



CCBE POSITION PAPER ON THE DRAFT COMMON FRAME OF REFERENCE

CCBE Position Paper on the Draft Common Frame of Reference

I. Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer member countries. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

In order to be prepared for the political debate of the European Parliament and the Council following the work of the academic groups on the DFCR, the CCBE underwent a round of discussions and consultations to formulate a position on core subjects of European contract law, i.e. sales contracts and damages. The CCBE hereby expresses its continued willingness and readiness to further participate in any debate concerning the shape of European Contract Law.

The CCBE takes a pro-active approach with regard to European Contract Law because it believes that a coherent European contract law for transborder actions is important for the European citizen and as well as for the proper functioning of the Internal Market.

The following work has been undertaken by the CCBE:

- CCBE Resolution on European Contract Law in November 2006: http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/en_contract_law_ccbe1_118371753_6.pdf
- CCBE Position Paper on certain principles of European Contract Law (Freedom of contract, Standard terms of contract, Notion of professional and consumer and Remedies and damages): http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_Position_Pap1_1205761_121.pdf
- CCBE Position paper on the Draft Consumer Rights Directive (http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_position_on_1_126018_2031.pdf)

The CCBE has taken into account the motion for a resolution of the European Parliament of 17 July 2008 concerning the Common Frame of Reference (CFR) on European Contract Law which states that "(...) when taking a decision about the content of the CFR, the Commission should bear in mind that the CFR could go well beyond a mere legislative tool and could result in an optional instrument (...)”

Furthermore, the CCBE also has taken into account the position of the Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding, in her presentation of the political perspective of the Commission on the CFR as a possible instrument for European Contract Law. The Commissioner intends to complete – with the help of academic expertise from across Europe – the work on the common frame of reference in the course of 2010, and to include it thereafter into a well-publicised legal instrument. Moreover, she stressed that she intends to work on the three first building blocks of a coherent European contract law, namely standard terms and conditions, consumer rights and common principles of contract law, with the purpose of paving the way for one day developing a European Civil Code (which could take the form either of a voluntary tool to improve coherence, or of an optional 28th contract law regime or of a more ambitious project).¹

In consideration of, and in line with these political initiatives, the CCBE would like pro-actively to contribute to the debate.²

¹ http://www.europarl.europa.eu/hearings/static/commissioners/answers/reding_replies_en.pdf

² The French CCBE delegation expressed partly deviating comments which are further explained at: <http://www.dbfbruxelles.eu/pdf/observationFranceCCR.pdf>

However, the CCBE – at least at present - does not envisage presenting a thorough commentary and new suggestions for a body of sales law within the framework of a (possible) European Contract Law. Instead, the CCBE intends rather to formulate general guidelines whilst commenting in detail on any proposal of a sales law as soon as it comes into existence, hopefully in the near future.

II. The CCBE Position on Sales Law and Damages/Remedies:

For the reasons given above, the CCBE therefore focuses on general contract law including consumer law, and restricts this position paper to comments on sales law and on damages, thereby further outlining guidelines for the political debate.

1. Sales law

In general, the CCBE believes that the Sales Directive 1999/44³, which has been enacted by the EU member states and the CISG (Convention on Contracts for the International Sale of Goods), and which is equally enacted by most of the EU member states together with the various national rules, is a regime sufficient to regulate sales law at European level. It does not seem desirable to implement either the sales law of the DCFR or any other regime, such as the PELS⁴, as suggested by the Study Group. A fourth layer of rules besides the legal instruments already in place would be detrimental to a transparent and clear structure of European contract law, and would thus have a negative impact on the principle of legal certainty.

The Sales Directive 1999/44 contains rules to be considered mandatory in order to safeguard the respective goals of consumer protection. The CCBE proposes that leading principles of the Sales Directive should also be implemented with regard to transactions between professionals (b2b). However, apart from this, the CCBE strongly supports freedom of contract as a fundamental principle and a solid basis of all European laws.⁵ Such a step could be taken as part of a review foreseen by Article 12 of the Sales Directive.

The following leading principles have been identified as cornerstones for a revision of the Sales Directive within the framework of European Contract Law:

a) Article 2 of the Sales Directive 1999/44¹: Conformity with the contract

In a similar way to CISG (United Nations Convention on Contracts for the International Sale of Goods; Vienna, 11th April 1980), Article 2 takes the lack of conformity of the sales good with the contract as a starting point. It defines the requirements for sales good to be in conformity with the contract on the side of the consumer and the seller. If the requirements are met, it is rebuttably presumed that the good is in conformity with the contract.

The UK CCBE delegation's dissenting position can be found at:

<http://www.barcouncil.org.uk/consultations/responsetoconsultationpapers/>

3 Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

4 Hondius, Heutger, Jeloschek, Sivesand, Wiewiorowska, Principles of European Law, Sales, 2008

5 The CCBE Austrian delegation believes that the leading principles of the Sales Directive 1999/44/EC listed up in lit a) – c) of the Part II of the Draft position paper (referring to Articles 2, 3. and 5 of the Sales Directive), shall apply to b2b contracts only as default rule in absence of an agreement of the parties. Without prejudice to its general dissent from this position paper, the UK delegation supports the Austrian delegation's view.

b) Article 3: Rights of the consumerⁱⁱ

Article 3 contains the provision which is the basis of many further rules concerning the sale of consumer goods and generally sale and purchase agreements, stating: *“The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.”*

c) Article 5: Time limitsⁱⁱⁱ

Article 5 determines the limitation period to exercise consumer rights in case of non-conformity of a good.

The CCBE believes that the time limits provided in Article 5 of the Sales Directive are in principle also applicable to b2b contracts, as is the shift of burden of proof within a period of six months after the passing of risk.

d) Article 7: Binding nature^{iv}

In order to safeguard the principles laid out in the Sales Directive for the benefit of the consumer, Article 7 sets out that the rights foreseen for the consumer cannot be restricted or waived, and are thus mandatory. The CCBE supports the extension⁶ of these rights to b2b contracts, as well as the standard of the “weaker party” provided by the Late Payment Directive n° 35/2000 (art. 3(3): “grossly unfair” or “gross deviation from good commercial practice”)^v. Where standard terms of contracts are used, it is desirable to enlarge the scope of notion of consumer and professional according to certain concrete criteria reflecting an inequality of bargaining power. However, this should not apply to individually negotiated terms of contract.

With regard to the definition of delivery and passing of risk, the CCBE proposes that certain additions should be made within the framework of the Sales Directive 1999/44:

a) Definition of delivery

Delivery should mean, by default, that the consumer takes physical possession of the goods, but the parties can agree otherwise. However, the European Commission would need to take note that the definition of delivery is not consistent in all jurisdictions.

Attention might be also paid to cases where the consumer wrongfully refuses to accept delivery.

b) Regulation of the passing of the risk in consumer sales

The passing of the risk should be regulated at Community level and be linked to the moment of delivery. A regulation of the passing of the risk would lead to legal certainty, especially for enterprises when undertaking cross-border transactions. However, the definition of delivery needs to be further clarified at European level, e.g. as linked to physical possession, unless otherwise agreed by the parties. Another important issue here is who shall arrange and pay for necessary insurance coverage. This may very well be undertaken by enterprises, which can include the costs in the price of the goods. What may be foreseen by enterprises is that the choice of time and place is at the disposal of the consumer.

6 Not supported by the Austrian delegation, except of the extension of the “weaker party” standard. Without prejudice to its general dissent from this position paper, the UK delegation supports the Austrian delegation’s view.

2. Damages/Remedies

a) General

III. – 3:701 sequ. – of the Draft of the CFR (Draft) form a sound basis for determining the conditions and the amount of damages attributable to the aggrieved party, i.e. to the creditor.

b) Detailed articles

III.–3:701: Right to damages

(1) *The creditor is entitled to damages for loss caused by the debtor's non-performance of an obligation, unless the non-performance is excused.*

(2) *The loss for which damages are recoverable includes future loss which is reasonably likely to occur.*

(3) *“Loss” includes economic and non-economic loss. “Economic loss” includes loss of income or profit, burdens incurred and a reduction in the value of property. “Non-economic loss” includes pain and suffering and impairment of the quality of life.*

It might be debatable whether “non-economic loss” should be part of any damages to be awarded in case of breach of a contractual obligation. However, it appears that most European laws cover non-economic loss as a potential part of a damages claim.⁷

III.–3:702: General measure of damages

The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor as nearly as possible into the position in which the creditor would have been if the obligation had been duly performed. Such damages cover loss which the creditor has suffered and gain of which the creditor has been deprived.

On the basis of the Roman principle “restitutio in integrum”, it seems fair that Sec. III. – 3:702 defines the damages to be awarded to the benefit of the creditor according to the hypothesis: “the position in which the creditor would have been, if the obligation had been duly performed”. The CCBE believes that there does not seem to be any reasonable alternative to this principle.

III.–3:703: Foreseeability

The debtor in an obligation which arises from a contract or other juridical act is liable only for loss which the debtor foresaw or could reasonably be expected to have foreseen at the time when the obligation was incurred as a likely result of the non-performance, unless the non-performance was intentional, reckless or grossly negligent.

This test might deviate from a number of European laws which hold that causation is the relevant factor to determine the debtor's liability for a loss. However, it should be kept in mind that this test is the same in Art. 74 CSIG (Convention on Contracts for the International Sales of Goods), and, due to the case law available in this respect, it might be advisable to maintain it as such.⁸

⁷ Not supported by the Austrian delegation. Without prejudice to its general dissent from this position paper, the UK delegation supports the Austrian delegation's view.

⁸ Not supported by the Austrian delegation. Without prejudice to its general dissent from this position paper, the UK delegation supports the Austrian delegation's view.

III.-3:710: Stipulated payment for non-performance

(1) *Where the terms regulating an obligation provide that a debtor who fails to perform the obligation is to pay a specified sum to the creditor for such non-performance, the creditor is entitled to that sum irrespective of the actual loss.*

(2) *However, despite any provision to the contrary, the sum so specified in a contract or other juridical act may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and the other circumstances.*

Sec. III. – 3: 710 follows closely the understanding of Art. 3 Sec. 3 of the Late Payment Directive. The CCBE would recommend the test for “grossly excessive” as provided by Article Art. 3(3) of the Late Payment directive, e.g.: “grossly unfair” or “gross deviation from good commercial practice”.

III. Conclusion

With the above position, the CCBE seeks to contribute pro-actively not only to the debate on the academic DCFR, but to give input to the political debate on the Common Frame of Reference.

On a larger scale, the CCBE through its work and legal expertise aims to support a more coherent European Contract Law, which will not only strengthen the position of the European citizen as consumer but will also enhance the proper functioning of the European internal market.

i

Article 2 Conformity with the contract

1. The seller must deliver goods to the consumer which are in conformity with the contract of sale.
2. Consumer goods are presumed to be in conformity with the contract if they:
 - (a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;
 - (b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;
 - (c) are fit for the purposes for which goods of the same type are normally used;
 - (d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labeling.
3. There shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.
4. The seller shall not be bound by public statements, as referred to in paragraph 2(d) if he:
 - shows that he was not, and could not reasonably have been, aware of the statement in question,
 - shows that by the time of conclusion of the contract the statement had been corrected, or
 - shows that the decision to buy the consumer goods could not have been influenced by the statement.
5. Any lack of conformity resulting from incorrect installation of the consumer goods shall be deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sale of the goods and the goods were installed by the seller or under his responsibility. This shall apply equally if the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.

ii

Article 3
Rights of the consumer

1. The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.
2. In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6.
3. In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate.
A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account:
 - the value the goods would have if there were no lack of conformity,
 - the significance of the lack of conformity, and
 - whether the alternative remedy could be completed without significant inconvenience to the consumer.Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.
4. The terms "free of charge" in paragraphs 2 and 3 refer to the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials.
5. The consumer may require an appropriate reduction of the price or have the contract rescinded:
 - if the consumer is entitled to neither repair nor replacement, or
 - if the seller has not completed the remedy within a reasonable time, or
 - if the seller has not completed the remedy without significant inconvenience to the consumer.
6. The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

iii

Article 5
Time limits

1. The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years as from delivery of the goods. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall not expire within a period of two years from the time of delivery.
2. (...)
3. Unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.

iv

Article 7
Binding nature

1. Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer.
Member States may provide that, in the case of second-hand goods, the seller and consumer may agree contractual terms or agreements which have a shorter time period for the liability of the seller than that set down in Article 5(1). Such period may not be less than one year.
2. Member States shall take the necessary measures to ensure that consumers are not deprived of the protection afforded by this Directive as a result of opting for the law of a non-member State as the law applicable to the contract where the contract has a close connection with the territory of the Member States.

v DIRECTIVE 2000/35/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 June 2000
on combating late payment in commercial transactions:

Article 3(3)
Interest in case of late payment

3. Member States shall provide that an agreement on the date for payment or on the consequences of late payment which is not in line with the provisions of paragraphs 1(b) to (d) and 2 either shall not be enforceable or shall give rise to a claim for damages if, when all circumstances of the case, including good commercial practice and the nature of the product, are considered, it is grossly unfair to the creditor. In determining whether an agreement is grossly unfair to the creditor, it will be taken, *inter alia*, into account whether the debtor has any objective reason to deviate from the provisions of paragraphs 1(b) to (d) and 2. If such an agreement is determined to be grossly unfair, the statutory terms will apply, unless the national courts determine different conditions which are fair.