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CCBE Position Paper on certain Principles of European Contract Law

**Freedom of contract
Standard terms of contract
Notion of professional and consumer
Remedies and damages**

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Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents more than 700,000 European lawyers through its member bars and law societies of the European Union and the European Economic Area. In addition to membership from EU bars, it has also observer representatives from a further six European countries' bars. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

In the field of European Contract Law, the CCBE in November 2006 issued a resolution (please see: http://www.ccbe.org/fileadmin/user_upload/NTCdocument/en_contract_law_ccbe1_1183717536.pdf) The resolution refers to the Common Frame of Reference. The Common Frame of Reference (CFR) was drafted to bring about a framework set of annotated rules to which the European and national legislators and the European and national courts, including arbitral tribunals, can refer when in search for a commonly acceptable solution to a given problem. The CFR was also prepared with a view to allowing parties to a contract, whether cross-border or purely domestic, to incorporate its content into their agreement. The CFR is also useful for helping SMEs in doing business, in particular doing business abroad, and for strengthening the consumer's trust in the proper functioning of the Internal Market when buying goods or ordering services from a business situated in another country. The political future of this academic CFR, called Draft Common Frame of Reference (DCFR) is still rather unclear. The European Commission introduced the toolbox function of the CFR, in other words, a text helping the Commission to improve the internal coherence of directives on consumer protection in contract law. However, another function of the CFR could also be as an "Optional Instrument", i.e. as an independent regime of contract law, additional to the Member States' systems, to which parties to a cross-border contract can opt-in.¹

In the CCBE resolution of November 2006 it was resolved

- That the CCBE is in full support of the initiative to create a Common Frame of Reference in order to improve the quality and coherence of the existing Acquis and future legal instruments in the area of contract law;
- That the CCBE is willing to cooperate in this respect with both the European Commission and the European Parliament by contributing its practical and academic legal expertise to this important political undertaking.

The CCBE in 2007 has undertaken work on certain principles of European Contract Law, namely:

- I. Freedom of Contract
- II. Standard terms of Contract
- III. Notion of Professional and Consumer
- IV. Remedies and damages

This paper represents the next step in the CCBE's contribution to this issue². The CCBE's work referred to the studies undertaken by the Joint Network on European Private Law in the context of the

¹ Please compare: Prof. Christian von Bar, "An Introduction to the Academic Common Frame of Reference", speech given at the ERA seminar "Towards a Common Frame of Reference – Principles of European Contract Law" in Trier on 19-21 September 2007.

² Not including the UK. Whilst fully endorsing the assertion that freedom of contract is a fundamental principle of contract law, the UK delegation to the CCBE regrets that it is unable to support the rest of this CCBE Position Paper. It does continue to endorse the November 2006 CCBE resolution on European Contract Law.

EU Sixth Framework Programme, "Network of Excellence". The CoPECL Network of Excellence ("Common Principles of European Contract Law" = CoPECL), founded in May 2005, comprises several Universities, Institutions and other Organisations, as well as more than 150 researchers operating in all EU Member States. The Network includes several groups, like e.g. the Study Group on a European Civil Code, the Acquis Group, the Economic Impact Group, etc. The Network has delivered the "Draft Common Frame of Reference" (DCFR) for European contract law. The proposal is presented in the form of principles, including definitions, general concepts and legal rules.

Since the DCFR (Draft Common Frame of Reference) prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) has now been delivered to the European Commission, the CCBE would like to contribute to this work. 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 DCFR, the CCBE underwent a round of discussions and consultations to formulate a position on the most important and decisive principles. The CCBE hereby expresses its willingness and readiness to further participate in any debate concerning the shape of European Contract Law.

I. Freedom of contract

It is proposed that the CCBE hereby acknowledges **Freedom of contract** as a fundamental principle of contract applying to contracts with both European citizens and enterprises. Such freedom is a solid basis in all European laws. However, restrictions on this freedom, whether by way of mandatory rules, avoidance of unfair contract terms or in any other form, may be justified in relation to certain situations or types of contract, particularly where there is or may be inequality of bargaining power and a lack of knowledge of understanding. Even though many European laws differ in this respect, the CCBE believes that it is advisable at the present time to not try to find a common ground for all applicable restrictions. Therefore, the CCBE is of the opinion that further research should be undertaken by the Commission.

The CCBE supports the application of freedom of contract to all contractual undertakings, be it on the basis of consumer – business/professional (b2c) or between businesses (b2b). In this respect it must be noted that b2b- contracts already form part of the *acquis communautaire*.

For purposes of a more coherent contract law at European level, it is desirable to review the existing provisions applicable to b2b contracts to ensure that they are consistent in approach if included in any new European instrument.

A number of Member States have introduced various forms of direct liability of producers. The European Commission is obliged by virtue of Art. 12 of the Sales Directive to investigate whether such direct liability should be introduced to the benefit of the consumer. Taking this into account the CCBE believes that such approach should be favoured in respect of the remedy of replacement by faultless products, but in respect of other remedies only if the ultimate seller does not comply with its obligations resulting from the defect within a reasonable time. Furthermore, with regard to recital 9 of the Consumer Sales Directive³, the CCBE agrees that in favour of consumer protection, the ultimate seller should have a right of recourse. Such right of recourse against the producer should not only be restricted to those instances where the product sold by the ultimate seller has been found to be defective. A right of recourse against the producer should also be extended to all breaches of contractual obligations unless the ultimate seller or any intermediary in the distribution chain is liable.

³ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of consumer goods and associated guarantees –
(9) Whereas the seller should be directly liable to the consumer for the conformity of the goods with the contract; whereas this is the traditional solution enshrined in the legal orders of the Member States; whereas nevertheless the seller should be free, as provided for by national law, to pursue remedies against the producer, a previous seller in the same chain of contracts or any other intermediary, unless he has renounced that entitlement; whereas this Directive does not effect the principle of freedom of contract between the seller, the producer, a previous seller or any other intermediary; whereas the rules governing against whom and how the seller may pursue such remedies are to be determined by national law;

II. Standard Terms of Contract

The use of standard terms, or adhesion contracts or of similar contractual techniques is a phenomenon known to all European legal systems. The Acquis provides for several instruments for a judicial control of their use, the most important of which is the Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. In this respect, Annex to Directive 93/13 is addressed as a “grey list” (with a right for the judge to decide which term is unfair) as opposed to a “black list” rendering certain terms automatically unfair. Therefore, the CCBE considers such “non-exhaustive list” of standard terms (“grey list”, please see Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts) as a sound basis for consumer protection⁴.

The CCBE considers that it is desirable to achieve a higher level of uniformity in all European Member States by referring to any clauses contained in the “grey list” when standard terms of contract are in question. Additionally, there seems to be need to reverse recent decisions of the European Court of Justice⁵ and to no longer vest due competence to so finally apply any terms of the “grey list” by national courts only.

The CCBE supports the position that the term “individually negotiated”⁶ should be considered to be adequate to cover the non-applicability of consumer protection in a case of standard terms of contract, provided, the consumer in the negotiations was able to actually influence the content of the terms of the contract in accordance with his best interests. Provided that such individual negotiations actually have taken place, then the overall principle of freedom of contract should apply without any further restrictions.

Considering these principles, the CCBE holds that any Member State could go beyond the contents of such “grey list” in order to achieve a higher level of consumer protection, if so needed.

B2B contracts are governed by the contractual rules on general terms and conditions. Therefore,, B2B contracts should be regulated by law in order to correct gross deviations from legal principles and good commercial practice, provided that any such general terms or conditions are to be considered unfair to the other party. The CCBE believes that the standard provided by Article 3(3) of the late payment directive⁷ is appropriate to protect the “weaker” party, e.g. a non-consumer.

⁴ Please see: “Draft Acquis Principles” – Article 6:305 (by Thomas Pfeiffer and the Terminology Group)

⁵ ECJ, 1.4.2004, C-237/02 Freiburger Kommunalbauten and ECJ -26.10.2006, C-168/05 Elisa Maria Mostaza

⁶ Please see “Draft Acquis Principles”– Article 6:101, section 2 (by Thomas Pfeiffer and the Terminology Group):
(2) A term supplied by one party (the user) is not individually negotiated if the other party has not been able to influence its content because it has been drafted in advance, in particular as part of a pre-formulated standard contract. In contracts between a business and consumer, terms drafted by a third person are deemed to have been supplied by the business, unless the consumer introduced them to the contract.

⁷ 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.

III. Notion of Professional and Consumer

Currently the EC Directives do not have coherent definitions of the concepts of “consumer” and “professional”, although these are fundamental concepts for the application of the consumer acquis. The definitions in general reveal two common and recurring features: (i) the consumer is a natural person and (ii) the purpose should be outside some kind of business, commercial or trade activity.⁸ Despite of any such deficiency of an overall definition the CCBE favours that the **Notion of professional and consumer** should be used with the above understanding in the horizontal instrument to be implemented in the foreseeable future. The CCBE is aware of the fact that such enlargement of consumer protection might be difficult to define properly and adequately to the entire satisfaction of all European Member States.

However, from a political standpoint it would be desirable to enlarge the scope of this definition according to certain concrete criteria reflecting a similar inequality of bargaining power that otherwise exists between the consumer and the professional, provided standard terms of contract are used.

IV. Remedies and Damages

In the *acquis communautaire*, one can find various duties and obligations defined, like for example pre-contractual information duties or rules on conformity for businesses towards consumers. Apart from Article 2 of the Consumer Sales Directive, Article 7 of the Unfair Commercial Practices Directive contains a more general regulation of the pre-contractual information duty of businesses towards consumers.

Considering that definitions of duties and obligations already form part of the *acquis communautaire*, the overall majority of the CCBE favours a European framework instrument which outlines the general principles of remedies as foreseen e.g. in Recital 9, 11 and Article 4 of the Consumer Sales Directive, including damages. The CCBE believes that the formulation of duties and obligations requires adequate remedies, including damages in order to improve the consumer protection.

Conclusions

With the position proposed on a few selected principles of European Contract Law which carry essential political importance, the CCBE aims at contributing to the political debate. The CCBE thus renews its willingness to cooperate with both the European Commission and the European Parliament by providing its practical and academic legal expertise to this important political undertaking.

⁸ G. ALPA, J. HERRE, E. HONDIUS (Task Force on Consumers and Professionals), *The notions of consumer and professional and some related questions*,, p.3.