



## UvA-DARE (Digital Academic Repository)

### Sales law in the DCFR

Loos, M.B.M.

**DOI**

[10.2139/ssrn.1640525](https://doi.org/10.2139/ssrn.1640525)

**Publication date**

2012

**Document Version**

Submitted manuscript

**Published in**

The Draft Common Frame of Reference: national and comparative perspectives

[Link to publication](#)

**Citation for published version (APA):**

Loos, M. B. M. (2012). Sales law in the DCFR. In V. Sagaert, M. Storme, & E. Terryn (Eds.), *The Draft Common Frame of Reference: national and comparative perspectives* (pp. 453-489). (Ius Commune reeks; Vol. 99). Intersentia. <https://doi.org/10.2139/ssrn.1640525>

**General rights**

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

**Disclaimer/Complaints regulations**

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.



# CENTRE FOR THE STUDY OF EUROPEAN CONTRACT LAW

Centre for the Study of European Contract Law  
Working Paper Series  
No. 2010/04

## **Sales law in the DCFR**

Marco B.M. Loos

[m.b.m.loos@uva.nl](mailto:m.b.m.loos@uva.nl)

Centre for the Study of European Contract Law  
Universiteit van Amsterdam  
P.O. Box 1030  
1000 BA Amsterdam  
The Netherlands

## Sales law in the DCFR

Prof. Dr. Marco B.M. Loos\*

### 1. Introduction<sup>1</sup>

Book IV.A of the Draft Common Frame of Reference is dedicated to sales contracts. It is based on the Principles of European Law on Sales (PELS)<sup>2</sup>, which were published in 2008,<sup>3</sup> but contains minor and sometimes more important deviations thereof.<sup>4</sup> The PELS, in turn, draw heavily on the Vienna Sales Convention (CISG)<sup>5</sup> and the Consumer sales directive.<sup>6</sup> The General Comments to the PELS indicate that the CISG served as the starting point for drafting, and the Consumer sales directive was accepted to constitute the minimum standard of protection for – at least – consumer sales contracts. The PELS, and indirectly therefore also the DCFR, attempt to bridge the differences between the CISG and the Consumer sales directive.<sup>7</sup> This explains why the provisions of the DCFR on sales contracts to a large extent mirror the provisions of the CISG and the Consumer sales directive. Yet, the provisions of the DCFR have undergone further amendment in order for these provisions to work properly together with the other provisions of the DCFR and to prevent unnecessary repetition. This explains why Book IV.A DCFR does not contain any rules on the formation of contract, whereas the CISG devotes several provisions on this matter. Moreover, the number of provisions on remedies in Book IV.A DCFR is very limited, given the general regulation of this subject in Book III Chapter 3 DCFR.

In this paper I will look into several aspects of Book IV.A DCFR and, in particular with regard to remedies, of Book III DCFR. Where appropriate, I will compare these provisions with the corresponding provisions in the PELS and, occasionally, with those of the CISG and the Consumer sales directive.

This paper is structured as follows. First, in section 2, I will address both the substantive and the personal scope of the provisions. I will then (section 3) deal with the obligations of both the buyer and the seller and the passing of risk. However, the obligation to deliver goods that are in conformity with the contract deserves so much attention that it will be dealt with in a separate section 4. Section 5 will be dedicated to the buyer's duty to notify a lack of conformity, regulated in Articles III.–3:107 and

---

\* Professor of Private law, in particular of European Consumer Law, at the Universiteit van Amsterdam, and associated with the *Centre for the Study of European Contract Law* of that university. This paper will be published in V. Sagaert, M. E. Storme, E. Terryn (eds.), *The DCFR: a national and comparative perspective*, Antwerp/Oxford: Intersentia, 2010 (forthcoming).

<sup>1</sup> It should be noted that I was involved in various capacities in the development of the DCFR and the PELS.

<sup>2</sup> To the extent that most of the comments of the DCFR are actually copied from the PELS.

<sup>3</sup> E.H. Hondius, V. Heutger, Chr. Jeloschek, H. Sivesand and A. Wiewiorowska, *Principles of European Law on Sales*, Munich: Sellier European law publishers, 2008.

<sup>4</sup> Cf. Chr. von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (Outline edition)*, Munich: Sellier European law publishers, 2009, Introduction, nos. 54-56, p. 33-34.

<sup>5</sup> United Nations Convention on Contracts for the International Sale of Goods, concluded in Vienna in 1980.

<sup>6</sup> Directive 1999/44/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, *Official Journal* 1999, L 171/12.

<sup>7</sup> Cf. Hondius et al. (eds.) 2009, Comment D under 7. of the General Introduction of the PELS, p. 103.

IV.A.–302-304 DCFR. The situation where too few or too many goods are delivered will be addressed in section 6. In section 7 I will deal with the remedies in case of non-performance. In this paper I will focus on the buyer's remedies for non-conformity, but I will also discuss the consequences of a complete failure by the seller to perform. Where necessary I will also discuss the general remedies for non-performance the buyer may invoke. Section 8 concludes this paper with a brief summary of the main findings and some final remarks.

## 2. Scope of the provisions of Book IV.A DCFR

### 2.1 Substantive scope

Article IV.A.–1:202 DCFR (Contract for sale) defines a contract for sale as the contract 'under which one party, the seller, undertakes to another party, the buyer, to transfer the ownership of the goods to the buyer, or to a third person, either immediately on conclusion of the contract or at some future time, and the buyer undertakes to pay the price.' From this, it appears easy to determine the main obligations of the parties – the seller's obligation to transfer the ownership of the goods, and the buyer's obligation to pay the price. This is, however, not entirely true, as the fundamental obligation of the seller to deliver a good, *which is in conformity with the contract* – the obligation, which in practice is most problematic – is not even mentioned in the definition of the contract. This is not different from the definition of a sales contract in the legislation of the Member States of the EU, though.

Traditionally, contracts by which goods are exchanged are qualified as contracts for barter. Barter contracts differ from sales contracts in the sense that the counter-performance is not expressed in the obligation to pay a price, but in the obligation to provide a good in exchange for the good that that party hopes to receive. In many legal systems, the rules on sales contracts are applied with appropriate adaptations.<sup>8</sup> Article IV.A.–1:203 DCFR (Contract for barter) has taken over that approach. Paragraph (2) indicates that each party is considered to be the buyer with regard to the goods that they are to receive under the contract and the seller with respect to the goods that they are to transfer.

Perhaps more surprising is the limitation, which follows from Article IV.A.–1:101, paragraph (3) DCFR (Contracts covered): contracts for the sale (or barter) of immovable property (e.g. the sale of land and buildings) are not covered by the provisions of the DCFR. The exclusion is not explained at all in the Comments to the DCFR – these only indicate *that* the rules do not apply by virtue of this paragraph (3).<sup>9</sup> Comment C to the corresponding Article 1:105 PELS (Application to other assets)<sup>10</sup> is no more illustrative than the Comments to the DCFR, but elsewhere the Comments are clearer. Firstly, in the General Introduction to the PELS it is argued that with regard to the sale of immovable property 'the regulation under the Member States differs considerably and no common ground could be found'.<sup>11</sup> It is further argued that the sale of immovable property normally requires certain formal requirements such as registration and that the general remedies regime and

---

<sup>8</sup> Cf. Hondius et al. (eds.) 2009, Comment A to Article 1:103 PELS, p. 124.

<sup>9</sup> See Chr. von Bar et al. (eds.) 2009, Comment D to Article IV.A.–1:101 DCFR, p. 1210.

<sup>10</sup> Cf. Hondius et al. (eds.) 2009, Comment C to Article 1:105 PELS, p. 136.

<sup>11</sup> Cf. Hondius et al. (eds.) 2009, Comment I under 1. of the General Introduction to the PELS, p. 106.

notification requirements are not always suitable to immovable property.<sup>12</sup> Finally, it is stated that the sale of such property is complex and is regulated separately from the sale of goods in several systems, and it is repeated that several legal systems have introduced specific formal provisions regarding the validity of the contract.<sup>13</sup>

The exclusion of sales contracts pertaining to immovable property does not seem very convincing in the light of the DCFR, since the contract to construct immovable property not only falls within the scope of the DCFR, but is even to be seen as the archetype of a construction contract under Article IV.C.–3:101 DCFR (Scope). Moreover, in the Notes to both Article 1:104 PELS<sup>14</sup> (Definition of ‘goods’) and Article IV.A.–1:201 DCFR<sup>15</sup> it is remarked that under most systems the general regime of sales law also covers the sale of immovable property and that the same rules apply, albeit that specific formalities with regard to the conclusion of the contract and the registration of the contract in a public register. In fact, the specific provisions pertaining to the conclusion of the contract largely amount to form requirements and, occasionally, a right of withdrawal or similar scheme. That this would result in some specific provisions does not mean that the sale of immovable property could not largely be governed by the same rules. The same applies to possible modifications of the remedies for non-conformity and failure to deliver, and to the applicability of notification requirements. More significant differences exist with regard to (the performance of) the obligation to transfer the immovable property and possibly the need to develop a European register for the ownership of immovable property. However, where such a European register is suggested for proprietary security rights<sup>16</sup> and the possibility of registration of other movable goods is left to national law,<sup>17</sup> this argument cannot be seen as conclusive for leaving out this matter from the DCFR altogether.

This suggests that the true reason to exclude such sales contracts is another. It is true that no common ground could be found with regard to the sale of immovable property, but this can hardly come as a surprise, since the policy decision not to deal with the sale of immovable property was taken already in the starting phase of the development of the PELS, and no common ground has ever been looked for. In fact, the only reason to exclude such contracts from the scope of the PELS is that at the time the decision about the scope of the underlying research had to be taken it was considered too politically sensitive to include the sale of immovable property within the scope of the PELS.<sup>18</sup> The same reasoning applies to the even more politically sensitive subjects of the transfer of ownership in immovable property and the lease of such property. This explains why such rules are also missing in the DCFR. Yet, in my view, this policy decision should have been expressed openly in the Comments to the PELS and the DCFR.

---

<sup>12</sup> Cf. Hondius et al. (eds.) 2009, Comment I under 1. of the General Introduction to the PELS, p. 106.

<sup>13</sup> Cf. Hondius et al. (eds.) 2009, Comment B to Article 1:104 PELS, p. 127.

<sup>14</sup> Cf. Hondius et al. (eds.) 2009, Note 2 to Article 1:104 PELS, p. 130.

<sup>15</sup> Cf. Chr. von Bar et al. (eds.) 2009, Note 6 to Article IV.A.–1:201 DCFR, p. 1230.

<sup>16</sup> Cf. Article IX.–3:301 DCFR (European register of proprietary security; other systems of registration or notation).

<sup>17</sup> See Article VIII.–1:102 DCFR (Registration of goods).

<sup>18</sup> The Working Teams that prepared the PELS, the Principles of European Law on Service Contracts (PELSC) and the Principles of European Law on Commercial Agency, Franchising and Distribution Contracts (PELCAFD) worked together in the initial stages of the research, sharing each other’s researchers and debating the initial policy decisions. I was at that time the team manager of the Working Team preparing the PELSC and present during these initial discussions on the development of the PELS.

The restriction of the substantive scope of Book IV.A DCFR follows the restrictive definition of the term ‘goods’ in the Annex to the DCFR, where it is said to mean corporeal movables. The term, however, includes ships, vessels, hovercraft, aircraft, animals, liquids, gases and even.<sup>19</sup> Article IV.A.–1:101 paragraph (2) DCFR extends the scope of Book IV.A DCFR to contracts for the sale or barter of electricity, stocks, shares, investment securities and negotiable instruments, other forms of incorporeal property, and rights in information or data, including software and databases, but the provisions of Book IV.A DCFR apply to such contracts only ‘with appropriate adaptation’, implying that the specific nature of the ‘goods’ are to be taken into account when the provisions of Book IV.A DCFR are being applied. For instance, with regard to a contract for the supply of electricity, it would be rather difficult to imagine how the seller would comply with the obligation to transfer *property*. Moreover, provisions on non-conformity and on the transfer of risk could not be applied without modification.

Article IV.A.–1:102 DCFR (Goods to be manufactured or produced) has been derived from the Consumer sales directive and marks the border line between sales contracts under Book IV.A DCFR and construction and processing contracts under Book IV.C DCFR. In many legal systems, the border line between sales and services is rather difficult to determine. In practice, the qualification often depended upon the answer to the question whether the ordering party had supplied a substantial part of the materials necessary for the manufacture or production of the goods. If that were the case, the contract would be qualified as a contract for work, whereas in the other case it would be qualified as a sales contract.<sup>20</sup> Nevertheless, many qualification problems remained, not in the least because it is far from easy to determine what ‘a substantial part’ is. Moreover, the borderline need not necessarily be the same in all legal systems. Yet, when developing a more or less uniform system of consumer sales law, it had to be established which contracts would fall within the scope of the Consumer sales directive and which would not. This was all the more relevant since the attempt to develop a Directive on the liability for services<sup>21</sup> failed and substantive regulation of service contracts therefore was no longer to be expected for a longer period of time. As a result, a number of borderline cases were explicitly included within the scope of the Consumer sales directive. As a result, Article 1 paragraph (4) of that directive indicates that for the purposes of the directive, contracts for the supply of consumer goods that must be manufactured or produced are deemed to be contracts of sale for the purposes of the directive. As a result, the Member States have had to amend their legislation in such a manner that such contracts would at least also be qualified as consumer sales contracts, whether or not they could also be qualified as contracts for work or otherwise. Moreover, the Member States would have to make sure that in case of conflicts between the rules applicable to sales contracts and those applicable to contracts for work, the rules on sales contracts would be given priority.<sup>22</sup> Article IV.A.–1:102 DCFR (Goods to be manufactured or produced) does exactly that by providing that ‘a contract under which one party undertakes, for a price, to manufacture or produce goods for the other party and to transfer their ownership to

---

<sup>19</sup> Cf. Chr. von Bar et al. (eds.) 2009, Annex, p. 555. Cf. also the definition in Article VIII.–1:201 DCFR pertaining to the transfer of property.

<sup>20</sup> Hondius et al. (eds.) 2008, Comment B to Article 1:102 PEELS, p. 119.

<sup>21</sup> Proposal for a Council Directive on the liability of suppliers of services, *OJ* 1991, C 12/8.

<sup>22</sup> Cf. explicitly Article 7:5 paragraph (4), last sentence, of the Dutch Civil Code.

the other party *is to be considered as primarily a contract for the sale of the goods*' (emphasis added, ML). By using the words 'is to be considered as primarily', the general provision of Article II.-1:107 DCFR (Mixed contracts) is triggered. Paragraphs(3) and (4) of that Article indicate that to such a contract the provisions on sales contract apply, whereas the provisions of Book IV.C on service contracts only apply, with appropriate adaptations, so far as is necessary to regulate the service elements of the contract and provided that they do not conflict with the rules applicable to sales contracts.

## 2.2 Personal scope

The provisions of Book IV.A DCFR don't contain a specific provision regarding their personal scope. From the general provision of Article I.-1:101 DCFR (Intended field of application), it may be inferred that the Book applies to all sales contracts that fall within the substantive scope of Book IV.A, irrespective whether a party is to be qualified as a consumer or a professional party. As a consequence, its provisions apply to consumer sales contracts (B2C-contracts), contracts between professional parties (B2B-contracts), to contracts between two individual parties (C2C-contracts) and the less common situation where the seller is a consumer and the buyer a professional party (C2B-contracts).<sup>23</sup> This does not mean that all provisions are applicable to all sales contracts: some provisions apply only where the contract is qualified as a consumer sales contract within the meaning of Article IV.A.-1:204 DCFR (Consumer contract for sale),<sup>24</sup> or are not applicable to such contracts.<sup>25</sup> Some provisions are explicitly restricted to sales contracts between two professional parties.<sup>26</sup> And there is one peculiar provision, which applies when the *seller* is not a professional party: Article IV.A.-4:202 DCFR (Limitation of liability for damages of non-business sellers) provides that if the seller is a consumer, the buyer is not entitled to damages for lack of conformity exceeding the contract price, unless the seller fraudulently did not disclose the lack of conformity before delivery. For the application of this Article, it is not relevant whether the buyer is a professional party (C2B-contract) or a consumer (C2C-contract).<sup>27</sup>

The specific provisions applicable to consumer sales contracts apply if the seller is a professional party – or, in the words of the DCFR, a 'business' – and the buyer is a consumer. Both terms are defined in Article I.-1:105 DCFR ("Consumer" and "business"). According to paragraph (1), 'consumer' means 'any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession' (emphasis added, ML). Paragraph (2) defines 'business' as meaning 'any natural or legal person, irrespective of whether publicly or privately owned, who is

---

<sup>23</sup> Cf. also Hondius et al. (eds.) 2008, Comment C to Article 1:101 PELS, p. 112.

<sup>24</sup> See for instance Article IV.A.-2:304 DCFR (Incorrect installation under a consumer contract for sale) and Article IV.A.-2:309 DCFR (Limits on derogation from conformity rights in a consumer contract for sale). See for further examples Chr. von Bar et al. (eds.) 2009, Comment E to Article IV.A.-1:204 DCFR, p. 1244.

<sup>25</sup> See for instance Article IV.A.-4:301 paragraph (4) DCFR (Examination of the goods) indicating that the buyer's obligation to examine the goods upon or shortly after delivery does not apply in the case of a consumer sales contract. See for further examples Chr. von Bar et al. (eds.) 2009, Comment E to Article IV.A.-1:204 DCFR, p. 1244.

<sup>26</sup> See for instance Article IV.A.-4:302 DCFR (Notification of lack of conformity), which modifies the general provision of Article III.-3:107 DCFR (Failure to notify non-conformity) in case both parties are 'businesses'.

<sup>27</sup> Cf. also Hondius et al. (eds.) 2008, Comment A to Article 4:207 PELS, p. 296-297.

acting for purposes relating to the person's self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity'.

The definition of 'consumer' is particularly relevant with regard to 'mixed purpose contracts', i.e. contracts, which are concluded both for professional and consumer purposes. The classic example is the suitcase, which is bought for travelling to a symposium and for holiday purposes. A more modern example would be the purchase of a personal computer to be used both to work at home and to play computer games. Is the buyer in such cases a consumer or not? If he is, he is entitled to the protection of the specific provisions that apply to consumer sales contracts, if he is not, the seller may to a large degree dictate the contract terms, as the applicable sales rules then are only of a default nature.

The issue came up in a case on the competence of the Austrian courts in an international sales contract pertaining to the purchase of tiles, meant to be put on the roof of a farmhouse and the surrounding stables. If the buyer was to be considered a consumer, the Austrian court could hear his claim for damages on the basis of non-conformity, if not, only a German court would be competent to hear the case. In this Gruber-case the ECJ stated that if the buyer served both business and private purposes with his purchase, the consumer protection rules only apply if the buyer proves that the business purposes played an insignificant role only.<sup>28</sup> In that case, Mr. Gruber had bought tiles, 60 % of which were intended to be put on the roof of the farmhouse in which he lived, whereas 40% of the tiles were meant to be put on the roof of the surrounding stables. Given the 'professional' use of 40 % of the tiles, this meant that the consumer protection rules (of the Brussels Treaty, now the Brussels-I regulation) did not apply, and Mr. Gruber was forced to sue for non-performance in neighbouring Germany. If the ECJ would follow this line of reasoning also in matters of substantive law, this would mean that many buyers in contracts with a mixed character of private and professional purposes can no longer claim application of consumer protection rules.<sup>29</sup>

The definition of the notion 'consumer' in case law of the ECJ is therefore rather restrictive. It appears, however, that the definition is slightly broader in the DCFR, as Article I.-1:105 paragraph (1) DCFR ("Consumer" and "business") indicates that 'consumer' means 'any natural person who is acting *primarily* for purposes which are not related to his or her trade, business or profession'(emphasis added, ML). In an illustration, mentioned in the Comments to Article IV.A.-1:204 DCFR, the facts of the Gruber-case are reproduced. The text of the Comments provides as follows:

*'Illustration 3*

C buys tiles for the roof of her house, where 60% of the floor space is used for private purposes and 40% for business purposes (her law practice where she and her secretary spend most of their days). As she is acting primarily outside her business, the rules regulating consumer contracts for sale will apply.'<sup>30</sup>

---

<sup>28</sup> ECJ 20 January 2005, case C-464/01, [ECR] 2005, p. I-439 (Gruber/Bay Wa AG), nos. 46-47.

<sup>29</sup> Cf. M.B.M. Loos, *Review of the European Consumer Acquis*, GPR Praxis, Zeitschriften zum Gemeinschaftsprivatrecht, Munich: Sellier, 2008, p. 11-12.

<sup>30</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.-1:204 DCFR, p. 1242. The illustration is actually reproduced from Hondius et al. (eds.) 2006, Comment E to Article 1:202 PELS, p. 144. The PELS therefore make use of the same, more extensive, definition as the DCFR.



This implies that although the professional use of the goods is significant – 40 % of the tiles are to be used for professional purposes – the consumer protection rules apply nevertheless, as the private use of the goods is larger than the professional use. However, where the professional use outweighs the private use, the consumer protection rules do not apply, as the following illustration shows:

*‘Illustration 2*

B buys a laptop computer from a computer store. His purpose is to use the computer in his business as an engineering consultant. However, he will also use the computer for reading newspapers on the internet, his private e-mail, listening to music and watching movies while commuting. He estimates that he will use the computer for approximately 20% of the time for private purposes. As he is not acting primarily outside his business, the rules regulating consumer sales will not apply.’<sup>31</sup>

This means that the consumer notion used in the DCFR is broader than it is under current EU law, and therefore that more persons are offered the protection of the specific consumer protection rules, but mixed purpose contracts where the personal use is outweighed by the professional use, are not covered by these rules.

The latter example also indicates that it is considered decisive which purpose the buyer intends to give to the goods he purchases. This implies that the drafters of the DCFR have opted for the *subjective* criterion of the buyer’s intended purpose. In the Comments to the PEELS it is explicitly stated that whether the seller is aware of that purpose, is not considered relevant. The consumer protection rules may therefore apply even if the seller thought that the buyer was a professional party, as long as the buyer proves that he intended to use the goods in a private capacity.<sup>32</sup> In my view, this is the wrong approach: where the buyer, at the time of the conclusion of the contract, does not make clear to the seller that he buys the good for personal use, the seller should be entitled to rely on the apparent facts of the case. This means that in the absence of any indications to the contrary, the ordinary purpose of the goods should be decisive. In this more *objective* test, the buyer would be considered a consumer if the goods would normally be bought for personal use, whereas the buyer would be considered a business where the ordinary purpose would not (primarily) be for personal use.

The notion of mixed purpose contracts is also relevant for the application of Article I.–1:105 paragraph (3) DCFR. This provision makes clear that a party may be a consumer and a business at the same time. In the Comments, it is clarified that this applies in the case of mixed purpose contracts, by which a person sells

‘a computer, which is used primarily for personal reasons, but to some small extent also for business purposes[. Such person] is treated as a business in relation to any rule protecting consumer buyers.’

The purpose of this provision is

---

<sup>31</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.–1:204 DCFR, p. 1242. This illustration is again reproduced from Hondius et al. (eds.) 2006, Comment E to Article 1:202 PEELS, p. 144.

<sup>32</sup> Cf. Hondius et al. (eds.) 2006, Comment E to Article 1:202 PEELS, p. 144.

‘to give the buyer, if a consumer, the protections which would apply to a consumer dealing with a business. The buyer should not have to assess the extent to which the seller is acting for business purposes’.<sup>33</sup>

With regard to the sale of the computer, the seller is thus treated as a business, but with regard to its purchase, he acted as a consumer, implying that he may invoke the consumer protection provisions, e.g. the remedies for non-conformity, against his seller after having been sued by the subsequent buyer for the same reason.

### **3. The main obligations of the parties and the passing of risk**

In this section, I will deal with the main obligations of both the seller and the buyer. The seller’s obligations are largely mirrored by the buyer’s obligations, as will be set out in subsection 3.1. In that section, I will also briefly discuss the most important of the buyer’s obligations, his obligation to pay the price. In the subsequent sections, the emphasis will be on the *seller’s* obligations; however, where these are mirrored by the buyer’s obligations, I will also discuss the buyer’s reciprocal obligation and the interrelation between these obligations.

In subsections 3.2 and 3.3, I will discuss the seller’s obligation to transfer of the ownership of the goods and the obligation to transfer documents representing or relating to the goods. In subsections 3.4 and 3.5, I will deal with the delivery of the goods and subsequently with the interlinked problem of the passing of risk. The notion of (non-) conformity will be discussed in section 4.

#### *3.1 Overview of the main obligations under the sales contract*

As its heading indicates, Article IV.A–2:101 DCFR (Overview of obligations of the seller) provides an overview of the main obligations of the seller. According to this provision, the seller must:

- (a) transfer the ownership of the goods;
- (b) deliver the goods;
- (c) transfer such documents representing or relating to the goods as may be required by the contract; and
- (d) ensure that the goods conform to the contract.

Article IV.A.–3:101 DCFR (Main obligations of the buyer) contains a similar general provision on the obligations of the buyer. The buyer must

- (a) pay the price;
- (b) take delivery of the goods; and
- (c) take over documents representing or relating to the goods as may be required by the contract.

When reading these provisions, one immediately notices that the second and third main obligations of the buyer mirror the seller’s second and third obligation. The obligation to take delivery implies that the buyer must do all that may reasonably be expected from him to enable the seller to perform his obligation to deliver the goods.<sup>34</sup> As the Comments to Article IV.A.–3:101 DCFR indicate, these obligations to take delivery of the goods or the documents representing them or relating to them are

---

<sup>33</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment D to Article I.–1:105 DCFR, p. 94.

<sup>34</sup> Cf. Article IV.A.–3:104 under (a) DCFR (Taking delivery).

genuine obligations of the buyer, which implies that a failure to take delivery entitles the seller to invoke a remedy for non-performance rather than that such a failure only leads to the application of the doctrine of *mora creditoris*.<sup>35</sup> This implies that when the buyer does not take delivery of the goods at the agreed time for delivery, the seller may not only claim damages for the costs incurred for the extra period of storage of the goods,<sup>36</sup> but occasionally even may be allowed to terminate the sales contract for non-performance, even if the buyer would be willing to pay the sales price. Moreover, a failure to take delivery at the agreed time implies that the risk of deterioration or damage to the goods passes to the buyer.<sup>37</sup>

The buyer is, of course, also required to pay the agreed price, Article IV.A.–3:101 under (a) DCFR (Main obligations of the buyer) sets out.<sup>38</sup> Where the parties have not regulated this themselves, the price is to be determined on the basis of Article II.–9:104 DCFR (Determination of price), implying that the buyer is required to pay the price that is normally charged in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price. Payment then has to take place at the place of business of the seller or his home address<sup>39</sup> within a reasonable time after the sales contract was concluded.<sup>40</sup> This means that, unless the parties have made other arrangements, delivery and payment of the price take place at the same time and at the place of business or at the home address of the seller. This enables both parties to withhold the performance of their obligation to pay the price and to deliver the goods if the other party does not perform his reciprocal obligation.<sup>41</sup>

### 3.2 *Transfer of ownership*

Whereas the buyer's obligations are rather straight-forward, more may be said about the seller's obligations. The first of these is the seller's obligation to transfer the ownership of the goods. Even though this obligation features in the definition of a sales contract as the characteristic obligation of the seller, it is hardly regulated in the DCFR: it is the subject of only two specific provisions on third party rights and claims.<sup>42</sup> Moreover, there are no specific remedies for breach of the general obligation, implying that a breach of the obligations is subject to the general scheme of remedies under Book III DCFR.<sup>43</sup> This is all the more striking as the inclusion of an *obligation* to transfer the ownership is not self-evident. Whereas such an obligation is expressly recognised in most Member States<sup>44</sup> as well as in the Vienna Sales Convention,<sup>45</sup> it is not recognised in, for instance, France,<sup>46</sup> as in such legal systems

<sup>35</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.–3:101 DCFR, p. 1319-1320.

<sup>36</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment D to Article IV.A.–3:104 DCFR, p. 1329.

<sup>37</sup> Cf. Article IV.A.–5:201 (Goods placed at buyer's disposal). See further below, under 3.3.

<sup>38</sup> Where the 'price' is to be paid by exchanging a good in order to obtain another good, the parties have concluded a barter contract under Article IV.A.–1:203 (Contract for barter), see above, under 2.1.

<sup>39</sup> Cf. Article III.–2:101 paragraph (1)(a) and (2)(b) DCFR (Place of performance).

<sup>40</sup> Cf. Article III.–2:102 paragraph (1) DCFR (Time of performance).

<sup>41</sup> Cf. Article III.–3:401 DCFR (Right to withhold performance of reciprocal obligation).

<sup>42</sup> See below, under section 4.5 (Third party claims).

<sup>43</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment F to Article IV.A.–2:101 DCFR, p. 1254.

<sup>44</sup> See for instance § 1053 of the Austrian ABGB, Article 1583 of the Belgian Cc, Article 7:9 paragraph (1) of the Dutch BW section 2(1) of the English and Scottish Sale of Goods Act, Article 208(1) of the Estonian Law of Obligations Act, § 433 paragraph (1) of the German BGB, Article 365 paragraph (1) of the Hungarian Cc, Article 1470 of the Italian Cc, and Article 535 of the Polish Cc.

<sup>45</sup> Cf. Article 30 CISG.

<sup>46</sup> Cf. Article 1603 of the French Cc.

the transfer of ownership is considered to be a legal effect of the sales contract rather than an obligation of the seller to transfer the ownership.<sup>47</sup>

Where the PELS left the matter *when* ownership is transferred out of consideration, the DCFR contain an extensive regulation thereof in Book VIII on the Acquisition and loss of ownership of goods. The basic requirements of the transfer are set out in Article VIII.–2:101 DCFR (Requirements for the transfer of ownership in general). According to paragraph (1) of this Article, these are that the goods must exist and be transferable, the seller has the right or authority to transfer the ownership (implying normally that he must be the owner thereof), the buyer is entitled to the transfer of ownership on the basis of the sales contract and that there is an agreement as to the time the ownership passes or that delivery (or an equivalent thereto)<sup>48</sup> has taken place.

The DCFR therefore regulates when ownership passes, but indicates that the moment in which ownership passes may be regulated by contract. This means that ownership may pass already at the moment when the contract is concluded (which is the main rule in, for instance, France) or upon delivery (which is the main rule in many other legal systems). It seems likely that in a case where the parties have not explicitly determined the moment when ownership passes but have left the matter open unintentionally, a court of a Member State where national property law provides that ownership passes already at the moment when the contract is concluded will be more open to imply a term to that extent on the basis of Article II.–9:101 (Terms of a contract) than a court in a Member State where delivery is the normal mode for the transfer of property. This means that the DCFR is likely not to lead to much convergence of the moment that ownership passes.

### 3.3 *Transfer of documents*

Article IV.A.–2:101 under (c) DCFR requires the seller to transfer any documents representing or relating to the goods. In fact, two distinct types of documents are mentioned.<sup>49</sup> Firstly, the goods may be represented by documents. This appears in particular where the goods are delivered to a carrier and the carrier produces a bill of lading with which the seller or a party indicated by the seller may identify himself to the carrier as the party entitled to the delivery of the goods. The seller's obligation then implies that he must transfer such a bill of lading to the buyer. In doing so, the seller also delivers the goods in accordance with Article IV.A.–2:201 paragraph (2) DCFR (Delivery) and transfers the ownership of the goods in accordance with Article VIII.–2:105 paragraph (4) DCFR (Equivalents to delivery). In delivering the documents, the seller therefore discharges himself from three of his main obligations.

The second type of documents has no relevance for the ownership of the goods, but pertains to their use, functioning or maintenance. They include, for instance, user manuals and maintenance instructions. With the transfer of such documents, the seller enables the buyer to make proper use of the goods. The transfer of such documents is also part of the conformity-test.<sup>50</sup> To this type of documents belong also consumer guarantees and insurance policies, enabling the buyer to invoke the rights under the consumer guarantee or the insurance policy in case, for instance,

---

<sup>47</sup> Cf. Chr. von Bar et al. (eds.) 2009, Note no. 2 to Article IV.A.–2:101 DCFR, p. 1255.

<sup>48</sup> In this paper I will not discuss this matter. See on this matter Article VIII.–2:105 DCFR (Equivalents to delivery).

<sup>49</sup> Cf. also Chr. von Bar et al. (eds.) 2009, Comment D to Article IV.A.–2:101 DCFR, p. 1253.

<sup>50</sup> Cf. Article IV.A.–2:303 under (e) DCFR (Fitness for purpose, qualities, packaging).

the goods break down, get stolen or damaged. This is relevant, in particular, where the seller is not able to repair or replace the goods, but the party that has issued the consumer guarantee is, or where the seller is located far away from the home or business address of the buyer, and the party that has issued the consumer guarantee or the insurance policy may be approached more easily, as well as in the situation where the buyer's remedies towards the seller are restricted under a valid exemption clause or under Article IV.A.–4:202 (Limitation of liability for damages of non-business sellers). In this respect, it is important to note that if not provided otherwise in the guarantee document, the guarantee may also be invoked against the guarantor by subsequent owners of the goods within the duration of the guarantee.<sup>51</sup> In practice, such guarantee cannot be invoked unless the owner can produce the guarantee document, which justifies that the seller is obliged to hand over also such a document (unless otherwise agreed, obviously).

The buyer is required to take delivery of both types of documents under Article IV.A.–3:104 under (b) DCFR (Taking delivery). However, the consequences of a breach of this obligation radically differ whether the first or second type of documents are concerned: a failure to take delivery of the documents *representing* the goods will lead to the passing of risk and may lead to termination of the contract and to a claim for damages under Book III, Chapter 3 DCFR (Remedies for non-performance).<sup>52</sup> A failure to take delivery of documents *relating* to the goods, such as instruction manuals and guarantee documents, will in practice not lead to any remedy. Such documents are usually of no importance for the seller once the goods are transferred, which may mean that if the buyer refuses to take delivery, the seller may be inclined to dispose of these documents. In theory, this could mean that if the buyer subsequently claims performance of the obligation to hand over the documents, the seller would no longer be able to do so, in which case the buyer could be entitled to damages. Moreover, as the disposal of the documents was well within the seller's control, the seller could not invoke force majeure under Article III.–3:104 DCFR (Excuse due to an impediment). However, a claim for damages would mostly likely be barred under Article III.–3:704 DCFR (Loss attributable to creditor). Moreover, since the buyer himself is a debtor with regard to the obligation to take delivery, the seller may also invoke Article III.–3:203 DCFR (When creditor need not allow debtor an opportunity to cure) and thus be freed from any attempt by the buyer to cure his failure to take delivery in such situation.

### 3.4 Delivery

More extensively regulated is the seller's obligation to deliver the goods. Article IV.A.–2:201 paragraph (1) DCFR (Delivery) requires the seller to make the goods available to the buyer, or to a third party indicated by the buyer if such is agreed in the contract. Where it is agreed that the seller need only deliver documents representing the goods – which is often the case when the goods are stored by a third party – the seller must make these documents available to the buyer. Where the contract involves carriage of the goods by a carrier or a series of carriers, the seller performs his obligation to deliver by handing the goods over to the first carrier and by transferring to the buyer the bill of lading and any relevant other documents to enable the buyer to take over the goods, paragraph (2) provides.

---

<sup>51</sup> Cf. Article IV.A.–6:102 paragraph (2) DCFR (Binding nature of the guarantee).

<sup>52</sup> See also Chr. von Bar et al. (eds.) 2009, Comment D to Article IV.A.–3:104 DCFR, p. 1329.

Delivery normally requires the transfer of the physical control over the goods, but this need not be the case. The Comments give the example of two parties selling and buying a horse, but agreeing that the horse shall remain in the stables of the seller as the buyer does not have a stable, and that the buyer shall pay the sale for taking care of the horse.<sup>53</sup> In this example, continental lawyers will recognise the instrument of delivery *constitutum possessorium*. In practice, in such a case ownership of the goods will often be transferred by agreement between the parties already at the moment when the contract is concluded in accordance with Article VIII.–2:103 DCFR (Agreement as to the time ownership is to pass) and the seller will possess the goods for the buyer as of that moment. It should be noted that in this case, the parties have concluded a mixed contract of sales and storage, to which the provisions on storage contracts (Book IV.C, Chapter 5 DCFR) apply to the period after the seller starts to take care of the horse then owned by the buyer.

The parties are free to determine both the place and time for delivery. Where they have failed to do so, Article III.–2:101 DCFR (Place of performance) indicates that the seller has to deliver at his place of business or, in the absence thereof, at his habitual residence. This in practice means that the buyer has to pick up the goods from the seller's place of business or residence,<sup>54</sup> unless the parties have agreed that the goods will be delivered to the buyer by the seller himself or by a carrier.

Where the parties have not agreed upon a time for delivery, Article III.–2:102 DCFR (Time of performance) applies. According to that provision, the seller is required to deliver 'within a reasonable time after the conclusion of the contract'. Within this timeframe, the seller is relatively free to determine when he wishes to perform his obligations, which might in practice cause problems for the buyer, as the moment for performance of his obligation to *take* delivery is dependent on the moment the seller chooses to perform his obligation to deliver the goods. This seems problematic, in particular, where the parties had agreed that the seller would deliver the goods at the buyer's place of business and where the buyer would need to make arrangements to store the goods, which is not uncommon for commercial sales contracts: if the seller shows up unannounced, the buyer may need to incur costs for storing the goods elsewhere if he has no storage facilities available at the time of delivery. Where the buyer refuses to take delivery for such reason, he breaches his obligation to take delivery, and the risk of deterioration of or damage to the goods passes to him in accordance with Article IV.A.–5:201 DCFR (Goods placed at buyer's disposal).<sup>55</sup> However, in this situation Article III.–1:103 paragraph (1) DCFR (Good faith and fair dealing) requires the seller to act with good faith and fair dealing when performing his obligation to deliver, whereas Article III.–1:104 (Co-operation) requires both parties to co-operate with each other when and to the extent that this can reasonably be expected. These obligations imply that in a case where the seller knows or should know that the moment of delivery may cause problems to the buyer if he does not receive prior notice of that moment, the seller would have to inform the buyer thereof in good time before he actually delivers the goods.<sup>56</sup>

---

<sup>53</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment B to Article IV.A.–2:201 DCFR, p. 1259.

<sup>54</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment B to Article IV.A.–2:202 DCFR, p. 1264.

<sup>55</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment D to Article IV.A.–3:104 DCFR, p. 1329.

<sup>56</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment B and C to Article III.–1:104 DCFR, p. 686-687.

In the case the goods are delivered by a carrier, Article IV.A.–2:202 paragraph (2) DCFR (Place and time for delivery) provides that the seller must transfer the documents that represent the goods at the time required by the contract.<sup>57</sup> If he does so on time, the seller has discharged his obligation to deliver on time, even if the goods arrive only after the agreed date (unless the parties have agreed otherwise). However, if the parties to a consumer sales contract have agreed upon a specific time for delivery, the goods must be received from the last carrier or made available for collection by that time.<sup>58</sup>

When the seller delivers late, he is in breach of contract. In such case, the buyer may resort to the remedies set out in Book III, Chapter 3 DCFR (Remedies for non-performance),<sup>59</sup> with only the limitation of liability of Article IV.A.–4:202 DCFR (Limitation of liability for damages of non-business sellers) amending these general remedies.

If, on the other hand, the seller delivers the goods *before* the agreed time of delivery, the buyer is entitled to take or refuse delivery at that time. However, even though the seller is under an obligation to deliver at the agreed time and early delivery in this sense constitutes a non-performance by the seller, the buyer's remedies are very much restricted by his reciprocal obligation to take delivery: Article IV.A.–3:105 paragraph (1) DCFR (Early delivery and delivery of excess quantity) basically forbids him to refuse to take delivery at that time if acceptance of the tender 'would not unreasonably prejudice the buyer's interests'.<sup>60</sup> In other words: the buyer is required to accept the early delivery, unless he has a good reason to refuse delivery at that moment. This would obviously be the case if the goods the seller wishes to deliver clearly are not in conformity with the contract, but may also apply in other cases, for instance because the buyer has no storage facilities at his disposal at that moment. Nevertheless, the policy in the Article is clear: as a rule, the buyer is required to accept the early performance.<sup>61</sup> This implies that, generally speaking, fixing a moment for performance of the obligation to delivery merely prevents the buyer from claiming performance until the agreed moment for performance, but does not stand in the way of early performance by the seller.

Moreover, early delivery opens the possibility for the seller to invoke the right to cure under Article IV.A.–2:203 (Cure in case of early delivery). Under that Article, the seller is entitled to make up for any missing part or failing quantity, to deliver a replacing good or to otherwise remedy any lack of conformity in the goods delivered, unless the cure would cause the buyer unreasonable inconvenience or unreasonable expense, and, as paragraph (3) explicitly indicates, subject to the buyer's right to claim damages for any damage not remedied by the cure. The restriction that the cure may not cause the buyer unreasonable inconvenience or unreasonable expense implies, for instance, that the seller may not send a technician to repair a non-conforming but still functioning machine if the buyer needs to use the machine at that time.<sup>62</sup>

---

<sup>57</sup> Cf. Article IV.A.–2:202 paragraph (2) DCFR (Place and time for delivery).

<sup>58</sup> Cf. Article IV.A.–2:202 paragraph (3) DCFR (Place and time for delivery).

<sup>59</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment D to Article IV.A.–2:202 DCFR, p. 1264.

<sup>60</sup> Cf. Article IV.A.–3:105 paragraph (1) DCFR (Early delivery and delivery of excess quantity). As Chr. von Bar et al. (eds.) 2009, Comment D to Article IV.A.–3:105 DCFR, p. 1333, makes clear, this provision is in line with the general provision of Article III.–2:103 (Early performance).

<sup>61</sup> The Comments to this Article somewhat downplay the burden this Article imposes on the buyer, cf. Chr. von Bar et al. (eds.) 2009, Comment B to Article IV.A.–3:105 DCFR, p. 1332.

<sup>62</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.–2:203 DCFR, p. 1268.

### 3.5 Passing of risk

The passing of risk pertains to the question whether the buyer is required to pay the sales price if, due to a fortuitous event, the purchased goods are lost or damaged, or whether the seller is required to deliver other goods replacing the goods that were lost or damaged. Article IV.A.–5:101 DCFR (Effect of passing risk) sets out the main rule: once risk has passed, the buyer bears the risk of fortuitous loss or damage to the goods, implying that the buyer must still pay the sales price, and the seller is freed from his obligations. An exception is made when the loss or damage is the result of an act or omission of the seller. When, for instance, the goods are handed over to a carrier, risk passes under Article IV.A.–5:202 (Carriage of the goods). However, if during carriage the goods are damaged due to improper packaging by the seller, the buyer need not pay the price and the seller remains liable for the damage resulting from the improper packaging.<sup>63</sup>

Article IV.A.–5:102 paragraph (1) DCFR (Time when risk passes) provides, as a general rule, that risk passes at the moment when the buyer takes over the goods. However, as already indicated in section 3.4, in practice the buyer is required to pick up the goods from the seller's place of business or residence.<sup>64</sup> This implies that – apart from consumer sales contracts<sup>65</sup> – risk may already pass at the moment when the seller indicates to the buyer that he has placed the goods at the buyer's disposal (and is therefore ready to deliver), and the buyer becomes aware thereof: Article IV.A.–5:201 DCFR (Goods placed at buyer's disposal) indicates that in such case, risk passes to the buyer 'from the time when the goods should have been taken over'. The question then is when the buyer should have taken over the goods. In this respect, it should be noted that Article III.–2:102 DCFR (Time of performance), requiring a party to perform his obligation 'within a reasonable time after the conclusion of the contract' applies to the seller's obligation to deliver, but also to the *buyer's* obligation to *take* delivery – in practice: by collecting the goods. An illustration may help clarify the situation I have in mind:

John buys 1,000 kilos of potatoes from Peter, which potatoes are still to be identified by Peter to the contract. They have not made specific arrangements about the date of delivery. Two weeks later, Peter gives notice to John that the potatoes John has bought have been set apart for him and are ready to be collected by John. John replies that he will come and collect the potatoes the following day. In the following night, the place where the potatoes are stored is destroyed by fire, resulting in the loss of the potatoes set apart for John.

Assuming that the loss of the potatoes cannot be attributed to John (e.g. for failure to provide proper fire extinguishers), the question whether John may still collect potatoes (and need not pay for the destroyed potatoes) depends on whether risk has already passed, even though the potatoes had not yet been handed over to him. If the parties had not agreed upon a time for performance, both the seller's obligation to deliver and the buyer's obligation to collect the goods are due 'within a reasonable time after the conclusion of the contract'. It could be argued that a period of two weeks should normally be sufficient for John to come and collect the potatoes. In that

---

<sup>63</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment D to Article IV.A.– 5:101 DCFR, p. 1369.

<sup>64</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment B to Article IV.A.–2:202 DCFR, p. 1264.

<sup>65</sup> Cf. Article IV.A.–5:103 DCFR (Passing of risk in a consumer contract for sale), see below.



case, risk may have already passed to John, even though he only has become aware of the fact that the goods were identified to the contract the previous day. On the other hand, a court could also reason that John's obligation to take delivery does not become due at the moment when the contract is concluded, but only upon receipt of the notice of identification of the goods to the contract. In that case, John need not yet have taken over the goods, and is entitled to receive new potatoes and need only pay for these. In my view, that latter interpretation should prevail: in a situation as this the parties must be seen as having tacitly agreed upon a different time for performance of the buyer's obligation to take delivery, implying that he must come and collect the goods 'within a reasonable time' after the receipt of the notice by the seller that the goods may be collected. Similarly, where the seller is to deliver the goods at the buyer's place of business or residence, the buyer's obligation to take delivery should be interpreted as becoming due at the moment identified by the seller's giving notice of his intention to deliver on a specific date and time. Nevertheless, it seems odd that common situations such as these have not been properly dealt with.

In the case of generic goods, it may not be clear, which are the precise goods that were sold. For that reason, Article IV.A.–5:102 paragraph (2) DCFR provides that risk cannot pass until the goods are clearly identified to the contract, e.g. by markings on the goods ('bought by Jones'), shipping documents or by giving notice to the buyer ('the goods you bought, are the ones located in the first shelf on the right after entering our depot').<sup>66</sup> When such identification has taken place, and the seller has tendered the goods at the right place and time, risk passes to the buyer in accordance with Article IV.A.–5:201 DCFR from the time when the goods should have been taken over. As explained above, in my view the buyer will then have 'a reasonable time' to come and collect the goods. What may be considered 'a reasonable time' will of course depend on the circumstances, in particular on the time necessary to come and collect the goods, the time needed for preparation thereof, and the question whether or not the buyer could reasonably have anticipated the seller's notice and thus made the necessary preparations even before having received the notice. Whether that is possible depends to a large extent on the kind of business the buyer operates, if any.

Article IV.A.–5:202 (Carriage of the goods) provides that when the parties agree that the goods are to be delivered by a carrier or a series of carriers, risk passes at the moment when the goods are handed over to the first carrier, even if the documents representing the goods (e.g. a bill of lading) have not yet been delivered to the buyer and the goods, therefore, have not yet been delivered in accordance with Article IV.A.–2:201 paragraph (2) DCFR (Delivery). This implies that any damage to the goods during transportation is at the risk of the buyer and that it is up to him to try and claim damages from the carrier for improper performance of the transport contract<sup>67</sup> and to take out insurance. This explains also why, if the contract requires the seller to arrange for carriage of the goods, the seller must make such contracts as are necessary for the carriage to the fixed place by means of transportation appropriate to the circumstances and under terms, which are usual for such transportation.<sup>68</sup>

Article IV.A.–5:103 DCFR (Passing of risk in a consumer contract for sale) sets out that in a consumer sales contract, risk only passes when the consumer-buyer *actually*

---

<sup>66</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment B to Article IV.A.–5:201 DCFR, p. 1381.

<sup>67</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.–5:102 DCFR, p. 1374.

<sup>68</sup> Cf. Article IV.A.–2:204 DCFR (Carriage of the goods).

takes over the goods, unless the consumer has failed to take delivery and the non-performance of his obligation to do so is not excused.<sup>69</sup> Where the consumer has simply forgotten to pick up the goods, risk will have passed, but this is not the case when the consumer is hospitalized with severe injuries and was not able to have the goods picked up by an agent (e.g. a family member or friend): in such a case, the consumer's failure to take delivery is excused under Article III.-3:104 (Excuse due to an impediment), and the risk remains to be borne by the seller.<sup>70</sup>

The Article derogates not only from the normal situation under Article IV.A.-5:201 DCFR, where risk passes when the goods are identified to the contract, the seller has notified the buyer that he has placed the goods at the buyer's disposal, and the buyer should already have taken over the goods. More importantly, it also derogates from the just described Article IV.A.-5:202 DCFR: in the case of carriage of goods in a consumer sales contract, risk does not pass when the goods are delivered to the first carrier, but only when the last carrier hands over the goods to the buyer, or the buyer fails to take delivery at that time. The risk of damage to or loss of the goods during transportation is therefore borne by the seller. The reasoning behind this provision is that the seller is supposed to be in a better position to calculate the price by integrating the cost of transportation risks in, for instance, a favourable insurance scheme, whereas the consumer will normally have more problems in pursuing a claim for damages against the carrier or another third party, and obtaining insurance will be more costly. The Article is thought to also provide the seller with an incentive to exercise the utmost care in arranging transportation and in choosing a carrier, as he bears the risk of loss or damage.<sup>71</sup> Moreover, this division of risk may prevent sellers from trying to circumvent the general rule of this Article that in case of a consumer sales contract risk passes when the goods are handed over to the buyer by arranging carriage by a third party in stead of providing the transportation himself.

## 4. Conformity and non-conformity

### 4.1 Introduction

The fourth and final main obligation of the seller is the obligation 'to ensure that the goods conform to the contract', as Article IV.A.-2:101 DCFR (Overview of obligations of the seller) puts it. The requirement of conformity is further developed in Section 3 of Chapter 2 of Book IV.A DCFR (Conformity of the goods), which consists of no less than 9 articles. The first of these, Article IV.A.-2:301 DCFR (Conformity with the contract), appears to set out the main rule.<sup>72</sup> First of all, it confirms the application of the principles of party autonomy and *pacta sunt servanda*: the parties themselves decide on the quantity of the goods to be delivered, the quality the goods must have and the description the goods must meet, in what way they must be delivered and with which accessories, including manuals and installation instructions they are to be delivered.<sup>73</sup> However, the last of these Articles, Article IV.A.-2:309 (Limits on derogation from conformity rights in a consumer contract for

---

<sup>69</sup> Cf. Article IV.A.-5:103 paragraph (1) DCFR (Passing of risk in a consumer contract for sale). This Article is intended to be mandatory, cf. paragraph (4).

<sup>70</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment B to Article IV.A.-5:103 DCFR, p. 1378.

<sup>71</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.-5:103 DCFR, p. 1378-1379.

<sup>72</sup> As will be discussed below, subsection 4.3, the main rule is actually contained by Article IV.A.-2:302 under (f) DCFR (Fitness for purpose, qualities, packaging), which provides that the goods must 'possess such qualities and performance capabilities as the buyer may reasonably expect'.

<sup>73</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment B to Article IV.A.-2:301 DCFR, p. 1273.

sale), makes clear that in a consumer sales contract, the parties may derogate to the detriment of the consumer from the rules on conformity only once a lack of conformity is brought to the seller's attention. The Article thus prevents the seller from restricting the rights of a consumer before that moment, for instance in standard contract terms.<sup>74</sup> The Comments to this Article recognise, however, that there may be exceptions to this rule based on the reasonable expectations the buyer may have of the goods. This applies in particular where prior to the conclusion of the contract, both parties are aware that the goods do not possess the normal qualities of such goods and therefore are not fit for the purposes for which such goods are generally used. In such a case, the parties should be able to write in their contract that the goods that are to be delivered are substandard or second hand. The Comments to Article IV.A.–2:309 (Limits on derogation from conformity rights in a consumer contract for sale) argue that such a derogation should be agreed upon by individual agreement and should be accepted only if the circumstances of the case do not indicate otherwise: a second hand car that is intended to be driven on public roads and that is sold for a normal price, should be fit for driving on such public roads, and the seller should not be able to rely on the general description of the car as a 'wreck' in such case.<sup>75</sup>

The remainder of this section is built as follows. Firstly (subsection 4.2), I will discuss the relevant time for conformity: when must the goods conform to the contract and who bears the burden of proof thereof? In this subsection I will also deal with a lack of conformity resulting from incorrect installation of the goods. Secondly, I will go into the question what actually constitutes a lack of conformity (subsection 4.3). After that, I will discuss the Articles on liability of the seller for certain statements by third parties (subsection 4.4), and third party claims (subsection 4.5).

#### *4.2 Time for establishing (non-)conformity*

Article IV.A.–2:308 DCFR (Relevant time for establishing conformity) indicates that the decisive moment whether or not the goods conform with the contract is the moment when risk passes to the buyer, even if the non-conformity becomes apparent only at a later stage. The seller remains liable for defects originating from before the moment when risk has passed, but the buyer bears the consequences of defects that originate from after the moment when risk has passed.<sup>76</sup> Since risk has passed, the assumption is that the seller has discharged his obligations, implying that it is up to the buyer to prove that the goods not only are not in conformity with the contract, but also that the non-conformity already existed at the moment when risk passed or that the later manifestation of the non-conformity has its origins in a defect that did exist at that moment. In so far as it remains unclear whether or not the defect existed already before the passing of risk, the buyer will not have established that the seller is liable for the lack of conformity, and will therefore not have any remedy. The provision is justified primarily on the ground that as of that moment the goods have left the seller's sphere of influence, which means that the seller cannot control the goods anymore and therefore no longer can prevent the occurrence of any defect.<sup>77</sup>

However, paragraph (2) provides that in a consumer sales contract, any lack of conformity which becomes apparent within six months of the time when risk passes to

---

<sup>74</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment B to Article IV.A.–2:309 DCFR, p. 1316.

<sup>75</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment B to Article IV.A.–2:309 DCFR, p. 1316-1317.

<sup>76</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.–5:102 DCFR, p. 1373-1374.

<sup>77</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment B to Article IV.A.–2:308 DCFR, p. 1310-1311.

the buyer is presumed to have existed at that time unless this is incompatible with the nature of the goods or the nature of the lack of conformity. This provision is taken over from the six-month presumption of Article 5 paragraph (3) of the Consumer sales directive.<sup>78</sup> Under the directive, the seller cannot rebut the presumption by merely casting doubt as to whether the non-conformity existed at the moment when risk passed, but is required to positively prove that such non-conformity did not exist at that time.<sup>79</sup> The same is true under the DCFR, as follows from Illustration 3 to this Article:

*Illustration 3*

B, a consumer, buys a washing machine from A, a white-goods dealer. After four months it stops working due to a short circuit. This defect is presumed to have existed at the time of the passing of the risk. It is up to the seller *to prove that this was not the case* (emphasis added, ML).<sup>80</sup>

A different moment for establishing the non-conformity applies in a case where, under a consumer sales contract, the goods are installed incorrectly by or under the responsibility of the seller or by the consumer on the basis of a shortcoming in the installation instructions. Article IV.A.–2:304 DCFR (Incorrect installation under a consumer contract for sale) provides that in such a case the seller is liable for the resulting lack of conformity.<sup>81</sup> This provision is intended to prevent having to split the transaction into a sales part and a services part and, as a result, prevents litigation over the question whether the goods were initially unfit or whether something went wrong during the installation: in both cases, the remedies for non-conformity apply.<sup>82</sup> Article IV.A.–2:308 paragraph (3) DCFR (Relevant time for establishing conformity) – which was missing in the corresponding provision of Article 2:208 PELS – provides that the moment for establishing the non-conformity is not the moment when risk passes, but the moment when the installation is completed, as the defective installation will generally have taken place only when risk has already passed. For the application of the six month- presumption of paragraph (2) that same moment applies as the starting point.<sup>83</sup>

#### 4.3 The notion of non-conformity

What, then, constitutes non-conformity? Non-conformity is a catch-all notion describing any derogation or deviation of the goods from what the buyer was entitled to expect under the sales contract. That the reasonable expectations of the buyer are decisive is demonstrated by the final requirement of Article IV.A.–2:302 under (f) DCFR (Fitness for purpose, qualities, packaging), which provides that the goods must ‘possess such qualities and performance capabilities as the *buyer* may reasonably

---

<sup>78</sup> Cf. Chr. von Bar et al. (eds.) 2009, Notes under II, no. 7 to Article IV.A.–2:308 DCFR, p. 1314.

<sup>79</sup> See the wording of Article 5 paragraph (3) Consumer sales directive: ‘Unless proved otherwise...’. That the seller bears the burden of proof that the presumption does not apply follows also from the wording of the directive in other languages. In Dutch, the provision reads: ‘...tot bewijs van het tegendeel...’, in French: ‘Sauf preuve contraire’, in German: ‘Bis zum Beweis des Gegenteils’, in Italian: ‘Fino a prova contraria’, in Spanish: ‘Salvo prueba en contrario’.

<sup>80</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.–2:308 DCFR, p. 1311.

<sup>81</sup> The Article thus copies Article 2 paragraph 5 of the Consumer sales directive.

<sup>82</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comments B and D (mistakenly labelled as C) to Article IV.A.–2:304 DCFR, p. 1298-1299.

<sup>83</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment D to Article IV.A.–2:308 DCFR, p. 1312.

expect' (emphasis added, ML).<sup>84</sup> This final limb provides the general quality standard and acts as a general sweep-up rule, as the Comments state.<sup>85</sup> Whereas Article IV.A.–2:301 DCFR refers to the express terms of the sales contract, Article IV.A.–2:302 DCFR rather refers to the *implied* terms. This is exemplified by the specific provisions on the supply of accessories, installation instructions or other instructions: whereas under Article IV.A.–2:301 under (c) DCFR the buyer is entitled to receive a manual as to the way the goods are to be used if an express agreement to this effect was made, Article IV.A.–2:302 under (e) DCFR requires the seller to provide such a manual even if no such agreement was made, provided that the buyer may reasonably expect to receive such a manual.<sup>86,87</sup> When the buyer knew or reasonably could be assumed to have known of the non-conformity before the conclusion of the contract, he may not reasonably expect the absence of the non-conformity at the time of delivery. In that sense, Article IV.A.–2:307 (Buyer's knowledge of lack of conformity), where this is stated explicitly, seems superfluous. However, the Article does make clear that the buyer may be under a duty to examine the goods he purchases before the contract is concluded. Potentially, such a duty could go rather far: it could be argued that the buyer accepts any defects that would have been detected upon a superficial examination. From the Comments to the PELS it becomes clear, however, that such is not intended.<sup>88</sup>

The buyer's reasonable expectations are likely to be strongly influenced by the purpose for which the goods ordinarily will be used. In fact, in particular with regard to mass produced consumer goods the parties will often not have discussed the qualities and capabilities of the goods at all or only to a marginal extent, as the buyer relies on past experience and statements made in advertising or by third parties outside the distribution chain, e.g. on internet forums. The buyer will normally rely on such previously gathered experience or information. Similarly, where the buyer has in fact inquired specifically about the performance capabilities of the goods and has made known to the seller for which purpose he needs the goods, the buyer will normally rely on them being fit for such purpose if the seller does not tell him they are not fit for such use. Article IV.A.–2:302 under (a) and (b) DCFR merely confirms that such expectations will have to be honoured in so far as they are to be considered reasonable.

In some legal systems<sup>89</sup> a distinction is made between the delivery of defective goods and the delivery of the *wrong kind* of goods. In these legal systems, the latter situation (often referred to as *aliud pro alio*) is not treated as a non-conformity, but as a failure to deliver at all, rendering the general remedies for non-performance to be applicable. This approach may be defended in case the delivered goods have hardly anything in common with what was agreed – the textbook example is where red wine is delivered

---

<sup>84</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment B to Article IV.A.–2:302 DCFR, p. 1286.

<sup>85</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment B to Article IV.A.–2:302 DCFR, p. 1286.

<sup>86</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment B to Article IV.A.–2:302 DCFR, p. 1286.

<sup>87</sup> Similarly, Article IV.A.–2:301 under (b) DCFR (Conformity with the contract) requires the goods to be contained or packaged in the manner required by the contract, whereas Article IV.A.–2:302 under (d) DCFR (Fitness for purpose, qualities, packaging) requires the goods to be contained or packaged in a manner usual for such goods, or, where there is no such manner, in a manner adequate to preserve and protect the goods.

<sup>88</sup> Cf. Hondius et al. (eds.) 2009, Comment B to Article 2:207 PELS, p. 214.

<sup>89</sup> This is the case in Austria, Italy, Slovenia and Spain; cf. Chr. von Bar et al. (eds.) 2009, Note 15 to Article IV.A.–2:301 DCFR, p. 1280.

in stead of a horse<sup>90</sup> – but much more problematic when the delivered goods actually resemble what was agreed upon – instead of red wine from a certain year and from certain grapes, produced by a particular French producer, red wine is delivered from that producer, but from a different year or from different grapes. In other words: it is difficult to establish a clear borderline between what constitutes an *aliud* and what constitutes non-conformity. For that reason, all of these situations are covered by the notion of non-conformity.<sup>91</sup>

#### 4.4 Liability of the seller for third party statements

Articles IV.A.–2:303 DCFR (Statements by third persons) and II.–9:102 DCFR (Certain pre-contractual statements regarded as contract terms) indicate that in the case of a consumer sales contract, the professional seller is not only bound by his own statements about the characteristics and the specific qualities and performance capabilities of the goods, but also by statements of persons earlier in the production and distribution chain and by representatives of the producer about the specific qualities and performance capabilities of the goods, unless the buyer knew or should have known that the statement was incorrect or otherwise could not be relied on, the seller could not reasonably be expected to know of the statement, or the buyer's decision to conclude the contract was not influenced by the statement. In these provisions, one may recognise the provision of Article 2 paragraph (4) of the Consumer sales directive, but generalised in order to apply also to other consumer contracts. However, the scope of the provisions seems to be slightly more restricted than the corresponding provision in the Principles of European Law on Sales, as Article 2:203 PELS (Statements by third persons) was not restricted to *public* statements. In the Comments to the PELS it is clarified that under that provision also statements made during a telephone marketing campaign will bind the seller, unless he could not have been aware of these statements.<sup>92</sup> This implies that the burden of proof is on the seller. This is much less clear under the DCFR, as it seems that the buyer would have to prove that the statement is public – in which case the seller could still escape liability by proving that he nevertheless could not have been aware of the statement.<sup>93</sup>

Although Articles IV.A.–2:303 and II.–9:102 DCFR are written specifically for consumer sales contracts, this does not mean that outside consumer sales contracts such statements are irrelevant. In fact, as public statements made by or on behalf of the producer will normally influence the reasonable expectations the buyer may have of the goods under Article IV.A.–2:302 under (f) DCFR, the seller is also outside a consumer sales contract bound by such statements, unless he rebuts them or demonstrates that it was not reasonable for the buyer to rely on them, for instance because of the buyer's knowledge.

---

<sup>90</sup> Cf. Chr. von Bar et al. (eds.) 2009, Note 14 to Article IV.A.–2:301 DCFR, p. 1280, who borrow the example from Medicus, *Bürgerliches Recht*, 20<sup>th</sup> edition, Cologne et al.: Carl Heymanns Verlag, 2004, p. 200.

<sup>91</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment E to Article IV.A.–2:301 DCFR, p. 1275.

<sup>92</sup> Cf. Hondius et al. (eds.) 2009, Comment B to Article 2:203 PELS, p. 203.

<sup>93</sup> It should be noted that Article IV.A.–2:303 DCFR does not specifically mention that the statements should be public, but the text of the provision indicates that it operates 'by virtue of' the general Article II.–9:102 DCFR, and the Comments make clear that the Article is nothing more than a reminder that this general Article applies also with regard to the question whether the goods are in conformity with the contract. See Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.–3:203 DCFR, p. 1296. A further ground for hesitation is the heading of the Notes on the following page: 'Liability for (public) statements by third persons'.

#### *4.5 Third party claims*

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) may be seen as specifications of the obligation of the seller to transfer ownership under Article IV.A.–2:101 DCFR (Overview of obligations of the seller). However, these provisions on ‘legal defects’ are expressed in terms of non-conformity, which implies that the remedial scheme applicable to cases of non-conformity is applicable in stead of the general scheme of Book III, Chapter 3 DCFR. The only difference is that the maximum period for liability of two years under Article IV.A.–4:302 DCFR (Notification of lack of conformity) for B2B contracts does not apply with regard to third party claims.<sup>94</sup>

The first of these provisions sets out as a general rule that the goods must be free from any right or reasonably well founded claim of a third party. Third party claims, which are not reasonably well founded, do not constitute non-conformity. This implies that the seller will not be liable in such a case.<sup>95</sup> An interesting question is whether the seller would be liable in a case where a third party, without substantiating his claim, argues he has a better claim to the goods, and the buyer simply accepts the third party’s claim and then turns to the seller claiming the third party’s claim constitutes a lack of conformity. It would seem that in such a case, the seller should be able to escape liability. Nevertheless, I think the seller would be under the obligation to prove that the third party’s claim not only was not, but also could not be sufficiently substantiated.

Article IV.A.–2:306 DCFR (Third party rights or claims based on industrial property or other intellectual property) limits the seller’s liability in case of third party rights or claims based on intellectual property rights. In such cases, the seller is liable only if the seller knew or could reasonably be expected to have known of the right or claim. Moreover, the seller may escape liability also if the right or claim is the result of the seller’s compliance with technical drawings, designs, formulae or other specifications furnished by the buyer. It should be noted, however, that when the latter exception applies, the contract is a contract for the manufacture or production of goods under Article IV.A.–1:102 DCFR (Goods to be manufactured or produced). In accordance with Article II.–1:107 paragraphs (3) and (4) DCFR (Mixed contracts) to such a contract the provisions of Book IV.C on service contracts apply, with appropriate adaptations, so far as is necessary to regulate the service elements of the contract. This implies that where the seller/service provider is aware of the third party rights or claims before or when performing his obligations, he is required to warn the buyer/client of such possible third party rights or claims under Articles IV.C.– 2:102 (Pre-contractual duties to warn) or IV.C.– 2:108 DCFR (Contractual obligation of the service provider to warn).

### **5. The duty to notify and the period of liability**

Under Article 39 of the Vienna Sales Convention, the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the

---

<sup>94</sup> Cf. Hondius et al. (eds.) 2009, Comment A to Article 2:205 PELS, p. 209.

<sup>95</sup> Cf. Hondius et al. (eds.) 2009, Comment B to Article 2:205 PELS, p. 209.

nature of the non-conformity within a reasonable time after he has discovered it or ought to have discovered it. This provision applies to cross-border commercial sales contracts to which the CISG applies. The underlying policy has been taken over by Article 5 paragraph (2) of the Consumer sales directive, which offers Member States the possibility to introduce or maintain such a duty to notify in (domestic and cross-border) consumer sales contracts. From the 2007 Communication concerning the implementation of the directive it appears that the duty to notify has been introduced or maintained in 16 of the 25 Member States that were included in the underlying study, whereas 9 have not introduced such a duty.<sup>96</sup> The minority of Member States opposing the introduction of a duty to notify, however, include the three countries with the highest numbers of inhabitants (Germany, the United Kingdom and France), and the total of countries that have not introduced the duty to notify represent – depending on whether Rumania and Bulgaria have introduced the duty to notify – probably represent a majority of the inhabitants of the European Union.<sup>97</sup> It is clear that in particular with regard to consumer sales contracts, opinions as to whether a duty to notify is justified vary considerably.<sup>98</sup> Not surprisingly, the matter is highly debated with regard to the proposed Consumer rights directive.<sup>99</sup>

The same question has been debated when the Principles of European Law on Sales and the Draft Common Frame of Reference were prepared. In both the PELS and the DCFR, Chapter 4 section 3 is dedicated to the requirements of examination and notification. Both Article 4:301 PELS (Examination of the goods) and Article IV.A.–4:301 DCFR (Examination of the goods) require the buyer to examine the goods within as short a period as is reasonable in the circumstances. A failure to do so may mean that the buyer is not able to notify the seller in good time of a lack of conformity he should have recognised, which in turn may lead to the loss of the possibility to rely on the lack of conformity. However, the duty to examine the goods

<sup>96</sup> Cf. Communication from the Commission to the Council and the European Parliament on the implementation of Directive 1999/44/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 including analysis of the case for introducing direct producers' liability, COM (2007) 210 final, p 10. According to the Commission, only Austria, the Czech Republic, France, Germany, Greece, Ireland, Latvia, Luxembourg and the United Kingdom have not made use of the possibility. Rumania and Bulgaria were not included in the study.

<sup>97</sup> Cf. a website operated by the Dutch Bureau of the European Parliament and the University of Leiden; <http://www.europa-nu.nl/9353000/1/j9vvh6nf08temv0/vh72mb14wkwh> (lastly checked on 15 July 2010) the 8 countries mentioned by the European Commission represent over 49% of all inhabitants of the EU. If either Rumania or Bulgaria have not introduced the duty to notify, or Belgium is not calculated amongst the Member States that have done so, a majority of inhabitants of the European Union are currently not subjected to the duty to notify.

<sup>98</sup> See on this M.B.M. Loos, 'Consumer sales law in the proposal for a Consumer rights directive', *European Review of Private Law* 2010/1, p. 33.

<sup>99</sup> Proposal for a Directive of the European Parliament and of the Council on consumer rights of 8 October 2008, COM (2008) 614/4. The proposal may be downloaded at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0614:FIN:EN:PDF> (lastly checked on 14 July 2010). See, among others, Loos 2010, p. 31-33; H.W. Micklitz, N. Reich, 'Crónica de una muerte anunciada: the Commission proposal for a "directive on consumer rights"', *CMLR* 46 (2009), p. 503f; Twigg-Flesner 2009, p. 174f; G. Howells, R. Schulze, 'Overview of the Proposed Consumer Rights Directive', in: G. Howells, R. Schulze (eds.), *Modernising and Harmonising Consumer Contract law*, Munich: Sellier, 2009, p. 19f.; C. Twigg-Flenser, 'Fit for purpose? The proposals on sales', in: G. Howells, R. Schulze (eds.), *Modernising and Harmonising Consumer Contract law*, Munich: Sellier, 2009, p. 174f. J. Stabentheimer, 'Der Vorschlag für eine Richtlinie über Rechte der Verbraucher aus österreichischer Sicht' in: B. Jud, Chr. Wendehorst (eds.), *Neuordnung des Verbraucherprivatrechts in Europa? Zum Vorschlag einer Richtlinie über Rechte der Verbraucher*, Manzsche Verlags- und Universitätsbuchhandlung, Vienna 2009, p. 13f.



does not apply in the case of a consumer sales contract, paragraph (4) of both Articles indicate.

Under Article 4:302 paragraph (1) PELS (Notification of lack of conformity), the buyer is required to give notice to the seller, specifying the nature of the lack of conformity within a reasonable time after the buyer has discovered the non-conformity or ought to have discovered it. A failure to do so implies that the buyer may not invoke a remedy for non-conformity.<sup>100</sup> The seller may, however, not rely on the duty to notify if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer, Article 4:304 PELS (Seller's knowledge of lack of conformity) adds, thus copying the exception to the duty to notify listed in Article 40 CISG.

These provisions apply also in the case of a consumer sales contract. However, for such contracts, Article 4:302 paragraph (2) PELS (Notification of lack of conformity) adds that a notice given within two months is regarded as given on time. The provision is more stringent than the corresponding provision in the Consumer sales directive, as the period for notification does not start when the defect is in fact discovered, but already when it should have been discovered, but in fact is not. The absence of a duty to examine the goods, however, implies that the period for notification in most cases will commence when the goods are being used.<sup>101</sup> Moreover, where the Consumer sales directive does not indicate what remedies the consumer loses in the case a duty to notify is introduced in a Member State, and a failure to notify the lack of conformity leads to the loss of *all* remedies if the contract is not a consumer sales contract, according to paragraph (6), a consumer-buyer retains the possibility to invoke price reduction and damages not exceeding the contract price.<sup>102</sup> The consumer's right to invoke these remedies is, of course, restricted to the normal prescription rules.<sup>103</sup>

Any right to rely on the non-conformity extinguishes when two years have passed after delivery, Article 4:302 paragraph (3) PELS states.<sup>104</sup> This does not apply if the lack of conformity consists of a third party claim, paragraph (5) adds. Moreover, if the parties have agreed that the goods must remain fit for a particular purpose or for their ordinary purpose during a fixed period of time, the period during which the buyer may invoke a cure for non-conformity does not expire before that period has expired, paragraph (4) provides. If both the period of two years and the contractually fixed period have elapsed, paragraph (6) has the effect that in a consumer sales contract the consumer retains the possibility to invoke price reduction and damages not exceeding the contract price.

The corresponding Article in the DCFR, Article IV.A.–4:302 DCFR (Notification of lack of conformity), only contains three specific rules. Article IV.A.–4:302 paragraph (2) DCFR (Notification of lack of conformity) implies that in a contract between two professional parties the buyer may invoke a remedy for non-conformity only during

---

<sup>100</sup> Cf. Hondius et al. (eds.) 2009, Comment C to Article 4:302 PELS, p. 305-306.

<sup>101</sup> Cf. Hondius et al. (eds.) 2009, Comment F to Article 4:302 PELS, p. 307-308.

<sup>102</sup> It should be noted that this restriction of the consequences of a failure to notify does not apply if both parties are consumers, i.e. in the case of a C2C-contract.

<sup>103</sup> Cf. Hondius et al. (eds.) 2009, Comment F to Article 4:302 PELS, p. 308.

<sup>104</sup> An exception is made for third party claims and rights, cf. Article 4:302 paragraph (5) PELS and Article IV.A.–4:302 paragraph (4) DCFR.

the first two years after the goods are handed over to him. After the two year cut-off period, the seller is liable only if the parties have agreed that the goods should remain fit for purpose for a longer period, paragraph (3) provides. As the Comments indicate, this follows the closing words of Article 39 paragraph (2) CISG, which indicate that the (professional) buyer should not lose rights that have been specifically awarded to him by virtue of a contractual guarantee.<sup>105</sup> Moreover, the cut-off period does not apply to third party rights and claims, paragraph (4) adds. These provisions are therefore mere copies of the corresponding provisions of Article 4:302 paragraphs (2), (3) and (5) PELS.

However, the *general* rule on the duty to notify for non-conformity has been taken out of the Sales Book and placed in the more general Article III.–3:107 DCFR (Failure to notify non-conformity). Paragraph (1) of that Article provides that the creditor (here: the buyer) must notify the debtor (here: the seller) of the nature of the non-conformity within a reasonable time when the good or service is supplied or, if this is a later time, within a reasonable time when the defect is or ought to be discovered. The consequences of a failure to do so are the same as well: the buyer may not invoke a remedy for non-conformity. The provision is thought to follow from the requirement that remedies are to be exercised in accordance with good faith and fair dealing and concretises that requirement for cases of non-conformity.<sup>106</sup> Paragraph (3) copies the exception of Article 4:304 PELS and Article 40 CISG to the duty to notify in case the non-conformity relates to facts of which the seller knew or could not have been unaware and which he did not disclose to the buyer.

A major difference between the regulation of the duty to notify in the PELS and that in the DCFR is that Article III.–3:107 paragraph (4) DCFR explicitly *excludes* the duty to notify in the case the creditor is a consumer. The reason given for this restriction to the duty to notify is that consumers may be unaware of such a duty and that it could be harsh to deprive them of remedies for failing to observe it.<sup>107</sup> Given this rationale, it does not come as a surprise that the exclusion of the duty is not restricted to contracts where the debtor (the seller) is a professional party: it applies also in the case of a contract by which goods are sold from one consumer to another, e.g. through an online auction platform such as eBay. Moreover, as Article IV.A.–4:302 paragraph (1) DCFR indicates that this specific provision only applies in a B2B-contract, the two year cut-off period of paragraph (2) does not apply either in a consumer sales contract, implying that the consumer-buyer's rights are not effected by the mere passing of time from the moment of delivery in any other way than by the normal rules of prescription under Book III, Chapter 7 DCFR (Prescription). As in these cases the defect, by definition, is hidden, the period of prescription is suspended under Article III.–7:301 DCFR (Suspension in case of ignorance) until the moment that the buyer is expected to know of the non-performance. It should be noted that Article IV.A.–4:302 DCFR only applies if *both* parties are professional parties. This implies that the two year cut-off period does not apply in a consumer sales contract (a B2C-contract), but also not in the case where the *seller* is a consumer, even if the buyer is a professional party. In my view, this must be a drafting error, as there does not seem to be a justification to allow a professional buyer a longer period to claim a remedy for non-conformity if the seller is a consumer than he would have if the seller

---

<sup>105</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.–4:302 DCFR, p. 1354.

<sup>106</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment A to Article III.–3:107 DCFR, p. 806.

<sup>107</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment E to Article III.–3:107 DCFR, p. 807.

was also a professional party. The fact that the relevant Comment, including its heading, only refers to consumer sales contracts<sup>108</sup> confirms this impression.

The exclusion of the duty to notify and of the two year cut-off period in consumer sales contracts does not mean that the buyer does not bear any negative consequences if he does not inform the seller within a reasonable time of the non-conformity. To the contrary, Articles III.–3:302 paragraph (4) DCFR (Enforcement of non-monetary obligations) and III.–3:508 DCFR (Loss of right to terminate) indicate that the consumer does lose his right to claim specific performance (i.e. repair or replacement) or to terminate the contract if he fails to indicate that he wishes to claim performance or termination within a reasonable time after he has or could reasonably have become aware of the non-performance. These remedies are thought to place the seller in a particularly difficult position: specific performance entails additional costs for the seller, and may require him to turn to a third party who may be better equipped in remedying the non-conformity, whereas termination means that the seller loses all benefits he thought to gain from the contract. The Comments to Article III.–3:107 DCFR indicate that consumers should be aware of basic criteria of decent behaviour, requiring them to inform the seller that they wish to have the goods repaired or replaced or the contract terminated because of the non-conformity they have noticed. Such a duty to notify, based on good faith and fair dealing, would, however, be applied less strictly than Article III.–3:107 DCFR, as the duty would be triggered only by actual discovery of the non-conformity, and some (likely) prejudice on the part of the seller would be required in order for the consumer to lose his right to specific performance or termination.<sup>109</sup> Whereas these rights may be lost, a consumer's failure to give notice within a reasonable time does not affect the right to price reduction. Moreover, also the right to damages remains in tact, subject only to the general provision of Article III.–3:704 (Loss attributable to creditor) for the situation where the lack of notice has contributed to a higher loss.

## **6. Partial and excess delivery**

From Article IV.A.–2:301 under (a) DCFR (Conformity with the contract) it follows that the delivery of a quantity of goods less than was agreed upon, is treated as a non-conformity. This implies that the remedies for non-conformity apply, but, as the case may be, also the duty to examine the goods under Article IV.A.–4:301 and the duty to notify the seller that he has delivered too few goods under Articles III.–3:107 (Failure to notify non-conformity) and IV.A.–4:302 (Notification of lack of conformity). A failure to do so will lead to the loss of the right to invoke the remedies for non-conformity.<sup>110</sup> No notification is required, however, if the buyer has reason to believe that the remaining goods will be delivered, Article IV.A.–4:303 DCFR (Notification of partial delivery) indicates. This provision could, for instance, apply in case 600 goods are to be delivered by three lorries and the buyer is informed of the fact that one lorry has broken down on the way to the place of delivery.<sup>111</sup> Where no goods have been delivered at all, there is no non-conformity, but simply a non-performance, to which the general remedies for non-performance of Book III, Chapter 3 DCFR

---

<sup>108</sup> See Chr. von Bar et al. (eds.) 2009, Comment E to Article IV.A.–4:302 DCFR, p. 1355.

<sup>109</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment E to Article III.–3:107 DCFR, p. 807.

<sup>110</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.–4:301 DCFR, p. 1349.

<sup>111</sup> See also Hondius et al. (eds.) 2009, Comment B to Article 4:303 PELS, p. 318, .Illustration 1.

(Remedies for non-performance) apply.<sup>112</sup> In such a case, the duty to notify applies as of the moment when the buyer realises or should realise that the seller will not deliver any goods. A difficult question to answer is what rule applies if of the 600 goods sold, only ten are delivered. Is this still a case of non-conformity or should this be treated as a non-performance? In practice, however, the outcome would normally be the same: in either case, the duty to notify applies only once the buyer discovers or should discover that the seller has no intention to deliver the remaining 590 cars. If this were treated as a simple non-performance, one could argue that the buyer need not have understood that the delivery of only ten goods implied that the seller had no intention to deliver any other. Therefore, the buyer need not have understood that ‘partial’ delivery as a non-performance and therefore could not be expected to already have discovered the non-performance. If, on the other hand, the buyer could not expect that the seller would deliver the remaining goods, both under Article III.–3:107 and Articles IV.A.–4:302 and 303 DCFR the buyer would be required to notify the seller. It seems that even the burden of proof is the same, as in both cases the *buyer* would be expected to explain why he has not breached his duty to notify.

If the seller delivers *too many* goods, i.e. an excess quantity, this constitutes a lack of conformity under Article IV.A.–2:301 under (a) DCFR (Conformity with the contract) as well. However, the remedy is peculiar. Under Article III.–3:202 DCFR (Cure by debtor: general rules), the seller would normally be entitled to remedy the lack of conformity by taking back the excess quantity. Article IV.A.–3:105 (paragraph (2) DCFR (Early delivery and delivery of excess quantity) blocks the seller’s right to cure and gives the buyer the right to choose to either retain or refuse the excess quantity.<sup>113</sup> If he retains the excess quantity, the buyer must pay for the excess quantity at the contractual rate, paragraph (3) adds. This is all fine and well when the buyer is aware of the fact that an excess quantity is delivered, but that need not be the case. Nevertheless, since the delivery of an excess quantity is treated as a lack of conformity, the buyer (if he is not a consumer) is required to notify the seller of the excess delivery under Articles III.–3:107 DCFR (Failure to notify non-conformity) and IV.A.–4:302 DCFR (Notification of lack of conformity). If he fails to notify the seller within a reasonable time of the fact that an excess quantity is delivered, he has lost the possibility to rely on the non-conformity and, therefore, is deemed to have accepted the excess quantity.<sup>114</sup>

In the case of a consumer sales contract, the situation is different when the buyer on reasonable grounds believed that the seller has delivered the excess quantity intentionally and without error, knowing that it had not been ordered. In such case, paragraph (4) indicates, the delivery of the excess quantity is treated as the delivery of unsolicited goods. This implies that the fact that the consumer does not react to the delivery of the excess quantity may not be interpreted as the acceptance of the conclusion of an additional contract. Moreover, the consumer is allowed to either accept and make use of the excess quantity or to reject it.<sup>115</sup> If he decides to keep the excess quantity, he becomes the owner of it.<sup>116</sup>

---

<sup>112</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.–2:301 DCFR, p. 1274.

<sup>113</sup> Cf. also Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.–3:105 DCFR, p. 1332.

<sup>114</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.–3:105 DCFR, p. 1332.

<sup>115</sup> Cf. Article II.–3:401 DCFR (No obligation arising from failure to respond).

<sup>116</sup> Cf. Article VIII.–2:304 DCFR (Passing of ownership of unsolicited goods).

## 7. Remedies for non-conformity

### 7.1 General remedial scheme

The remedial scheme in the DCFR does not provide many specifics for sales contracts. In fact, the general remedies of Book III, Chapter 3 DCFR (Remedies for non-performance) apply with only a few modifications, which will be discussed below in section 7.3. This implies that in the case of non-conformity, the buyer has the right to enforce performance – in particular by claiming repair or replacement of non-conforming goods or, as the case may be, delivery of the missing goods – under Article III.–3:302 DCFR (Enforcement of non-monetary obligations), withhold performance of his reciprocal obligation to pay the price under Article III.–3:401 DCFR (Right to withhold performance of reciprocal obligation), the right to terminate the contract under Article III.–3:502 DCFR (Termination for fundamental non-performance), the right to a reduction of the price proportionate to the decrease in value under Article III.–3:601 DCFR (Right to reduce price), and, finally, the right to claim compensation of the loss caused by the non-conformity under Article III.–3:701 DCFR (Right to damages).

Technically, the case where the seller has not performed at all does not constitute a lack of conformity but merely a plain non-performance. In principal, the same remedies apply, but the specific modifications in Book IV.A DCFR would not. In many cases, the parties will have fixed the time for performance themselves. If that is the case, the question arises whether observing that period for performance is essential ('of the essence') to the creditor. Where this is the case, non-observance of the period constitutes a fundamental non-performance allowing the buyer, once again, to terminate the contract.<sup>117</sup> If the period of time agreed between the parties is rather of an indicative nature, the delay in performance is not yet fundamental. In that case, the buyer will have to give a notice fixing an additional period of time of reasonable length for performance. If the seller still does not perform within that extra period of time, the buyer may terminate the contract under Article III.–3:503 paragraph (1) DCFR (Termination after notice fixing additional time for performance). The notice must be stated in unambiguous terms – i.e. in not too friendly words – and must contain a clear period within which performance must take place.<sup>118</sup> Paragraph (2) adds that if the period mentioned in the notice is unreasonably short, the buyer may nevertheless terminate if a reasonable period has elapsed from the time of the notice. A period for performance, which is considered to be unreasonably short therefore does not render the notice to be invalid or ineffective, but is in effect transformed into a period of reasonable length. If the seller delivers only after the additional period for performance has elapsed, the buyer may accept or refuse delivery, whichever he prefers, as long as he acts in good faith<sup>119</sup> and provided that the original notice did not provide for automatic termination under Article III.–3:507 paragraph (2) DCFR (Notice of termination).

Termination itself also requires a notice, Article III.–3:507 paragraph (1) DCFR (Notice of termination) states. This is true also in the case where the seller by notice was given an additional time for performance by the buyer under Article III.–3:503 paragraph (1) DCFR in case of a delay in performance. However, that earlier notice may already indicate that if the seller has not delivered during the extra period for performance, the contract is automatically terminated. Termination then has effect

---

<sup>117</sup> See also Chr. von Bar et al. (eds.) 2009, Comment B to Article III.–3:203 DCFR, p. 818.

<sup>118</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article III.–3:503 DCFR, p. 863.

<sup>119</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article III.–3:503 DCFR, p. 864.

as of the moment fixed in the notice, or – if that period was unreasonably short – when a period of reasonable length has elapsed, Article III.–3:507 paragraph (2) DCFR provides.

### *7.2 The seller's right to cure*

Article III.–3:102 DCFR (Cumulation of remedies) sets out that remedies which are not incompatible may be cumulated. This implies in particular that when a buyer invokes the right to repair or replacement (i.e. specific performance of the obligation to deliver) or termination of the contract, he is not deprived from the right to claim damages for any remaining damage. In principle, the buyer is free to choose among the remedies available, Article III.–3:101 paragraph (1) DCFR (Remedies available) provides. However, the effect of this freedom is much restricted by the seller's right to cure under Section 2 of Chapter 3 (Cure by debtor of non-conforming performance), which is said to follow from both the notion of good faith and fair dealing and the desire to uphold contractual relations where possible and appropriate.<sup>120</sup> Article III – 3:202 DCFR (Cure by debtor: general rules) provides that the debtor (here: the seller) may perform again if performance is still possible within the time allowed for the original performance, but also if he is notified of the lack of conformity and promptly offers to cure it within a reasonable time and at his own expense. If he does so, the creditor (the buyer) may only withhold his own reciprocal performance (i.e. withhold payment) until a reasonable period for the cure has passed before turning to any other remedy.

This is different only in the four situations listed in Article III.–3:203 DCFR (When creditor need not allow debtor an opportunity to cure). Firstly, the seller need not be given a second chance to perform when the failure to perform correctly on time amounts to a fundamental non-performance. The textbook example is, of course, the case where a wedding dress is not delivered on the wedding day. The Comments indicate that a failure to deliver on time also amounts to a fundamental non-performance when the parties had agreed that strict compliance with the time for performance is of the essence of the contract.<sup>121</sup> In the Comments to the PEELS, it is clarified that the fact that the buyer cannot use the goods at all or only to a limited extent due to the non-conformity is an indication that the lack of conformity is fundamental, but this is generally not the case where the lack of conformity can be easily remedied at low cost.<sup>122</sup>

Secondly, the seller does not deserve a second chance when the seller knew of the lack of conformity and did not act in accordance with good faith and fair dealing. When the buyer has reason to believe such misbehaviour, he may immediately resort to the remedies for non-performance, including termination of the contract. This exception is explained in the Comments as to prevent debtors from being encouraged to take chances with defective performances knowing they will still get a second chance to get it right. Such behaviour would contradict the very basis of the right to cure as a consequence of the obligation for the buyer to act in accordance with good faith and fair dealing.<sup>123</sup>

A third exception is made for the situation where the buyer has reason to believe that the seller will not be able to cure within a reasonable time and without

---

<sup>120</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment A to Article III.–3:201 DCFR, p. 812.

<sup>121</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment B to Article III.–3:203 DCFR, in particular Illustration 1, p. 818.

<sup>122</sup> Cf. Hondius et al. (eds.) 2009, Comment B to Article 4:206 PEELS, p. 289.

<sup>123</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article III.–3:203 DCFR, p. 818.

significant inconvenience to the buyer or without otherwise prejudicing his legitimate interests. The exception is not further explained in the Comments to Article III.–3:202 DCFR. However, the Comments to Article 4:203 PELS (Seller’s opportunity to remedy the lack of conformity) indicate that the exception may apply if the buyer knows that the seller does not have the capacities to carry out a repair, e.g. because he has already unsuccessfully tried to remedy the lack of conformity before.<sup>124</sup> In the Illustration it is then clarified that if the seller has tried to remedy the non-conformity twice, the buyer need not offer the seller a possibility to try a third time. Nevertheless, it seems that the mere fact that the *first* attempt to repair has failed is not sufficient to conclude that the seller has lost the right to cure.

The final exception to the right to cure is the case where cure would be ‘inappropriate in the circumstances’. The Comments indicate that this is a sweeping-up provision meant to catch situations which cannot be foreseen and which might not fall under any of the previous exceptions.<sup>125</sup> One such situation has, however, be foreseen in the Principles of European Law on Sales, that is the situation where the *nature* of the lack of conformity gives the buyer reason to believe that he cannot rely on the seller’s future performance. In the Comments to Article 4:203 PELS, the drafters of the PELS give two examples. Firstly, the case where a buyer orders food for a party he is organising and where he discovers a dead mouse in one of the pies delivered. The Illustration indicates that even if there is still time and the seller principally is able and willing to rectify the defect, the buyer may refuse since he has totally and justifiably lost confidence in the seller. The second example is the case where a consumer buys a pair of jeans of a well known brand in a store, to find out later that the jeans are actually pirate copies. In this case, the buyer is not required to accept the replacement of the pair of jeans, the Illustration indicates.<sup>126</sup>

### 7.3 Specific rules on remedies for non-conformity

The first and probably most important modification of the general scheme of remedies is to be found in Article IV.A.–4:302 paragraphs (2) and (3) DCFR (Notification of lack of conformity). As was discussed above in section 5, this provision implies that in a contract between two professional parties the buyer may only during the first two years after the goods are handed over to him invoke a remedy for non-conformity, unless a longer contractual guarantee has been agreed upon. It follows from paragraph (1) of the Article that the two year cut-off period does not apply if the buyer is a consumer. In section 5 it is argued that the limitation of the scope of Article IV.A.–4:302 DCFR to B2B-contracts, which would mean that the exclusion of the two year cut-off period would also apply if the seller is a consumer and the buyer a professional party, is nothing more than a drafting error.

The provisions on remedies largely are intended to constitute default rules. Article IV.A.–4:101 DCFR (Limits on derogation from remedies for non-conformity in a consumer contract for sale) provides that in case of a consumer sales contract a derogation of these rules to the detriment of the consumer before the defect is brought to the seller’s attention – i.e. before the buyer has notified the seller of the non-conformity or otherwise informed the seller thereof – is not binding on the consumer. In other words, the remedial scheme is mandatory in case of a consumer sales contract, but the parties are free to derogate from these rules once the buyer has

---

<sup>124</sup> Cf. Hondius et al. (eds.) 2009, Comment B to Article 4:203 PELS, p. 273.

<sup>125</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article III.–3:203 DCFR, p. 819.

<sup>126</sup> Cf. Hondius et al. (eds.) 2009, Comment B to Article 4:203 PELS, p. 274.

become aware of the non-conformity, thus leaving room for the parties to compromise. In the Comments to the corresponding provision of Article 4:103 PELS (Limits on derogation in a consumer sale), the example is given of the situation where the buyer is not entitled to repair of the goods because the costs would be unreasonable to the seller, but the buyer nevertheless prefers repair over, for instance, price reduction. In such a case, Articles 4:103 PELS and IV.A.–4:101 DCFR would not stand in the way of an agreement between the parties under which the seller would repair the goods and the buyer would bear part of the costs thereof.<sup>127</sup>

The third modification copies Article 3 paragraph (6) of the Consumer sales directive. It enlarges the possibility for a consumer in a consumer sales contract to terminate the contract for non-conformity. Whereas under Article III.–3:502 DCFR termination is possible only in case of a fundamental non-performance, Article IV.A.–4:201 DCFR (Termination by consumer for lack of conformity) provides that in a consumer sales contract the consumer may terminate for any lack of conformity, unless the lack of conformity is minor. A lack of conformity is considered minor if it is of slight importance, or where the defect is relatively small in relation to the overall value of the product. Cosmetic defects, such as scratches, are normally considered as minor, the Comments indicate. The same is thought to be true in case of minor malfunctions in technical equipment that are of no major importance to the buyer.<sup>128</sup> On the other hand, when the usability is influenced to a large extent as a consequence of the lack of conformity and the lack of conformity may not easily be rectified, the consumer may terminate the contract even if the lack of conformity only constitutes a marginal reduction in the value.<sup>129</sup> A case-by-case analysis is required, though, the Comments indicate.<sup>130</sup>

Even when the lack of conformity, as such, justifies termination, this does not mean that termination in fact is available to the consumer. In practice, the consumer's right to termination is not as strong as it may seem, as his right to terminate the contract is subject to the seller's right to cure under Article III.–3:202 DCFR. Yet, if the seller does not cure the lack of conformity, the question is whether or not the consumer may terminate the contract. Article IV.A.–4:201 DCFR indicates that the consumer may then terminate, *unless* the lack of conformity is minor. This wording indicates that it is the *seller* who bears the burden to prove that the lack of conformity does not justify the termination of the contract. This is different under the general rule of Article III.–3:502 DCFR, where the buyer must prove that the lack of conformity amounts to a *fundamental* non-performance.

The fourth and final amendment of the general remedial scheme for a lack of conformity concerns a limitation of liability for damages in case the *seller* is a consumer. In such a case, Article IV.A.–4:202 DCFR (Limitation of liability for damages of non-business sellers) provides that the seller is not liable for more damages than the original sales price, unless the seller knew of the lack of conformity

---

<sup>127</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.–4:101 DCFR, p. 1336; Hondius et al. (eds.) 2009, Comment B to Article 4:101 PELS, p. 258.

<sup>128</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.–4:201 DCFR, p. 1342; Hondius et al. (eds.) 2009, Comment B to Article 4:206 PELS, p. 290.

<sup>129</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.–4:201 DCFR, p. 1342; Hondius et al. (eds.) 2009, Comment B to Article 4:206 PELS, p. 290.

<sup>130</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.–4:201 DCFR, p. 1342; Hondius et al. (eds.) 2009, Comment B to Article 4:206 PELS, p. 290.



and did not disclose it prior to the moment when risk passed. The provision applies both when the buyer is a professional party (C2B-contract) and when the buyer is a consumer (C2C-contract). Both types of contract may occur more often than one might think. With the development of the Internet and in particular of online auction sites such as eBay, C2C-contracts have become a much more common phenomenon than in the past. C2B-contracts are rather frequently concluded in cases where a consumer buys a new (or second-hand) car and pays the sales price in part *in natura* by handing in his old car. One could argue that in such case the parties have concluded two separate sales contracts. Alternatively, one could argue that the parties have concluded one mixed contract of sale and barter. In accordance with the general rule applicable to barter contracts, to such contracts the rules on sales contracts would then be applied with appropriate adaptations.<sup>131</sup> In both cases, with regard to his old car, the consumer is then considered to be the seller, and the car dealer the buyer.

The limitation of the consumer-seller's liability for damages to the sales price in Article IV.A.-4:202 DCFR hardly has any support in national law, the principal exceptions being France and Spain. Moreover, in the Nordic countries and in the Netherlands, under certain conditions the courts have the possibility to adjust or mitigate damages taking into account the seller's capacity as a private person and, as the case may be, the buyer's capacity as a professional buyer in case full liability would be unreasonable in the circumstances of the case.<sup>132</sup> Yet, similar constructions protecting the seller's financial interests seem absent in the vast majority of Member States. One would think that a rule that so clearly derogates from the current rule in the majority of legal systems would be supported by extensive and convincing argumentation in the Comments. This is not really the case. In the Comments, no better argumentation can be found than by stating, in rather general wording, that a far-reaching obligation to pay damages 'may become excessively onerous to a private seller, sometimes even disrupting the whole financial situation', in particular where the buyer is a professional party and as such may sustain larger losses than a consumer-buyer would.<sup>133</sup> Moreover, a fixed standard – by simply excluding all damages exceeding the sales price – is preferred over an open standard, as in this way a private party will then always know the extent of the risk taken.<sup>134</sup> It seems doubtful that with so meagre a justification a provision, which apparently is supported only in two legal systems, should be introduced in a European system. It would seem that a flexible instrument by way of an open standard would do more justice to the interests of *both* parties. Moreover, one may wonder why such a specific provision is needed in the case of a sales contract and not for other contracts where a consumer delivers a non-conforming good, e.g. the situation of a consumer-lessor, that of a consumer-constructor and, in particular, that of a consumer-donor: surely, the same considerations would apply for these consumers? When developing the Principles of European Law on Sales, such considerations need not have been taken into account, but that excuse does not hold when an overarching structure such as the DCFR is developed. In my view, Article IV.A.-4:202 DCFR lacks justification.

---

<sup>131</sup> Cf. Article IV.A.-1:203 DCFR (Contract for barter). Alternatively, one could argue that the parties have concluded two separate contract

<sup>132</sup> Cf. Chr. von Bar et al. (eds.) 2009, Notes to Article IV.A.-4:202 DCFR, p. 1347-1348; Hondius et al. (eds.) 2009, Notes to Article 4:207 PELS, p. 298.

<sup>133</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.-4:202 DCFR, p. 1346, and – in literally the same words – already Hondius et al. (eds.) 2009, Comments C to Article 4:207 PELS, p. 297.

<sup>134</sup> Cf. Chr. von Bar et al. (eds.) 2009, Comment C to Article IV.A.-4:202 DCFR, p. 1347, and – again in literally the same words – Hondius et al. (eds.) 2009, Comments C to Article 4:207 PELS, p. 297.

## 8. Summary of the main findings and concluding remarks

Section 2 of this paper deals with the scope of Book IV.A DCFR on sales contracts. The most notable provision pertaining to the scope of this Book is Article IV.A.–1:101, paragraph (3) DCFR (Contracts covered), which indicates that the sale of immovable property (e.g. the sale of land and buildings) is excluded. In this paper it is argued that this exclusion is unconvincing in the light of the fact that the contract to construct immovable property is even to be seen as the archetype of a construction contract under Article IV.C.–3:101 DCFR (Scope), and is in fact nothing but a policy decision not to engage in this politically sensitive area. It would have been better had this been explicitly recognised in the Comments to the DCFR or in the Comments to its predecessor, the PELS.

With regard to the scope of the provisions on consumer sales law, it should be noted that the definition of the notion of ‘consumer’ is slightly broader in the DCFR than under the case-law of the ECJ, as in the situation where the buyer purchases the goods *primarily* in a private capacity, but the professional purposes are not insignificant, he is considered to be a consumer under Articles I.–1:105 paragraph (1) DCFR (“Consumer” and “business”) and Article IV.A.–1:204 (Consumer contract for sale), whereas the ECJ, in its Gruber-ruling, indicated (for the purposes of the international competence of the courts) that the buyer could not be regarded as a consumer.

In section 3, the main obligations of the parties and the passing of risk are described. Article IV.A.–5:102 paragraph (1) DCFR (Time when risk passes) provides, as a general rule, that risk passes at the moment when the buyer takes over the goods. However, it is explained that apart from consumer sales contracts risk often passes not at delivery, but already at the moment when the seller indicates to the buyer that he has placed the goods at the buyer’s disposal (and is therefore ready to deliver), and the buyer becomes aware thereof. In contrast, Article IV.A.–5:103 DCFR (Passing of risk in a consumer contract for sale) indicates that for such a contract risk normally passes only when the consumer-buyer *actually* takes over the goods.

Section 4 of the paper deals specifically with the seller’s obligation to deliver a conforming good. The general Article IV.A.–2:301 DCFR (Conformity with the contract) makes clear that the parties themselves decide on, among other things, the quantity of the goods to be delivered, the quality the goods must have and the description the goods must meet. As such, the Article confirms the application of the principles of party autonomy and *pacta sunt servanda*. Where Article IV.A.–2:301 DCFR deals with the express terms, Article IV.A.–2:302 DCFR (Fitness for purpose, qualities, packaging) deals with the implied terms. The main criterion is to be found under (f): the goods must meet the buyer’s reasonable expectations. This implies, in particular, that the goods must be fit for the purpose for which the goods ordinarily will be used (Article IV.A.–2:302 under (b) DCFR), as well as for any particular purpose made known to the seller at the moment when the contract was concluded, unless the buyer did not rely or could not reasonably have relied on them being fit for that particular purpose (Article IV.A.–2:302 under (a) DCFR): the buyer may reasonably expect the goods to be fit for such ordinary or stated purpose. Similarly, the buyer may normally rely on public statements about the goods made by or on behalf of the producer on another party in the distribution chain. This is made explicit

for consumer sales contracts in Articles IV.A.–2:303 DCFR (Statements by third persons) and II.–9:102 DCFR (Certain pre-contractual statements regarded as contract terms), but applies also for non-consumer contracts, provided that it was reasonable for the buyer to rely on these statements.

Article IV.A.–2:308 DCFR (Relevant time for establishing conformity) indicates that the decisive moment whether or not the goods conform with the express or implied terms of the contract is the moment when risk passes to the buyer. The mere fact that the non-conformity becomes apparent only at a later stage does not change this fact. It implies, however, that it does not suffice for the buyer to prove that the goods are not in conformity with the contract, he needs to prove also that the non-conformity already existed at the moment when risk passed, either as an apparent or merely as a hidden defect. However, in so far as it remains unclear whether or not the defect existed already before risk passed, the buyer will not have established that the seller is liable for the lack of conformity, and will therefore not have any remedy.

Two particular situations of non-conformity are discussed in section 6, i.e. the case where the lack of conformity exists in the delivery of too few goods (partial delivery) or too many goods (excess delivery).

The duty to notify the non-conformity is discussed in section 5. The basic idea is that if the buyer can demonstrate that there is indeed a non-conformity for which the seller is liable, he needs to inform the seller thereof. Article III.–3:107 paragraph (1) DCFR (Failure to notify non-conformity) indicates that the buyer must do so within a reasonable time when the defect is or ought to be discovered. A failure to do so on time implies that the buyer may not invoke a remedy for non-conformity, unless the seller knew or should have known of the defect but did not disclose this to the buyer. However, and different from the corresponding provision in the PELS, the duty to notify does not apply in the case the creditor is a consumer. Yet, Articles III.–3:302 paragraph (4) DCFR (Enforcement of non-monetary obligations) and III.–3:508 DCFR (Loss of right to terminate) indicate that the consumer does lose his right to claim specific performance (i.e. repair or replacement) or to terminate the contract if he fails to indicate that he wishes to claim performance or termination within a reasonable time after he has or could reasonably have become aware of the non-performance.

Article IV.A.–4:302 paragraph (2) DCFR (Notification of lack of conformity) provides that any right to rely on the non-conformity extinguishes when two years have passed after delivery. If the parties have agreed that the goods must remain fit for a particular purpose or for their ordinary purpose during a fixed period of time, the period during which a consumer may invoke a cure for non-conformity does not expire before that period has expired, paragraph (3) adds. Since Article IV.A.–4:302 DCFR, according to its first paragraph, is restricted to contracts between two professional parties, the two year cut-off period does not apply if either the buyer or the seller is a consumer. To such contracts, only the ordinary rules of prescription under Chapter III.7 DCFR (Prescription) apply. It is argued that the exclusion of the two year cut-off period in a C2B-contract – i.e. when the buyer is a professional party and the seller a consumer, which may occur in particular where a consumer buys a new car and sells his old car to the car dealer – is in fact based on a drafting error.

The two year cut-off period is in fact the first of four modifications from the general remedial scheme of the DCFR, discussed in section 7. The remedial scheme is set out in Book III, Chapter 3 DCFR and is characterised in particular by the strong right of

the seller to cure the non-conformity under Article III –3:202 DCFR (Cure by debtor: general rules). The second derogation of the general remedial scheme is to be found in Article IV.A.–4:101 DCFR (Limits on derogation from remedies for non-conformity in a consumer contract for sale), which prohibits contractual derogations of the rules on conformity and the remedies for non-conformity to the detriment of the consumer-buyer before the defect is brought to the seller's attention. Furthermore, Article IV.A.–4:201 DCFR (Termination by consumer for lack of conformity) provides that in a consumer sales contract the consumer may terminate for any lack of conformity, unless the lack of conformity is minor, thus enlarging the consumer's right to termination to some cases of non-fundamental non-performance. And finally, Article IV.A.–4:202 DCFR (Limitation of liability for damages of non-business sellers) provides that the consumer-*seller* is not liable for more damages than the original sales price, unless he fraudulently did not disclose the lack of conformity to the buyer before risk passed. It is remarked that this limitation of the consumer-seller's liability for damages hardly has any support in national law and is not convincing, in particular not when one considers that similar provisions are missing in the regulation of other contracts by which a consumer delivers a non-conforming good, in particular the case of lease, construction and donation.

Notwithstanding the critique that the DCFR evokes, in general my impression of the rules of Book IV.A DCFR is rather positive.<sup>135</sup> The DCFR seems to have successfully bridged the gap between the Vienna Sales Convention and the Consumer sales directive, and has slightly improved the Principles of European Law on Sales, on which it is based. The European Commission, the Council of Ministers and the European Parliament should, in my opinion, take its provisions into account when developing rules on sales contracts. Both a future optional instrument and the proposed Consumer rights could benefit greatly from the work done in this field.

---

<sup>135</sup> It should be re-iterated that I was involved in various capacities in the development of the DCFR and the PELS, and my positive appraisal may therefore not come as a surprise.