



CCBE POSITION ON THE SERVICES AND MANDATE OF THE DRAFT COMMON FRAME OF REFERENCE WITH PARTICULAR REFERENCE TO SERVICE CONTRACTS BETWEEN LAWYERS AND CLIENTS

CCBE position on the services and mandate of the Draft Common Frame of Reference with particular reference to service contracts between lawyers and clients

The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries.

The CCBE has been actively following political and legislative developments in European contract law and has contributed to the debate through various position papers which support initiatives to promote a European contract law. The Draft Common Frame of Reference (DCFR) is one of the most interesting and challenging developments in this area and has been at the centre of the most recent work by the CCBE's European Contract Law working group. Previous CCBE position papers in this area include policies on general principles of European Contract Law (Freedom of contract, standard terms of contract, notion of professional and consumer, remedies and damages), http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_Position_Pap1_1205761121.pdf and on the DFCR as regards Sales law and damages and remedies, http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_Position_Pap1_1265878409.pdf.

The European Contract Law working group has now pro-actively investigated the Chapter on services and mandate of the DCFR in order to find out whether the legal principles established in these chapters are in line with the legal and contractual requirements of the contract between lawyers and their clients. This position paper does not intend to approve or disapprove of any other aspect of service and/or mandate contracts as listed in IV.C and IV.D of the CFR, as this current paper is restricted to comments only about the legal requirements of a contract between lawyer and client. However, this should not be understood as meaning that the CCBE has concentrated in its other pro-active work on the CFR – for instance, as listed above – only on the contract between lawyer and client, nor that future position papers will do so. Generally, the work of the CCBE in relation to the CFR is to ensure that it will be a sound and reasonable basis for a European Contract Law.

In relation to contracts between lawyers and clients, the CCBE's position is as follows:

1. The CCBE is of the opinion that any and all contractual relations between a lawyer and his client are based on the rules of deontology, applicable in each instance. These rules have priority, thus superseding any and all contractual terms and provisions, including those of the chapters on services and mandates of the CFR (IV.C and IV.D). This having stated, the following remarks seem to be appropriate:
2. The chapters on services and mandates adequately cover the needs and the requirements of a contract entered into between a lawyer and client. On the basis of the overall principle of freedom of contract, the provisions of these chapters provide an adequate basis for these contracts.
3. However, as outlined above, the rules on lawyers' deontology must be fully observed and safeguarded within the range of chapter IV.C and IV. D of the CFR. These principles are either "*leges speciales*" or are part of the public law. In any event they must have precedence and may not be changed or altered by any provisions of the afore mentioned chapters on services and/or mandates of the CFR.
4. The high standard of professional care to be observed by a lawyer is adequately in line with the provision of IV.C – 2: 105 Sect. 2 and 3 resp. IV.D – 3:103 Sect. 2 and 3 of the CFR: A lawyer being specialised in a given field and who purports to be a member of a group of professional service providers, exercising a higher standard of care and skill, must be and should be measured by these higher standards and not only by the standard of care and skill a reasonable service provider has to exercise in view of the specific circumstances of the mandate granted.

5. However, accepting these afore-mentioned principles does not and should not imply in any way whatsoever that the contract between a lawyer and client is or should be based on strict liability or – even worse – that the lawyer is obliged to achieve “specific result stated or envisaged by the client at the time of the conclusion of the contract”, as stated in IV.C – 2: 106 CFR. The contract between a lawyer and his client should generally be treated as a mandate, requiring the lawyer to act for the benefit of the client by using adequate care and skill as provided for in IV.D – 3: 103 CFR. This contract may be terminated by the client at any time without risking any claim for damages in this respect.
6. We have severe doubts as to the requirements outlined in IV.C – 2: 102 and – more specifically – in IV.C – 7: 102 CFR – pre-contractual duties to warn – as we are of the opinion that deontological rules, if properly and adequately observed by the lawyer, cover the needs of the client to be reasonably protected during the phase of a pre-contractual undertaking. In this respect, we refer to our position paper on the consumer rights directive COM(2008)614/3 http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_position_on_1_1260182_031.pdf.

Annex:

Extract from
**PRINCIPLES, DEFINITIONS AND MODEL RULES
OF EUROPEAN PRIVATE LAW**
Draft Common Frame of Reference (DCFR)
Articles and Comments
[Interim Edition, to be completed]
Prepared by the Study Group on a European Civil Code
and the Research Group on the Existing EC Private Law (Acquis Group)
Based in part on a revised version of the Principles of European Contract Law
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IV.C.–2:102: Pre-contractual duties to warn

- (1) *The service provider is under a pre-contractual duty to warn the client if the service provider becomes aware of a risk that the service requested:*
 - (a) *may not achieve the result stated or envisaged by the client,*
 - (b) *may damage other interests of the client, or*
 - (c) *may become more expensive or take more time than reasonably expected by the client.*
- (2) *The duty to warn in paragraph (1) does not apply if the client:*
 - (a) *already knows of the risks referred to in paragraph (1); or*
 - (b) *could reasonably be expected to know of them.*
- (3) *If a risk referred to in paragraph (1) materialises and the service provider was in breach of the duty to warn of it, a subsequent change of the service by the service provider under IV.C.–2:109 (Unilateral variation of the service contract) which is based on the materialisation of the risk is of no effect unless the service provider proves that the client, if duly warned, would have entered into a contract anyway. This is without prejudice to any other remedies, including remedies for mistake, which the client may have.*
- (4) *The client is under a pre-contractual duty to warn the service provider if the client becomes aware of unusual facts which are likely to cause the service to become more expensive or time-consuming than expected by the service provider or to cause any danger to the service provider or others when performing the service.*
- (5) *If the facts referred to under paragraph (4) occur and the service provider was not duly warned, the service provider is entitled to:*
 - (a) *damages for the loss the service provider sustained as a consequence of the failure to warn; and*
 - (b) *an adjustment of the time allowed for performance of the service.*
- (6) *For the purpose of paragraph (1), the service provider is presumed to be aware of the risks mentioned if they should be obvious from all the facts and circumstances known to the service provider, considering the information which the service provider must collect about the result stated or envisaged by the client and the circumstances in which the service is to be carried out.*

- (7) *For the purpose of paragraph (2)(b) the client cannot reasonably be expected to know of a risk merely because the client was competent, or was advised by others who were competent, in the relevant field, unless such other person acted as the agent of the client, in which case II.–1:105 (Imputed knowledge etc.) applies.*
- (8) *For the purpose of paragraph (4), the client is presumed to be aware of the facts mentioned if they should be obvious from all the facts and circumstances known to the client without investigation.*

IV.C.–2:105: Obligation of skill and care

- (1) *The service provider must perform the service:*
- (a) *with the care and skill which a reasonable service provider would exercise under the circumstances; and*
 - (b) *in conformity with any statutory or other binding legal rules which are applicable to the service.*
- (2) *If the service provider professes a higher standard of care and skill the provider must exercise that care and skill.*
- (3) *If the service provider is, or purports to be, a member of a group of professional service providers for which standards have been set by a relevant authority or by that group itself, the service provider must exercise the care and skill expressed in those standards.*
- (4) *In determining the care and skill the client is entitled to expect, regard is to be had, among other things, to:*
- (a) *the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the service for the client;*
 - (b) *if damage has occurred, the costs of any precautions which would have prevented that damage or similar damage from occurring;*
 - (c) *whether the service provider is a business; ;*
 - (d) *whether a price is payable and, if one is payable, its amount; and*
 - (e) *the time reasonably available for the performance of the service.*
- (5) *The obligations under this Article require in particular the service provider to take reasonable precautions in order to prevent the occurrence of damage as a consequence of the performance of the service.*

IV.C.–2:106: Obligation to achieve result

- (1) *The supplier of a service must achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract, provided that in the case of a result envisaged but not stated:*
- (a) *the result envisaged was one which the client could reasonably be expected to have envisaged; and*
 - (b) *the client had no reason to believe that there was a substantial risk that the result would not be achieved by the service.*
- (2) *In so far as ownership of anything is transferred to the client under the service contract, it must be transferred free from any right or claim of a third party. Articles IV.A.–2:305 (Third party rights or claims in general) and IV.A.–2:306 (Third party rights or claims based on industrial property or other intellectual property) apply with any appropriate adaptations.*

IV.C.–7:102: Obligation to collect preliminary data

- (1) *The provider must, in so far as this may reasonably be considered necessary for the performance of the service, collect data about:*
 - (a) *the particular purpose for which the client requires the information;*
 - (b) *the client's preferences and priorities in relation to the information;*
 - (c) *the decision the client can be expected to make on the basis of the information; and*
 - (d) *the personal situation of the client.*
- (2) *In case the information is intended to be passed on to a group of persons, the data to be collected must relate to the purposes, preferences, priorities and personal situations that can reasonably be expected from individuals within such a group.*
- (3) *In so far as the provider must obtain data from the client, the provider must explain what the client is required to supply.*

IV.D.–3:103: Obligation of skill and care

- (1) *The representative must perform the obligations under the mandate contract with the care and skill that the principal is entitled to expect under the circumstances.*
- (2) *If the representative professes a higher standard of care and skill the representative must exercise that care and skill.*
- (3) *If the representative is, or purports to be, a member of a group of professional representatives for which standards exist that have been set by a relevant authority or by that group itself, the representative must exercise the care and skill expressed in these standards.*
- (4) *In determining the care and skill the principal is entitled to expect, regard is to be had, among other things, to:*
 - (a) *the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the obligations;*
 - (b) *whether the obligations are performed by a business;*
 - (c) *whether a price is payable and, if one is payable, its amount; and*
 - (d) *the time reasonably available for the performance of the obligations.*