promote the use of this type of contract between enterprises, their associations, as well as with consumers associations and users. This task ensures transparency and equity rules in the drafting phase thanks to the collaboration of various economic and social elements. The Chambers of Commerce are an ideal subject to come to such an agreement.

The iniquity or vexation clauses do, on their turn, cause a considerable imbalance between the contract rights and obligations.

The use of model contracts and model clauses reduces the possible inconveniences of the so-called “standard contracts” that are drawn up by the enterprises. In some cases, these businesses put the consumer in a less favorable position. In some other cases, the contract texts are defined in ambiguous and scarcely clear terms, which makes the involved parties' rights and obligations scarcely transparent.

THE ROLE OF THE CHAMBERS OF COMMERCE

Through the 580 law of 29th December 1993, the Italian Chambers of Commerce are given major tasks to set a more and more balanced and transparent market. This recognition has then allowed the Chambers of Commerce to carry out numerous functions in order to foster fair competition between enterprises and to protect the consumers more and more adequately in the general interest of economy.

Between these functions, art. 2.2 of the 580 law of 1993 and following modifications has foreseen in particular:

- the drafting of model contracts;
- the control over the iniquity clauses in the contracts with consumers.

Thanks to the public bodies' role, which are independent and impartial, the Chambers of Commerce has been carrying these tasks in a professional way and then confirmed their market regulation genuine role.

In fact, the administrative feature of the Italian Chambers of Commerce *vis-à-vis* Italian and foreign market regulatory bodies, is to aggregate various market stakeholders, enterprises and consumers while being a reference network that is articulate on on the territory.

Therefore, uniform tools for all Chambers of Commerce are needed in order to provide concrete answers to enterprises and consumers throughout Italy.

The Chambers – thanks to the positive experience made so far – have then made a further quality step with the extra setting up of a national coordination team, which sets up and then spreads, at national level, the various opinions on iniquity clauses that are entailed in the standard contract models used in economic sectors and contractual schemes with no vexation clauses.

Furthermore, the processing phase of the collected opinions on vexation clauses within the contracts with consumers and the drafting of model contracts, that is coordinated at

national level with *Unioncamere*, has been the result of a concertation process both at local as well as at national level. This can certainly represent a model for the future also for other market regulating activities.

CARRIED OUT ACTIVITIES

While carrying out their functions of market regulation and service provider to enterprises and consumers, the Chambers of Commerce think model contracts to be simplified contract models with no unfair and unbalanced clauses, which can help preventing, as much as possible, conflict situations or may lead to a quick and effective out-of-Court solution, but especially contract model that can genuinely represent a guarantee tool to properly inform the weak contractor (consumer or small enterprise).

The preparation of contract models also aims at checking the possible presence of iniquity clauses in the standard contracts in the main economic sectors via an integrated action at national level of the Chambers of Commerce, with the collaboration of the Italian Authority on Fair Competition and Market and with the Ministry of Economic Development, besides the constant involvement of Businesses and Consumers Associations.

Neither this activity can be dissociated from the Italian Chamber of Commerce's most traditional competence, that is the inquiry on commercial “uses”. This role is clearly very important not only in terms of checking the spread of commercial practices but also in terms of possible introduction of inhibitory actions or changes (standard contracts).

The link between these activities, that are also supported by a major commitment of the Chambers in terms of promotion (promotional and judicial publications, as well as targeted communication campaigns, ...), has led to the introduction and spread of more balanced contractual models and represent a useful tool to ADR thanks to compromise clauses.

For the drafting of model contracts and carrying out (through individual working commissions) of a suitable control over iniquity clauses, extremely different sectors have been involved so as to cover all fields that had previously experienced conflicts between enterprises and consumers (for example: Real Estate, E-Commerce, Insurance /Bank/finance sector). By doing so, the deflation and prevention of conflicts between professionals and consumers are also pursued, also through the presence of clauses for conflict alternative composition.

The objective is to contribute to the creation of a transparent and informed market, which is regulated by clear rules that are known and shared, to enhance the businesses and consumers confidence and to win together over the challenge of modernization of our economic system.

DATA

In 2010, within the working group consisting of 18 Chambers of Commerce and coordinated by *Unioncamere*, a Code of commercial ethics, an opinion on iniquity clauses and 8 model contracts have been shared at national level (in the sectors of Commerce, Services and Tourism) and therefore added to the other contracts that had been already acquired in previous years at national level.

88 Chambers of Commerce have joined the Chamber initiative (see “spread of model contracts and control of the abuse clauses”) and are linked to a network structured administrative system, that is computerized and then linked through the web portal of *Unioncamere* (s. www.contratti-tipo.camcom.it) where all the model contracts are

published, as well as the opinions on iniquity clauses and codes of conduct that are shared at national level.

More specifically, 41 model contracts have been prepared on the territory, particularly focuses on Handcraft, Tourism, Services, Commerce and Real Estate (the two first sectors are definitely growing since 2009).

During the same period, 99 administrative procedures have been activated to control the use of iniquity clauses (among which 55 *ex-parte* and 44 own-initiative procedures), that is to say clauses that determine an unbalanced situation in terms of consumers' contract rights and obligations: 28% in the field of Real Estate, 22% in the Commerce, 19% in the Insurance /Bank/finance sector, 16% in the sector of Services (and Transports) and 9% in the Tourism.

To conclude, 12 inhibitory actions against the use of iniquity clauses have been brought to the Court in 2010 by the Chambers of Commerce, in particular after relevant consumers associations' communications.

INVOLVED PARTIES

These activities have involved consumers and businesses associations, Chambers of Commerce:

(1) The Consumers Associations (that protect the consumers' interests), whose nature and institutional purpose is to help better guaranteeing the proximity of the final model contract's beneficiary and the opinion given on vexation clauses. Furthermore, they carry out a consulting activity in the interest of each involved subject.

(2) The business associations that can spread fair contract model between their associates and meaningful opinions on vexations clauses, namely relevant points of reference to come to a replacement of the existing contracts with private models with no vexations clauses.

(3) To conclude, in this perspective, the individual Chambers of Commerce (public bodies in charge of the market regulation) follow, at local level, the promotion of standard contracts and the control of the iniquity clauses.

Unioncamere has then come to support this role, for the coordination at national level of the drafting activity of model contracts and collection of opinions of individual Chambers.

These actions and activities have strictly involved other national stakeholders, with specific competencies as to market regulation and consumers protection, that are: the Ministry for the Economic Development (General Directorate Market and Consumers Protection), the Italian Authority on Fair Competition and Market, the Professional Registers (Lawyers, Book-keepers, Engineers, attorneys).

Furthermore, the economic operators, enterprises, professional associations, consumers and their associations, can have access to the bank of national data of standard contracts and iniquity causes. To this purpose you can also go to the www.contratti-tipo.camcom.it portal where you can find a series of model contracts, codes of conduct and self-discipline and opinions on the presence of iniquity clauses in the standard models that are presently being used in the main economic sectors.

EUROPEAN PARLIAMENT

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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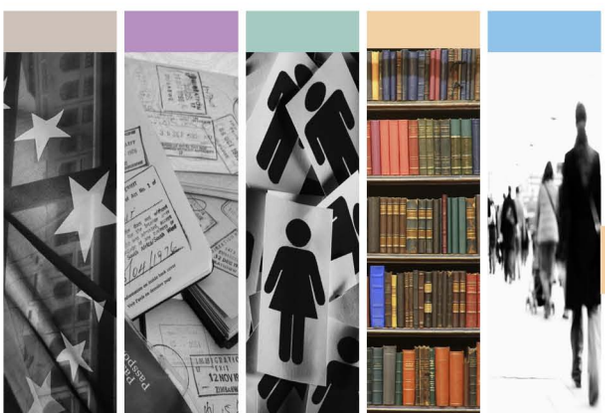

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