Mandate Contracts

(PEL MC)

prepared by

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Article 2:101, Nat. Notes, 1
PELoos, Bueno Díaz, Mandate Contracts, Chapter 2,
Article 2:101, Comp. Notes, 1
General Introduction

I. General

These Principles deal with contracts where one party (the principal) requests another party to arrange some of his legal affairs, often in exchange for a price. The legal affairs at hand consist of the conclusion of a contract with a third party – in these Principles referred to as ‘the prospective contract’ – or to perform another juridical act. Where the agent is required to act in the name of the principal, the mandate contract is a contract for direct representation. When performed, a direct contractual relationship is created between the principal and the third party. If, on the other hand, the agent is required to act in his own name, the mandate contract is a contract for indirect representation. In this situation, the contract that is concluded by the agent does not bind the principal but the agent himself. These Principles also apply in cases where the agent is authorised but not required to act on behalf of the principal, e.g. in cases where the parties agree that the agent may conclude a contract on behalf of the principal if he sees an opportunity to do so, but do not want to require the agent to actively look for it.

The powers of the agent may also concern only the preparation of a contract with the third party, without the agent having the power to conclude the contract himself. In this case, the mandate contract takes the form of intermediation. The scope of these Principles, however, is restricted to such cases of intermediation where the services of the agent are aimed at the arrangement of the principal’s legal affairs. Therefore, its provisions do not apply to contracts whereby two parties are to be brought together for personal reasons, as in the case of marriage brokerage.

II. Relation to General Contract Law (PECL) and the Principles of European Law on Service Contracts (PEL SC)

The Principles of European Contract Law (PECL) provide general rules of contract law. Those rules apply, in principle, to all types of contracts, independent of their object (e.g. sales, insurance, medical treatment, construction, and joint venture) or the status of the parties (consumer, merchant, small business, multinational). As a result, these rules are necessarily rather general and abstract. Although abstract rules certainly have an important function – they warrant normative integrity – practice also needs more specific rules. Therefore, in addition to the general contract law contained in the PECL, the Principles of European Law series, developed within the framework of the Study Group on a European Civil Code, also contain sets of principles specifically relating to sales contracts, service contracts, and long-term commercial contracts, for instance.

These Principles fill a gap left by the Principles of European Law on Service Contracts (PEL SC). Although there is much to be said about looking at mandate contracts as a specific
service contract, when developing the rules of the PEL SC no specific attention was paid to this type of contract. The reason for this was of a rather practical nature: the research capacity of the Working Team on Service Contracts was rather limited. The team originally consisted of Maurits Barendrecht, Marco Loos, Andrea Pinna, Rui Cascao, and Roland Lohnert. Lohnert eventually left the Team and was much later replaced by Stéphanie van Gulijk. At an earlier stage, Chris Jansen joined the Team. In addition, the Working Team drew on the help of some of the researchers in the Working Teams that prepared the volumes of the Principles of European Law on Sales (PEL S) (Christoph Jeloschek, Giorgos Arnikouros, Hanna Sivesand, and Aneta Wiewiorowska) and the Principles of European Law on Commercial Agency, Franchising and Distribution Contracts (PEL CAFDC) (Odavía Bueno Díaz and Manola Scotton) for the preparation of national notes. The Working Team further benefitted from discussions with the other members of these Working Teams (Ewoud Hondius, Viola Heutger, Martijn Hesselink, Jacobien Rutgers, and Muriel Veldman). Still, the development of the Principles and Comments mainly depended on the Working Team itself. Not surprisingly, the number of types of service contracts that could be covered was limited, and particular services had to be left out.

This was problematic in particular with regard to mandate contracts. The problem was that the rules on representation in the PELC – which regulate the external relationship between the principal and the third party – basically presuppose a preceding contractual relationship between the client and his agent. That internal relationship requires specific regulation, without which the mandate contract would be governed solely by the general provisions on service contracts, i.e. Chapter 1 (General provisions) of the PEL SC. Upon request by the Study Group on a European Civil Code, however, it was decided that such specific rules should be developed after all for mandate contracts. To that extent, a second small Working Team on mandate contracts was established consisting of the authors of this volume. Both of us thus worked on related aspects – Loos on service contracts and Bueno Díaz on commercial agency.

The Working Team originally preferred to take Chapter 1 (General Provisions) of the Principles of European Law on Service Contracts as a starting point for the development of a specific Chapter on Mandate Contracts. It was thought that these contracts could easily be understood as contracts for specific services. That would mean that in principle, the rules of Chapter 1 PEL SC (General Provisions) would apply. Where the rules of this Chapter provide a proper solution for a topic, these rules would apply directly without any modification or specification. This approach would decrease the risk of discrepancies between these specific services and other service contracts, which could lead to litigation on qualification issues. Where Chapter 1 PEL SC (General Provisions) did not touch upon the matter at hand, a specific rule in a Chapter on Mandate Contracts could be needed. Where Chapter 1 PEL SC (General Provisions) would provide for a solution that is not apt to deal with the specific requirements of a mandate contract, the specific Chapter on Mandate Contracts should then contain a modification of or derogation from Chapter 1 PEL SC (General Provisions). It was thought, however, that derogation from the provision in Chapter 1 PEL SC (General Provisions) would not be needed very often.
**Illustration 1**
A principal wants to buy a shipment of cocoa beans on the market. As he is too busy to participate on the market himself, he appoints an agent to join in on the bidding on the cocoa beans. The parties do not make specific arrangements as to how the price for the agent’s services is to be calculated.

If Chapter 1 PEL SC (General Provisions) applied, Article 1:102 PEL SC (Price) would provide that the agent is entitled to the market price generally charged for services of this kind at the time of the conclusion of the contract.

**Illustration 2**
A principal wants to buy a painting at an auction. Because the principal prefers to remain anonymous, she orders the curator of an art gallery to buy the painting for her without disclosing the principal’s name to the seller. The curator examines the painting before the auction starts and discovers the painting may be a fraud.

If Chapter 1 PEL SC (General Provisions) applied, the curator would be required to warn the principal of his suspicions unless the principal already knew of the risk before the contract with the curator was concluded, as in Article 1:110 PEL SC (Contractual Duty of the Service Provider to Warn).

As in these two Illustrations, the provisions in Chapter 1 PEL SC (General Provisions) seem to provide adequate solutions to the question to what price the agent is entitled and whether the principal is to be informed of the curator’s suspicions; the Chapter on Mandate Contracts would not contain a specific provision on these issues. This view was supported by a large minority of the members of the Coordinating Committee of the Study Group on a European Civil Code. These members argued that the rules applicable to mandate contracts belonged most appropriately as an additional Chapter in the Principles of European Law on Service Contracts (PEL SC), because they were essentially concerned with contracts for the provision of representation or intermediation services.

However, a (slight) majority of the members of the Coordinating Committee favoured the development of a self-standing set of rules on mandate contracts. Some members argued that mandate contracts could not be regarded as services as the act of representation leads to contractual ties between the principal and the third party. As such they were sufficiently distinctive to merit separate treatment, as was indeed the case in most legal systems. These members further argued that mandates were very often unilateral acts. The focus of the existing national provisions was more on what the agent was authorised and instructed to do on behalf of the principal than on the obligation that the agent took upon himself. This majority view led to the development of a separate Book IV.D in the Draft Common Frame of Reference and to these Principles of European Law on Mandate Contracts (PEL MC).

Therefore, even though the drafters of the PEL MC were well aware of the content of the PEL SC, the rules on service contracts and mandate contracts nevertheless look very different. These rules ultimately have become the subject of a separate book of the Draft Common Frame of Reference (DCFR). There are several reasons for this. First, when the second
Working Team started its work on mandate contracts, some of the members of the Study Group on a European Civil Code had serious doubts whether the rules on mandate contracts should be included in what is now Book IV of the Draft Common Frame of Reference, or rather should be added to the rules on representation (now included in Book II, Chapter 6 DCFR (Representation)). These rules govern the external relation between principal and third party, whereas the rules on mandate contracts pertain to the internal relation between principal and agent. In this respect, it should be noted that in many national codifications, these sets of rules are grouped together. Moreover, there was considerable time pressure from the European Commission, which required the rules on mandate contracts to be ready for publication by the end of 2007, whereas the Working Team had only started its work in 2005 when the comments to the PEL SC and the PEL CAFDC were about to be finalised. There was considerable concern in the Study Group that if the Working Team were to start aligning the rules on mandate contracts to those on service contracts, progress would be too slow for the rules on mandate contracts to be included in the DCFR. As a result, the drafting of Principles on mandate contracts became a much more stand-alone undertaking than was originally envisaged. Ultimately, there was no longer any chance to try to harmonise the rules on mandate contracts with those on service contracts. The consequence is that the general provisions on service contracts may apply to mandate contracts only by way of analogy for those cases where the specific rules of Book IV.D of the DCFR do not provide an answer.

III. Relation to Draft Common Frame of Reference (DCFR)

As indicated, these Principles were developed to be included in the Draft Common Frame of Reference. This explains why these Principles are almost a copy of the provisions of Book IV.D of the DCFR – the numbers of the Articles and their headings are identical (with only the reference to Book IV.D being deleted), and the contents of the provisions are almost identical. Some minor changes have had to be made, however, based on the fact that the Principles of European Law series builds on the PECL rather than on the DCFR. This explains why the text of the Articles occasionally refers to the provisions of the PECL instead of their counterpart in the DCFR.

The DCFR was published earlier than the Principles of European Law on Mandate Contracts. This is caused in part by the fact that the Comments to Book IV.D have had to be much shorter than the Comments that the drafters of the PEL MC deemed necessary for a proper understanding of the provisions. Moreover, the final editing and occasionally also the drafting of the Comments to the DCFR was left to the editors of the full edition of the DCFR, and in our view did not always fully reflect the reasons why a certain provision was included in the text of the DCFR and these Principles, or state the correct intention of the text of these provisions. It should be noted, however, that the cases where this has occurred are few in number. Given the fact that the Comments for these Principles may shed some additional light on the meaning of the provisions of Book IV.D of the DCFR, the Comments and the notes to the PEL MC may be relied on when interpreting the provisions of the DCFR as regards mandate contracts.
Substantively, the Articles of the Principles of European Law on Mandate Contracts correspond to those of Book IV.D of the DCFR. However, references to other provisions of the DCFR have been replaced by references to the provisions of the Principles of European Contract Law. Moreover, one Article in the DCFR has not been taken over in these Principles. This concerns Article IV.D. – 7:101 DCFR (Conclusion of prospective contract by principal or other agent). This Article provides that if the mandate contract was concluded solely for the conclusion of a specific prospective contract, the mandate contract ends when that contract is concluded by the principal himself or on the principal’s behalf by another agent. The conclusion of the prospective contract is then treated as a notice of termination. Upon further consideration, it was thought that this Article was superfluous, as the conclusion of the prospective contract may also be seen as a revocation of the agent’s authority to represent the agent under Article 1:104 (Revocation of the mandate) of these Principles. Under Article 6:101 paragraph (2) (Termination by notice in general), this revocation is then already treated as a notice under that provision. Consequently, Articles IV.D. – 7:102 (Death of the principal) and IV.D. – 7:103 DCFR (Death of the agent) correspond with Articles 7:101 (Death of the principal) and 7:102 PEL MC (Death of the agent).

IV. Mainly Default Rules: Some Mandatory Protection

These Principles mainly contain default rules, with some exceptions explained at the end of each Comment to the individual Articles.

The general idea behind these Principles is that the mandate contract is concluded primarily in the interests of the principal and that the agent typically is a professional party who is sufficiently capable of taking care of his own interests. The default rules of these Principles set out which rules reasonable parties acting in good faith and with fair dealing would agree on given this starting point. Furthermore, these Principles are meant to foster the communication between the parties. For this reason, Chapters 3 (Performance by the Agent) and 4 (Directions and Changes) contain several specific information obligations requiring the agent to inform or warn the principal, and the principal to respond where necessary. Moreover, Articles 2:102 (Price), 2:103 (Expenses incurred by agent), and 3:402 (Accounting to the principal) provides that payment of the price or reimbursement of the expenses incurred by the agent only becomes due after the agent has given account of his activities in performing the mandate contract. Mandatory rules are deemed necessary only with regard to conflicts of interests that were not properly disclosed to the principal (Articles 5:101 (Self-contracting) and 5:102 (Double mandate)), and with regard to some of the provisions on termination of the mandate contract by notice under Chapter 6 (Termination by notice other than for non-performance).

However, in order to prevent the principal from disregarding the legitimate interests of the agent, specific provisions have been included to safeguard these interests as well. In particular, the right of the agent to terminate the mandate contract for extraordinary and serious reason under Article 6:105 (Termination by agent for extraordinary and serious reason) is mandatory as well. With this provision, the agent is also protected from unilateral changes of the mandate by the principal, or by directions which in the view of the agent