Title:

Additional Information:
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Table of Contents:
DCFR Outline Edition

Book I: General provisions
I. – 1:102: Interpretation and development
I. – 1:103: Good faith and fair dealing
I. – 1:104: Reasonableness

Book II: Contracts and other juridical acts
Chapter 1: General provisions
II. – 1:102: Party autonomy
II. – 1:103: Binding effect
II. – 1:104: Usages and practices
II. – 1:106: Form
II. – 1:109: Standard terms
II. – 1:110: Terms “not individually negotiated”

Chapter 3: Marketing and pre-contractual duties
Section 3: Negotiation and confidentiality duties
II. – 3:301: Negotiations contrary to good faith and fair dealing

Chapter 4: Formation
Section 1: General provisions
II. – 4:101: Requirements for the conclusion of a contract
Section 2: Offer and acceptance
II. – 4:204: Acceptance
II. – 4:206: Time limit for acceptance
II. – 4:208: Modified acceptance
II. – 4:209: Conflicting standard terms
II. – 4:210: Formal confirmation of contract between businesses

Chapter 6: Representation
II. – 6:102: Definitions
II. – 6:103: Authorisation

Chapter 7: Grounds of invalidity
Section 2: Vitiated consent or intention
II. – 7:201: Mistake

Chapter 8: Interpretation
Section 1: Interpretation of contracts
II. – 8:101: General rules
II. – 8:102: Relevant matters
II. – 8:103: Interpretation against supplier of term or dominant party
II. – 8:104: Preference for negotiated terms
II. – 8:105: Reference to contract as a whole
II. – 8:106: Preference for interpretation which gives terms effect

Chapter 9: Contents and effects of contracts
Section 1: Contents
II. – 9:103: Terms not individually negotiated
Section 4: Unfair terms
II. – 9:403: Meaning of “unfair” in contracts between a business and a consumer
II. – 9:404: Meaning of “unfair” in contracts between non-business parties
II. – 9:405: Meaning of “unfair” in contracts between businesses
II. – 9:406: Exclusions from unfairness test
II. – 9:407: Factors to be taken into account in assessing unfairness
II. – 9:408: Effects of unfair terms
II. – 9:410: Terms which are presumed to be unfair in contracts between a business and a consumer

Book III: Obligations and corresponding rights
Chapter 1: General
III. – 1:103: Good faith and fair dealing
III. – 1:110: Variation or termination by court on a change of circumstances

Chapter 2: Performance
III. – 2:101: Place of performance
III. – 2:102: Time of performance
III. – 2:103: Early performance
III. – 2:109: Currency of payment
III. – 2:113: Costs and formalities of performance

Chapter 3: Remedies for non-performance
Section 1: General
III. – 3:104: Excuse due to an impediment
III. – 3:107: Failure to notify non-conformity

Section 5: Termination
Sub-section 1: Grounds for termination
III. – 3:502: Termination for fundamental non-performance
III. – 3:504: Termination for anticipated non-performance

Chapter 4: Plurality of debtors and creditors
Section 1: Plurality of debtors
III. – 4:101: Scope of Section
Section 2: Plurality of creditors
III. – 4:201: Scope of section

Chapter 5: Change of parties
Section 1: Assignment of rights
Sub-section 1: General
III. – 5:101: Scope of Section

Chapter 6: Set-off and merger
Section 1: Set-off
III. – 6:101: Definition and scope
(4) Issues within the scope of the rules but not expressly settled by them are so far as possible to be settled in accordance with the principles underlying them.

(5) Where there is a general rule and a special rule applying to a particular situation within the scope of the general rule, the special rule prevails in any case of conflict.

I. – 1:103: Good faith and fair dealing

(1) The expression “good faith and fair dealing” refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.

(2) It is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party’s prior statements or conduct when the other party has reasonably relied on them to that other party’s detriment.

I. – 1:104: Reasonableness

Reasonableness is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices.

Book II: Contracts and other juridical acts

Chapter 1: General provisions

II. – 1:102: Party autonomy

(1) Parties are free to make a contract or other juridical act and to determine its contents, subject to any applicable mandatory rules.

(2) Parties may exclude the application of any of the following rules relating to contracts or other juridical acts, or the rights and obligations arising from them, or derogate from or vary their effects, except as otherwise provided.

(3) A provision to the effect that parties may not exclude the application of a rule or derogate from or vary its effects does not prevent a party from waiving a right which has already arisen and of which that party is aware.

II. – 1:103: Binding effect

(1) A valid contract is binding on the parties.

(2) A valid unilateral undertaking is binding on the person giving it if it is intended to be legally binding without acceptance.

(3) This Article does not prevent modification or termination of any resulting right or obligation by agreement between the debtor and creditor or as provided by law.
II. – 1:104: Usages and practices

(1) The parties to a contract are bound by any usage to which they have agreed and by any practice they have established between themselves.

(2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable.

(3) This Article applies to other juridical acts with any necessary adaptations.

II. – 1:106: Form

(1) A contract or other juridical act need not be concluded, made or evidenced in writing nor is it subject to any other requirement as to form.

(2) Where a contract or other juridical act is invalid only by reason of non-compliance with a particular requirement as to form, one party (the first party) is liable for any loss suffered by the other (the second party) by acting in the mistaken, but reasonable, belief that it was valid if the first party:

(a) knew it was invalid;
(b) knew or could reasonably be expected to know that the second party was acting to that party’s potential prejudice in the mistaken belief that it was valid; and
(c) contrary to good faith and fair dealing, allowed the second party to continue so acting.

II. – 1:109: Standard terms

A “standard term” is a term which has been formulated in advance for several transactions involving different parties and which has not been individually negotiated by the parties.

II. – 1:110: Terms “not individually negotiated”

(1) A term supplied by one party is not individually negotiated if the other party has not been able to influence its content, in particular because it has been drafted in advance, whether or not as part of standard terms.

(2) If one party supplies a selection of terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection.

(3) If it is disputed whether a term supplied by one party as part of standard terms has since been individually negotiated, that party bears the burden of proving that it has been.

(4) In a contract between a business and a consumer, the business bears the burden of proving that a term supplied by the business has been individually negotiated.

(5) In contracts between a business and a consumer, terms drafted by a third person are considered to have been supplied by the business, unless the consumer introduced them to the contract.

Chapter 3: Marketing and pre-contractual duties
Section 3: Negotiation and confidentiality duties

II. – 3:301: Negotiations contrary to good faith and fair dealing

(1) A person is free to negotiate and is not liable for failure to reach an agreement.

(2) A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing. This duty may not be excluded or limited by contract.

(3) A person who is in breach of the duty is liable for any loss caused to the other party by the breach.

(4) It is contrary to good faith and fair dealing, in particular, for a person to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

Chapter 4: Formation

Section 1: General provisions

II. – 4:101: Requirements for the conclusion of a contract

A contract is concluded, without any further requirement, if the parties:

(a) intend to enter into a binding legal relationship or bring about some other legal effect; and

(b) reach a sufficient agreement.

II. – 4:204: Acceptance

(1) Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.

(2) Silence or inactivity does not in itself amount to acceptance.

II. – 4:206: Time limit for acceptance

(1) An acceptance of an offer is effective only if it reaches the offeror within the time fixed by the offeror.

(2) If no time has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time.

(3) Where an offer may be accepted by performing an act without notice to the offeror, the acceptance is effective only if the act is performed within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.
II. – 4:208: Modified acceptance

(1) A reply by the offeree which states or implies additional or different terms which materially alter the terms of the offer is a rejection and a new offer.

(2) A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.

(3) However, such a reply is treated as a rejection of the offer if:

(a) the offer expressly limits acceptance to the terms of the offer;
(b) the offeror objects to the additional or different terms without undue delay; or
(c) the offeree makes the acceptance conditional upon the offeror’s assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.

II. – 4:209: Conflicting standard terms

(1) If the parties have reached agreement except that the offer and acceptance refer to conflicting standard terms, a contract is nonetheless formed. The standard terms form part of the contract to the extent that they are common in substance.

(2) However, no contract is formed if one party:

(a) has indicated in advance, explicitly, and not by way of standard terms, an intention not to be bound by a contract on the basis of paragraph (1); or
(b) without undue delay, informs the other party of such an intention.

II. – 4:210: Formal confirmation of contract between businesses

If businesses have concluded a contract but have not embodied it in a final document, and one without undue delay sends the other a notice in textual form on a durable medium which purports to be a confirmation of the contract but which contains additional or different terms, such terms become part of the contract unless:

(a) the terms materially alter the terms of the contract; or
(b) the addressee objects to them without undue delay.

Chapter 6: Representation

II. – 6:102: Definitions

(1) A “representative” is a person who has authority to affect directly the legal position of another person, the principal, in relation to a third party by acting on behalf of the principal.

(2) The “authority” of a representative is the power to affect the principal’s legal position.

(3) The “authorisation” of the representative is the granting or maintaining of the authority.

(4) “Acting without authority” includes acting beyond the scope of the authority granted.

(5) A “third party”, in this Chapter, includes the representative who, when acting for the principal, also acts in a personal capacity as the other party to the transaction.

II. – 6:103: Authorisation

(1) The authority of a representative may be granted by the principal or by the law.
Chapter 7: Grounds of invalidity

Section 2: Vitiated consent or intention

II. – 7:201: Mistake

(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:

(a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could reasonably be expected to have known this; and

(b) the other party;

(i) caused the mistake;

(ii) caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake;

(iii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors; or

(iv) made the same mistake.

(2) However a party may not avoid the contract for mistake if:

(a) the mistake was inexcusable in the circumstances; or

(b) the risk of the mistake was assumed, or in the circumstances should be borne, by that party.

Chapter 8: Interpretation

Section 1: Interpretation of contracts

II. – 8:101: General rules

(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.

(2) If one party intended the contract, or a term or expression used in it, to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could reasonably be expected to have been aware, of the first party’s intention, the contract is to be interpreted in the way intended by the first party.

(3) The contract is, however, to be interpreted according to the meaning which a reasonable person would give to it:

(a) if an intention cannot be established under the preceding paragraphs; or

(b) if the question arises with a person, not being a party to the contract or a person who by law has no better rights than such a party, who has reasonably and in good faith relied on the contract’s apparent meaning.

II. – 8:102: Relevant matters

(1) In interpreting the contract, regard may be had, in particular, to:

(a) the circumstances in which it was concluded, including the preliminary negotiations;

(b) the conduct of the parties, even subsequent to the conclusion of the contract;

(c) the interpretation which has already been given by the parties to terms or expressions which are the same as, or
similar to, those used in the contract and the practices they have established between themselves;

(d) the meaning commonly given to such terms or expressions in the branch of activity concerned and the interpretation such terms or expressions may already have received;
(e) the nature and purpose of the contract;
(f) usages; and
(g) good faith and fair dealing.
(2) In a question with a person, not being a party to the contract or a person such as an assignee who by law has no better rights than such a party, who has reasonably and in good faith relied on the contract’s apparent meaning, regard may be had to the circumstances mentioned in sub-paragraphs (a) to (c) above only to the extent that those circumstances were known to, or could reasonably be expected to have been known to, that person.

II. – 8:103: Interpretation against supplier of term or dominant party

(1) Where there is doubt about the meaning of a term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred.

(2) Where there is doubt about the meaning of any other term, and that term has been established under the dominant influence of one party, an interpretation of the term against that party is to be preferred.

II. – 8:104: Preference for negotiated terms

Terms which have been individually negotiated take preference over those which have not.

II. – 8:105: Reference to contract as a whole

Terms and expressions are to be interpreted in the light of the whole contract in which they appear.

II. – 8:106: Preference for interpretation which gives terms effect

An interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not.

Chapter 9: Contents and effects of contracts

Section 1: Contents

II. – 9:103: Terms not individually negotiated

(1) Terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying the terms took reasonable steps to draw the other party’s attention to them, before or when the contract was concluded.

(2) If a contract is to be concluded by electronic means, the party supplying any terms which have not been individually negotiated may invoke them against the other party only if they are made available to the other party in textual form.

(3) For the purposes of this Article

(a) “not individually negotiated” has the meaning given by II. – 1:110 (Terms “not individually negotiated”); and
Section 4: Unfair terms

II. – 9:403: Meaning of “unfair” in contracts between a business and a consumer

In a contract between a business and a consumer, a term [which has not been individually negotiated] is unfair for the purposes of this Section if it is supplied by the business and if it significantly disadvantages the consumer, contrary to good faith and fair dealing.

II. – 9:404: Meaning of “unfair” in contracts between non-business parties

In a contract between parties neither of whom is a business, a term is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and significantly disadvantages the other party, contrary to good faith and fair dealing.

II. – 9:405: Meaning of “unfair” in contracts between businesses

A term in a contract between businesses is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.

II. – 9:406: Exclusions from unfairness test

(1) Contract terms are not subjected to an unfairness test under this Section if they are based on:

(a) provisions of the applicable law;
(b) international conventions to which the Member States are parties, or to which the European Union is a party; or
(c) these rules.

(2) For contract terms which are drafted in plain and intelligible language, the unfairness test extends neither to the definition of the main subject matter of the contract, nor to the adequacy of the price to be paid.

II. – 9:407: Factors to be taken into account in assessing unfairness

(1) When assessing the unfairness of a contractual term for the purposes of this Section, regard is to be had to the duty of transparency under II. – 9:402 (Duty of transparency in terms not individually negotiated), to the nature of what is to be provided under the contract, to the circumstances prevailing during the conclusion of the contract, to the other terms of the contract and to the terms of any other contract on which the contract depends.

(2) For the purposes of II. – 9:403 (Meaning of “unfair” in contracts between a business and a consumer) the circumstances prevailing during the conclusion of the contract include the extent to which the consumer was given a real opportunity to become acquainted with the term before the conclusion of the contract.

II. – 9:408: Effects of unfair terms

(1) A term which is unfair under this Section is not binding on the party who did not supply it.

(2) If the contract can reasonably be maintained without the unfair term, the other terms remain binding on the parties.

II. – 9:410: Terms which are presumed to be unfair in contracts between a business and a consumer
(1) A term in a contract between a business and a consumer is presumed to be unfair for the purposes of this Section if it is supplied by the business and if it:

(a) excludes or limits the liability of a business for death or personal injury caused to a consumer through an act or omission of that business;

(b) inappropriately excludes or limits the remedies, including any right to set-off, available to the consumer against the business or a third party for non-performance by the business of obligations under the contract;

(c) makes binding on a consumer an obligation which is subject to a condition the fulfilment of which depends solely on the intention of the business;

(d) permits a business to keep money paid by a consumer if the latter decides not to conclude the contract, or perform obligations under it, without providing for the consumer to receive compensation of an equivalent amount from the business in the reverse situation;

(e) requires a consumer who fails to perform his or her obligations to pay a disproportionately high amount of damages;

(f) entitles a business to withdraw from or terminate the contractual relationship on a discretionary basis without giving the same right to the consumer, or entitles a business to keep money paid for services not yet supplied in the case where the business withdraws from or terminates the contractual relationship;

(g) enables a business to terminate a contractual relationship of indeterminate duration without reasonable notice, except where there are serious grounds for doing so; this does not affect terms in financial services contracts where there is a valid reason, provided that the supplier is required to inform the other contracting party thereof immediately;

(h) automatically extends a contract of fixed duration unless the consumer indicates otherwise, in cases where such terms provide for an unreasonably early deadline;

(i) enables a business to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; this does not affect terms under which a supplier of financial services reserves the right to change the rate of interest to be paid by, or to, the consumer, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the consumer at the earliest opportunity and that the consumer is free to terminate the contractual relationship with immediate effect; neither does it affect terms under which a business reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that the business is required to inform the consumer with reasonable notice, and that the consumer is free to terminate the contractual relationship;

(j) enables a business to alter unilaterally without a valid reason any characteristics of the goods, other assets or services to be provided;

(k) provides that the price of goods or other assets is to be determined at the time of delivery or supply, or allows a business to increase the price without giving the consumer the right to withdraw if the increased price is too high in relation to the price agreed at the conclusion of the contract; this does not affect price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described;

(l) gives a business the right to determine whether the goods, other assets or services supplied are in conformity with the contract, or gives the business the exclusive right to interpret any term of the contract;

(m) limits the obligation of a business to respect commitments undertaken by its agents, or makes its commitments subject to compliance with a particular formality;

(n) obliges a consumer to fulfil all his or her obligations where the business fails to fulfil its own;

(o) allows a business to transfer its rights and obligations under the contract without the consumer’s consent, if this could reduce the guarantees available to the consumer;

(p) excludes or restricts a consumer’s right to take legal action or to exercise any other remedy, in particular by referring the consumer to arbitration proceedings which are not covered by legal provisions, by unduly restricting the evidence available to the consumer, or by shifting a burden of proof on to the consumer;

(q) allows a business, where what has been ordered is unavailable, to supply an equivalent without having expressly informed the consumer of this possibility and of the fact that the business must bear the cost of returning what the consumer has received under the contract if the consumer exercises a right to withdraw.

(2) Subparagraphs (g), (i) and (k) do not apply to:

(a) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate beyond the control of the business;

(b) contracts for the purchase or sale of foreign currency, traveller’s cheques or international money orders denominated in foreign currency.
Book III: Obligations and corresponding rights

Chapter 1: General

III. – 1:103: Good faith and fair dealing

(1) A person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship.

(2) The duty may not be excluded or limited by contract or other juridical act.

(3) Breach of the duty does not give rise directly to the remedies for nonperformance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have.

III. – 1:110: Variation or termination by court on a change of circumstances

(1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.

(2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may:

(a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or
(b) terminate the obligation at a date and on terms to be determined by the court.

(3) Paragraph (2) applies only if:

(a) the change of circumstances occurred after the time when the obligation was incurred;

(b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances;

(c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and

(d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.

Chapter 2: Performance

III. – 2:101: Place of performance

(1) If the place of performance of an obligation cannot be otherwise determined from the terms regulating the obligation it is:

(a) in the case of a monetary obligation, the creditor’s place of business;
(b) in the case of any other obligation, the debtor’s place of business.

(2) For the purposes of the preceding paragraph:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to
the obligation; and
(b) if a party does not have a place of business, or the obligation does not relate to a business matter, the habitual residence is substituted.

(3) If, in a case to which paragraph (1) applies, a party causes any increase in the expenses incidental to performance by a change in place of business or habitual residence subsequent to the time when the obligation was incurred, that party is obliged to bear the increase.

III. – 2:102: Time of performance

(1) If the time at which, or a period of time within which, an obligation is to be performed cannot otherwise be determined from the terms regulating the obligation it must be performed within a reasonable time after it arises.

(2) If a period of time within which the obligation is to be performed can be determined from the terms regulating the obligation, the obligation may be performed at any time within that period chosen by the debtor unless the circumstances of the case indicate that the creditor is to choose the time.

(3) Unless the parties have agreed otherwise, a business must perform the obligations incurred under a contract concluded at a distance for the supply of goods, other assets or services to a consumer no later than 30 days after the contract was concluded.

(4) If a business has an obligation to reimburse money received from a consumer for goods, other assets or services supplied, the reimbursement must be made as soon as possible and in any case no later than 30 days after the obligation arose.

III. – 2:103: Early performance

(1) A creditor may reject an offer to perform before performance is due unless the early performance would not cause the creditor unreasonable prejudice.

(2) A creditor’s acceptance of early performance does not affect the time fixed for the performance by the creditor of any reciprocal obligation.

III. – 2:109: Currency of payment

(1) The debtor and the creditor may agree that payment is to be made only in a specified currency.

(2) In the absence of such agreement, a sum of money expressed in a currency other than that of the place where payment is due may be paid in the currency of that place according to the rate of exchange prevailing there at the time when payment is due.

(3) If, in a case falling within the preceding paragraph, the debtor has not paid at the time when payment is due, the creditor may require payment in the currency of the place where payment is due according to the rate of exchange prevailing there either at the time when payment is due or at the time of actual payment.

(4) Where a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place where payment is to be made.

III. – 2:113: Costs and formalities of performance

(1) The costs of performing an obligation are borne by the debtor.
(2) In the case of a monetary obligation the debtor’s obligation to pay includes taking such steps and complying with such formalities as may be necessary to enable payment to be made.

Chapter 3: Remedies for non-performance

Section 1: General

Page: 239

III. – 3:104: Excuse due to an impediment

(1) A debtor’s non-performance of an obligation is excused if it is due to an impediment beyond the debtor’s control and if the debtor could not reasonably be expected to have avoided or overcome the impediment or its consequences.

(2) Where the obligation arose out of a contract or other juridical act, nonperformance is not excused if the debtor could reasonably be expected to have taken the impediment into account at the time when the obligation was incurred.

(3) Where the excusing impediment is only temporary the excuse has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the creditor may treat it as such.

(4) Where the excusing impediment is permanent the obligation is extinguished. Any reciprocal obligation is also extinguished. In the case of contractual obligations any restitutionary effects of extinction are regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations.

(5) The debtor has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the creditor within a reasonable time after the debtor knew or could reasonably be expected to have known of these circumstances. The creditor is entitled to damages for any loss resulting from the non-receipt of such notice.

Page: 240

III. – 3:107: Failure to notify non-conformity

(1) If, in the case of an obligation to supply goods, other assets or services, the debtor supplies goods, other assets or services which are not in conformity with the terms regulating the obligation, the creditor may not rely on the lack of conformity unless the creditor gives notice to the debtor within a reasonable time specifying the nature of the lack of conformity.

(2) The reasonable time runs from the time when the goods or other assets are supplied or the service is completed or from the time, if it is later, when the creditor discovered or could reasonably be expected to have discovered the non-conformity.

(3) The debtor is not entitled to rely on paragraph (1) if the failure relates to facts which the debtor knew or could reasonably be expected to have known and which the debtor did not disclose to the creditor.

(4) This Article does not apply where the creditor is a consumer.

Page: 244

Section 5: Termination

Sub-section 1: Grounds for termination

III. – 3:502: Termination for fundamental non-performance

(1) A creditor may terminate if the debtor’s non-performance of a contractual obligation is fundamental.

(2) A non-performance of a contractual obligation is fundamental if:
(a) it substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, unless at the time of conclusion of the contract the debtor did not foresee and could not reasonably be expected to have foreseen that result; or

(b) it is intentional or reckless and gives the creditor reason to believe that the debtor’s future performance cannot be relied on.

III. – 3:504: Termination for anticipated non-performance

A creditor may terminate before performance of a contractual obligation is due if the debtor has declared that there will be a non-performance of the obligation, or it is otherwise clear that there will be such a non-performance, and if the non-performance would have been fundamental.

Chapter 4: Plurality of debtors and creditors

Section 1: Plurality of debtors

III. – 4:101: Scope of Section

This Section applies where two or more debtors are bound to perform one obligation.

Section 2: Plurality of creditors

III. – 4:201: Scope of Section

This Section applies where two or more creditors have a right to performance under one obligation.

Chapter 5: Change of parties

Section 1: Assignment of rights

Sub-section 1: General

III. – 5:101: Scope of Section

(1) This Section applies to the assignment, by a contract or other juridical act, of a right to performance of an obligation.

(2) It does not apply to the transfer of a financial instrument or investment security where such transfer is required to be by entry in a register maintained by or for the issuer or where there are other requirements for transfer or restrictions on transfer.

Chapter 6: Set-off and merger

Section 1: Set-off

III. – 6:101: Definition and scope

(1) “Set-off” is the process by which a person may use a right to performance held against another person to extinguish
in whole or in part an obligation owed to that person.

(2) This Chapter does not apply to set-off in insolvency.

Referring Principles:

I.1.7 - Interpretation and supplementation of the Principles