

RESPONSE FORM

DISCUSSION PAPER ON REMEDIES FOR BREACH OF CONTRACT

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In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the proposals, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

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**List of questions and proposals**

Chapter 1 Introduction

1. Do consultees have any information or data on:

(a) the economic impact of the current law relating to remedies for breach of contract; or

(b) the potential economic impact of any proposed reform of that law?

(Paragraph 1.48)

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| **Comments on Question 1**«InsertTextHere» |

Chapter 2 Retention and withholding performance

1. Should the term “retention” be replaced by “suspension” or “withholding” of performance to describe the remedy under which a creditor is entitled as a temporary measure in response to the debtor’s breach not to perform its outstanding obligations under the contract?

(Paragraph 2.6)

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| **Comments on Question 2**«InsertTextHere» |

1. In view of the present uncertainty about the meaning and scope of mutuality in the law on breach of contract, do consultees consider that adoption of the DCFR’s formulation of its equivalent concept of reciprocal obligations would provide a useful and workable clarification of the position?
2. Alternatively, are other approaches canvassed in recent judicial decisions to be preferred?

(Paragraph 2.15)

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| **Comments on Questions 3 and 4**«InsertTextHere» |

1. If mutuality is redefined, should it nonetheless remain capable of stretching across more than one contract, the inter-relationship of which arises from their both being part of a single transaction between the parties?

(Paragraph 2.16)

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| **Comments on Question 5**«InsertTextHere» |

1. Do consultees consider that party A who is in breach of contract should be entitled to exercise any right or pursue any remedy arising out of party B’s breach of contract occurring before B has terminated the contract for A’s breach?

(Paragraph 2.23)

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| **Comments on Question 6**«InsertTextHere» |

1. If a general statutory restatement is pursued, should it provide for a creditor to withhold performance as a response to non-performance by the debtor?

(Paragraph 2.29)

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| **Comments on Question 7**«InsertTextHere» |

1. Do consultees consider that any general restatement should provide that:

(a) the debtor’s non-performance must be material before the creditor can exercise the remedy of retention or withholding performance; or

(b) the courts have power to deal with abusive or oppressive use of the remedy?

(Paragraph 2.35)

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| **Comments on Question 8**«InsertTextHere» |

1. Would it be useful for any legislation on suspension or withholding of performance as a remedy for breach of contract to state that it does not apply to special retention?

(Paragraph 2.46)

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| **Comments on Question 9**«InsertTextHere» |

Chapter 3 Retention and withholding performance

1. Do consultees agree that “anticipated breach” is a more exact way of describing the situation in which a creditor may begin to exercise remedies for breach even although the time for the relevant performance by the debtor has not yet arrived?

(Paragraph 3.6)

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| **Comments on Question 10**«InsertTextHere» |

1. Do consultees agree that it is desirable to distinguish clearly between the concepts of anticipated breach and material breach, and that applying the term “repudiation” to both of them is undesirable?
2. If so, do consultees consider that the use of the term “repudiation” would become unnecessary as a result of the suggested changes to the law canvassed elsewhere in Chapter 3?

(Paragraph 3.12)

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| **Comments on Questions 11 and 12**«InsertTextHere» |

1. If a general statutory restatement is pursued, should it provide that the creditor may terminate before performance of a contractual obligation is due if:

(a) the debtor has declared that there will be a non-performance of the obligation, or it is otherwise clear that there will be such a non-performance; and

(b) that non-performance would have been fundamental?

(Paragraph 3.27)

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| **Comments on Question 13**«InsertTextHere» |

1. Do consultees consider that there would be any merit in postponing reform on this point in the meantime to see how the decision in AMA is developed?
2. Alternatively, do consultees consider that it would now be desirable to give effect to our 1999 recommendation and reform the law so that, where the creditor has not yet performed its obligation and it is clear that the debtor is unwilling to receive performance, the creditor may nonetheless proceed and recover payment unless:

(a) the creditor could have made a reasonable substitute transaction without significant effort or expense; or

(b) performance would be unreasonable in the circumstances?

(Paragraph 3.47)

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| **Comments on Questions 14 and 15**«InsertTextHere» |

1. Do consultees agree that the law should provide that a creditor may respond to indications of the debtor’s unwillingness or inability to perform its obligations as and when they fall due under the contract by either:

(a) notifying the debtor of its concerns and that it is going to withhold performance of its own obligations, while empowering the debtor to end the withholding by sending the creditor an adequate assurance that it will perform its obligation when the time comes; or

(b) seeking an adequate assurance directly from the debtor, being thereby entitled to withhold its performance until such assurance is received, and becoming entitled to terminate the contract if one is not received within a reasonable time?

(Paragraph 3.51)

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| **Comments on Question 16**«InsertTextHere» |

Chapter 4 Termination

1. Do consultees consider that:

(a) “rescission” should be replaced with “termination”?

(b) “resile” should be replaced with “withdraw”?

(Paragraph 4.11)

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| **Comments on Question 17**«InsertTextHere» |

1. Should the term “fundamental breach” or “substantial breach” be adopted in place of “material breach” as the term for the kind of breach which justifies termination of a contract?

(Paragraph 4.15)

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| **Comments on Question 18**«InsertTextHere» |

1. Should persistent non-material breaches be treated as a breach justifying termination?

(Paragraph 4.16)

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| **Comments on Question 19**«InsertTextHere» |

1. If a general statutory restatement is pursued, should it provide for a right of partial termination where the obligations under a contract are separable?

(Paragraph 4.18)

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| **Comments on Question 20**«InsertTextHere» |

1. If a general statutory restatement is pursued, should it provide for a creditor to terminate the contract within a reasonable time after material (or substantial or fundamental) non-performance by the debtor?

(Paragraph 4.20)

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| **Comments on Question 21**«InsertTextHere» |

1. We invite comment on:

(a) a requirement that the creditor notify termination to the debtor; and

(b) the need for the law to specify the prospective effects of termination.

(Paragraph 4.21)

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| **Comments on Question 22**«InsertTextHere» |

1. If a general statutory restatement is pursued, should it provide for an ultimatum procedure by which a non-material breach of contract could lead to termination of the contract by the creditor who had previously notified the debtor of a reasonable period of time within which the latter must perform the obligation in question?
2. If so, should it also provide that:

(a) during the period of the notice the creditor is entitled to withhold its performance and may claim damages for the period of delay;

(b) the notice may provide for automatic termination by non-performance at the end of the notified period; and

(c) if the notice period is unreasonably short, termination (whether automatic or requiring further notice to the debtor) can take place only at the end of a reasonable period of time?

(Paragraph 4.26)

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| **Comments on Questions 23 and 24**«InsertTextHere» |

1. Do consultees agree that where parties have rendered conforming performances under a contract but not received the reciprocal counter-performances, there should be reciprocal restitution of the uncompleted performances after termination for breach?
2. If so, does the system of rules set out on this matter in the DCFR provide a satisfactory approach to the issue?
3. Alternatively, do consultees consider that the law in this area should be left to develop, particularly as to the relationship between breach of contract and unjustified enrichment?

(Paragraph 4.33)

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| **Comments on Questions 25 to 27**«InsertTextHere» |

Chapter 5 Other self-help remedies

1. Should a price reduction remedy along the lines of that provided in sections 24, 44 and 56 of the Consumer Rights Act 2015 also be provided for non-consumer contracts in general?
2. Do consultees have any information or data about the use of this remedy in a consumer context?

(Paragraph 5.7)

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| **Comments on Questions 28 and 29**«InsertTextHere» |

1. Should the debtor have a right to carry out a cure (repair or replace or repeat performance) of a prior non-performance notified to it by the creditor if:

(a) performance is still possible within any relevant time limit imposed by the contract; or

(b) the debtor offers a cure at its own expense, to be carried out within a reasonable time?

1. Should this right exist only if the non-performance is not so fundamental as to entitle the creditor to terminate the contract?
2. If consultees consider that debtors should have such a right, do they agree that while the cure is carried out the creditor may not terminate the contract, but that it may withhold its own performance and that it retains the right to claim damages for the initial non-performance if appropriate?
3. Do consultees also agree that the debtor has the obligation to take back the replaced item at its own expense, while the creditor need not pay for any use made of that item?
4. Do consultees further agree that if the cure is not carried out within a reasonable time the creditor may terminate the contract and exercise any other remedy available to it in respect of the breach of contract?
5. Do consultees finally agree the creditor should not be obliged to accept an offer of cure if:

(a) it has reason to believe that the debtor’s initial performance was made with knowledge of its non-conformity and was not in accordance with good faith and fair dealing;

(b) it has reason to believe that the debtor will be unable to effect the cure within a reasonable time and without significant inconvenience to the creditor or other prejudice to the creditor’s legitimate interests; or

(c) cure would be inappropriate in the circumstances?

(Paragraph 5.13)

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| **Comments on Questions 30 to 35**«InsertTextHere» |

1. Should any creditor have a right to seek cure from the debtor in line with the specific remedy of repair or replacement (or repeat performance of a service) now afforded to consumers under the Consumer Rights Act 2015?

(Paragraph 5.20)

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| **Comments on Question 36**«InsertTextHere» |

Chapter 6 Enforcing performance

1. Do consultees agree that the terminology used to describe the remedy used to enforce performance of an obligation could usefully be clarified?
2. If so, do consultees consider that it would be appropriate to call the remedy a “performance order”? Do consultees prefer an alternative formulation?

(Paragraph 6.10)

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| **Comments on Questions 37 and 38**«InsertTextHere» |

1. Are consultees aware of any issues arising in relation to actions for payment that we should consider at this time?

(Paragraph 6.14)

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| **Comments on Question 39**«InsertTextHere» |

1. Should civil imprisonment be retained as the ultimate sanction for wilful refusal to comply with a decree *ad factum praestandum*?
2. If so, should the periods for which civil imprisonment may be ordered for wilful refusal to comply with a decree *ad factum praestandum* and for breach of interdict be aligned in length?
3. As a means of enforcing a decree *ad factum praestandum*, should the courts be empowered to make such orders as may be just and equitable in all the circumstances as an alternative to civil imprisonment?
4. If so, should it be possible for a court to make such orders together with the initial decree?
5. Should it be open to the court to specify a penalty which is to be paid if a party fails to comply with a decree *ad factum praestandum*?
6. If so, should the penalty be payable to the creditor or the state? If the former, should the amount of the penalty be determined having regard to the creditor’s “legitimate interests” as defined in the general law on penalty clauses?

(Paragraph 6.40)

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| **Comments on Questions 40 to 45**«InsertTextHere» |

1. Do consultees consider that there would be merit in replacing the current methods of enforcing non-monetary obligations with a single bespoke remedy, encompassing both positive and negative obligations?
2. If so, do consultees support our suggestion that the courts should be given a broad power to make an order which is intended to secure performance of the obligation?
3. Would consultees prefer to confer a general discretion on the courts to select an appropriate order, or to have rules to be applied by the court in order to determine the most appropriate order?
4. Do consultees consider that it would be beneficial to give examples of the sort of order that might be made, particularly for more unusual possibilities such as fines or an extended right to repair and replacement?

(Paragraph 6.44)

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| **Comments on Questions 46 to 49**«InsertTextHere» |

Chapter 7 Damages

1. If a general statutory restatement is pursued, should it provide that:

(a) damages are primarily compensation for any recoverable loss caused to the creditor by the debtor’s breach of contract;

(b) the guiding principle in assessing damages is to put the creditor in the position that it would have been in had the contract been fully performed;

(c) losses which are not reasonably foreseeable to the parties at the time of contracting are irrecoverable;

(d) damages may be reduced to the extent that the creditor unreasonably fails to minimise its loss;

(e) damages are to be measured by the currency most appropriately reflecting the creditor’s loss?

1. If a general statutory restatement is pursued, should it provide that:

(a) in general, loss is assessed as at the date of breach; but

(b) exceptions to this general rule may be allowed?

1. If so, what exceptions should be allowed?

(Paragraph 7.13)

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| **Comments on Question 50 to 52**«InsertTextHere» |

1. Subject to the normal remoteness and other rules, should damages recoverable for breach of contract include non-patrimonial loss or harm of any kind?
2. In particular, should loss of the satisfaction of obtaining a contractual benefit, and harm in the form of pain, suffering or mental distress be included?

(Paragraph 7.35)

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| **Comments on Questions 53 and 54**«InsertTextHere» |

Chapter 8 Gain-based damages

1. Do consultees consider that reasonable fee awards of damages for breach of contract should be introduced?
2. If so:

(a) in what circumstances should such an award of damages be available; and

(b) how should the courts calculate a reasonable fee?

(Paragraph 8.43)

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| **Comments on Questions 55 and 56**«InsertTextHere» |

1. Do consultees consider that the courts should be empowered to order a debtor to account to a creditor for profits arising from the debtor’s breach of contract?
2. If so, do consultees consider that such an order should be available:

(a) in response to any breach of contract; or

(b) only where specified conditions are met?

1. If consultees consider that such an order should only be available where specified conditions are met, they are asked for their views on the appropriateness of the following conditions:

(a) that specific implement or interdict would have been available to the creditor before the breach occurred;

(b) the breach having occurred, that ordinary damages would be inadequate as they would leave the creditor undercompensated as the debtor’s gain from the breach would be out of proportion to the creditor’s loss; and

(c) that no reasonable creditor would have consented to the breach in exchange for a reasonable fee.

1. Consultees are also asked whether they think that any other conditions would be appropriate in addition to, or in substitution for, those conditions.

(Paragraph 8.57)

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| **Comments on Questions 57 to 60**«InsertTextHere» |

Chapter 9 Transferred loss claims

1. Do consultees consider that in general a party who breaches a contract should be liable in damages for the loss caused by that breach, even if the loss was suffered by someone other than the other party to the contract?

(Paragraph 9.48)

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| **Comments on Question 61**«InsertTextHere» |

1. Do consultees think that it would be preferable for a third party to be able to seek damages directly from the debtor, instead of relying on the creditor to seek damages on behalf of the third party and then account to the third party for them?
2. If so, do consultees think that:

(a) a third party should only be able to claim damages against a debtor if it was reasonably foreseeable to the debtor that a person in the third party’s position might suffer loss;

(b) the third party and the creditor should only be able to recover their own losses arising from the debtor’s breach of contract;

(c) it should be left to the courts to ensure that double recovery is not permitted, rather than making specific provision about it?

(Paragraph 9.60)

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| **Comments on Questions 62 and 63**«InsertTextHere» |

1. Do consultees think that transferred loss claims should be available only where the following conditions are met:

(a) that the contract in question was one to carry out work upon, or provide services in relation to, property belonging to the creditor;

(b) that the property was subsequently transferred to a third party; and

(c) that the third party’s loss could have been reasonably foreseen by the debtor at the time of contracting?

1. If so, do consultees agree that it should remain open to the courts to develop the broader ground approach to transferred loss if a suitable case arises?

(Paragraph 9.62)

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| **Comments on Questions 64 and 65**«InsertTextHere» |

1. Do consultees think that a transferred loss claim should not be available where:

(a) the contracting parties have made alternative provision in the contract for the third party to have a right of action against the debtor;

(b) the contracting parties have expressly excluded the operation of transferred loss claims in the contract;

(c) the debtor and the third party have entered into a separate agreement giving the third party a right of action against the debtor, such as a collateral warranty?

1. Do consultees think that a transferred loss claim should be available despite the fact that:

(a) the third party may have available to it a non-contractual claim against the debtor;

(b) it is possible that the creditor could assign to the third party its claim against the debtor for breach of contract?

(Paragraph 9.66)

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| **Comments on Questions 66 and 67**«InsertTextHere» |

1. Do consultees consider that a third party should only be allowed to claim damages for breach of contract?
2. If not, what alternative remedies (such as the right to cure) should be available to third parties?

(Paragraph 9.68)

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| **Comments on Questions 68 and 69**«InsertTextHere» |

Chapter 10 Contributory negligence

1. If a general statutory restatement is pursued, should it provide that a party may not exercise any of the remedies for non-performance to the extent that it caused the other party’s non-performance?

(Paragraph 10.42)

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| **Comments on Question 70**«InsertTextHere» |

1. Should a defence of the creditor’s contributory negligence be available to the debtor in any claim for damages for breach of contract, with the effect of reducing the creditor’s damages to such extent as the court thinks just and equitable having regard to the creditor’s share in the responsibility for the damage?

(Paragraph 10.56)

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| **Comments on Question 71**«InsertTextHere» |

Chapter 11 A general statutory restatement?

1. If a general statutory restatement is pursued, should it provide that it does not affect:

(a) any special regime of remedies provided by law for particular kinds of contract;

(b) parties’ freedom of contract with regard to making provision about remedies in their contracts?

(Paragraph 11.8)

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| **Comments on Question 72**«InsertTextHere» |

1. If a general statutory restatement is pursued, should it provide that:

(a) as a general principle, remedies are cumulative except where their exercise together is incompatible;

(b) the court cannot give two or more remedies which would result in benefits to the creditor exceeding its loss;

(c) although a creditor may switch from one remedy to another, this is barred when:

(i) an election between substantive rights is involved; or

(ii) the party in breach is prejudiced by the vacillation?

(Paragraph 11.11)

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| **Comments on Question 73**«InsertTextHere» |

1. If a general statutory restatement is pursued, should it extend to unilateral voluntary obligations?

(Paragraph 11.12)

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| **Comments on Question 74**«InsertTextHere» |

1. If a general statutory restatement is pursued, do consultees agree that:

(a) it is unnecessary to refer to a general requirement of good faith;

(b) bespoke provision should instead be made in relation to particular remedies where the concept of good faith is relevant?

(Paragraph 11.22)

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| **Comments on Question 75**«InsertTextHere» |

1. If a general statutory restatement is pursued, should it include default provisions about notices?
2. If so, should it be possible to give notice orally?

(Paragraph 11.25)

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| **Comments on Questions 76 and 77**«InsertTextHere» |

1. Do consultees have any comments to make on the suggested coverage of a general statutory restatement of the law on remedies for breach of contract?

(paragraph 11.29)

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| **Comments on Question 78**«InsertTextHere» |

1. Do consultees consider that it would be desirable to prepare a general statutory restatement of the law on remedies for breach of contract?

(paragraph 11.29)

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| **Comments on Question 79**«InsertTextHere» |

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| **General Comments**«InsertTextHere» |

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.