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from: German delegation
to: Working Party on Civil Law Matters (Sales Law)
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Subject: Proposal for a Regulation of the European Parliament and of the Council on a
Common European Sales Law
- Comments by the German delegation on Articles 93 and 94¹

At the last meeting of the Council working party, Articles 93 / 94 CESL were included in the discussion. In our view, some fundamental questions on these articles have not yet been reliably clarified, which is why they are being presented to the Council working party again:

1. Scope

a) Personal

May it be assumed that Articles 93 and 94 paragraphs 1 (a) are only applicable to consumer contracts (sales contracts and contracts for the supply of digital content)?

¹ This document corresponds to the working document by the German delegation which was distributed during the meeting of the Friends of the Presidency Group / Working Party on Civil Law Matters (Sales Law) on 26 October 2012.

Articles 96 and 97 of the Feasibility Study suggest that this is what is intended. The text of Articles 93 and 94 CESL is not unambiguous, however. Consumer status is not mentioned in connection with contracts for the supply of digital content, but it appears again at the end of the sentence concerning the obligation to deliver.

b) Material

May it be assumed that Articles 93 and 94 paragraphs 1 (a) are only applicable, even in the case of consumer sales contracts, when the contracts concerned are distance or offpremises contracts or contracts in which the seller has undertaken to arrange carriage to the buyer?

Articles 96 and 97 of the Feasibility Study suggest that this assumption is correct. The text of Articles 93 and 94 CESL is unclear, however, to the extent that the relative clause only refers to contracts for the supply of digital contents.

c) Obligation to carry according to paragraphs 1 (a) and (b)

How do paragraphs 1 (a) of Articles 93 and 94 differ from paragraphs (b) (i) and (b) with regard to the obligation to carry? Paragraphs 1 (a) – applicable only to consumers – only cover a “contract ... in which the seller has undertaken to arrange carriage to the buyer“.

Paragraphs 1 (b) (i) and (b) – which are generally applicable – cover “any other case where the contract of sale involves carriage of the goods”. What is the difference? How would the following examples be resolved?

Example 1: Consumer buys a chair at the trader’s shop. At the consumer’s request, the trader is willing to deliver the chair to the consumer.

Example 2: Consumer buys a washing machine at the trader’s shop. The trader does not deliver, but the consumer organises transport by a carrier.

Example 3: Consumer buys a washing machine at the trader's shop. The seller does not deliver but refers the consumer to an independent delivery service offered in return for payment which has put up a stand on his premises.

Additional question: To which case in paragraphs 1 does Article 96 refer ("Where the contract requires the seller to arrange for carriage of the goods (...)")?

d) Obligation to deliver the goods under Article 94 (1) (c)

Is the obligation to make the goods or the digital content available dependent on this being done at the agreed time? Can the obligation to deliver be fulfilled even when the goods or digital content are made available ahead of schedule, i.e. before the time fixed?

Example 4: Consumer buys an X-brand chair in trader's shop. Consumer is supposed to collect the chair on 1 October. Trader fetches an X-brand chair from his warehouse and puts it out ready for collection. On 30 September, the chair is destroyed by an unavoidable fire on the trader's premises. Did the trader fulfil his obligation arising from Article 94 (1) (c)?

2. Obligation to deliver and passing of risk

We are aware that Articles 140 ff. have not yet been negotiated by the Council working party.

Nevertheless, some basic questions arise concerning the interplay of the obligation to deliver (Article 93 ff) and the passing of risk (Article 140 ff), which, in our view are decisive for understanding Articles 93 et seq.

What does the obligation to deliver mean for the passing of risk?

In our view, the question arises as to whether Articles 142 ff. provide for the passing of risk regardless of whether the seller has fulfilled his obligation to deliver (and possibly his obligation to transfer the ownership). Or may it be assumed on the basis of general considerations that the seller's right to the sales price always exists when he has fulfilled (all) Federal Ministry of Justice October 2012 3 his obligations? In such a case, the rules concerning the passing of risk would no longer be relevant.

Example 5: Consumer buys a washing machine at trader's shop. The consumer organises carriage by a carrier because that is cheaper for him than the delivery service offered by the trader. The washing machine is destroyed in transit.

Depending on how one interprets Articles 93 (1) (b) (i) and 94 (1) (b), the seller fulfils his obligation to deliver by handing over the goods to the carrier or possibly by making the goods available at his place of business (Articles 93 (1) (b) (ii) and 94 (1) (c)).

In contrast, according to Article 142 (1), the risk passes to the consumer only when he has acquired physical possession of the goods. Article 142 (4) does not appear to be applicable, since the seller has offered the option of carriage.

The seller has fulfilled his obligations under Articles 93 et seq. (and it is assumed that he has also transferred ownership), whereas the risk under Article 142 would not yet have been passed to the consumer. Thus, the consumer would not have to pay the purchase price. Is that correct?
