

# Modernized Provisions of the German Civil Code (2002 ~ )

## Book II: Law on Obligations

### < Selected provisions >

☞ Based on the official English translation published on the website of the German Federal Government:  
[http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html)

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## Division 1. Contents of obligations

### Title 1. Duty of performance

#### < Effects of obligations: Primary and secondary duties of the debtor >

##### § 241

##### Duties arising from an obligation

(1) By virtue of an obligation the creditor is entitled *to claim performance from the debtor*. The performance may also consist in forbearance.

(2) An obligation may also, depending on its contents, oblige each party *to take account of the rights, legal interests and other interests of the other party*.

##### § 242

##### Performance in good faith

The debtor has a duty *to perform according to the requirements of good faith*, taking customary practice into consideration.

[...]

#### < Time for performance >

##### § 271

##### Time for performance

(1) Where no time for performance has been specified or is evident from the circumstances, the creditor may demand performance immediately, and the debtor may effect it immediately.

(2) Where a time has been specified, then in case of doubt it must be assumed that the creditor may not demand performance, but the debtor may effect it prior to that time.

[...]

#### < Release of the debtor from duty of performance >

##### § 275

##### Exclusion of the duty of performance

(1) A claim for performance is excluded to the extent that *performance is impossible for the debtor or for any other person*.

(2) The debtor may refuse performance to the extent that performance requires *expense and effort which*, taking into account the contents of the obligation and the requirements of good faith, *is grossly disproportionate to the interest in performance of the creditor*. When it is determined what efforts may reasonably be required of the debtor, it must also be taken into account whether he is responsible for the obstacle to performance.

(3) In addition, the debtor may refuse performance if he is to effect the performance in person and, when the obstacle to the performance of the debtor is weighed against the interest of the creditor in performance, *performance cannot be reasonably required of the debtor*.

(4) The rights of the creditor are governed by §§ 280, 283 to 285, 311a and 326.

#### < Responsibility of the debtor >

##### § 276

##### Intention and negligence

(1) *The debtor is responsible for intention and negligence*, if a higher or lower degree of liability is neither laid down nor to be inferred from the otherwise provided contents of the obligation, especially in case of the giving of a guarantee or the assumption of a procurement risk. The provisions of §§ 827 and 828 apply with the necessary modifications.

(2) A person acts negligently if he fails to exercise the reasonable care which is required in the ordinary interaction.

(3) The debtor may not be released in advance from liability for intention.

**§ 277****Standard of care in ones own affairs**

A person who owes only the care that he customarily exercises in his own affairs is not released from liability for gross negligence.

**§ 278****Vicarious liability of the debtor**

The debtor is *responsible for fault on the part of his legal representative, and of persons whom he uses to perform his obligation*, to the same extent as for fault on his own part. The provision of § 276 (3) does not apply.

[...]

**< Principle of liability for breach of duty >**

**§ 280****Damages caused by breach of duty, delay in performance**

(1) If the debtor *breaches a duty* arising from the obligation, the creditor may *demand compensation for the damage caused thereby*. This does not apply if *the debtor is not responsible for the breach of duty*.

(2) *Damages for default in performance* may be demanded by the creditor only subject to the additional requirement of § 286.

(3) *Damages in lieu of performance* may be demanded by the creditor only subject to the additional requirements of §§ 281, 282 or 283.

**< Damages in lieu of performance (I): non-performance, defective performance >**

**§ 281****Damages in lieu of performance for non-performance or failure to effect performance as owed**

(1) *So far as the debtor does not effect performance in due time or does not effect performance as owed, the creditor may*, subject to the requirements of § 280 (1), *demand damages in lieu of performance* under the condition that he has unsuccessfully set a reasonable period for the debtor for performance or cure. If the debtor has performed only in part, the creditor may demand damages in lieu of complete performance only if he has no interest in the partial performance. In the case where the debtor has not effected performance as owed, the creditor may not demand damages in lieu of performance if the breach of duty is trivial.

(2) Setting a period for performance or cure is not necessary if the debtor seriously and definitively refuses performance or if there are special circumstances which, after the interests of both parties are weighed, justify the immediate assertion of a claim for damages.

(3) If the nature of the breach of duty is such that setting a period of time is out of the question, a warning notice is given instead.

(4) The claim for performance is excluded as soon as the creditor has demanded damages in lieu of performance.

(5) If the creditor demands damages in lieu of complete performance, the debtor is entitled to claim the return of his effected performance under §§ 346 to 348.

**< Damages in lieu of performance (II): Breach of duty of care >**

**§ 282****Breach of a duty under § 241 (2)**

*If the debtor breaches a duty under § 241 (2), the creditor may*, subject to the requirements of § 280 (1), *demand damages in lieu of performance*, in the case where the performance by the debtor is not acceptable for the creditor any more.

## < Damages in lieu of performance (III): Exclusion of duty of performance >

**§ 283** **Exclusion of duty of performance under debtor's responsibility**  
*If the debtor is released from duty to perform under § 275 (1) to (3), the creditor may*, subject to the requirements of § 280 (1), *demand damages in lieu of performance. § 281 (1) sentences 2 and 3 and (5)* apply with the necessary modifications.

## < Demand for reliance interest >

**§ 284** **Reimbursement of useless expenses**  
*In place of damages in lieu of performance*, the creditor may demand reimbursement of *the expenses which he has made* and in all fairness was entitled to make *in reliance on receiving performance*, unless the purpose of the expenses would not have been achieved, even if the debtor had not breached his duty.

[...]

## < Debtor's default in performance >

**§ 286** **Default of the debtor**  
(1) *If the debtor, having received a warning notice from the creditor after the arrival of the time of performance, fails to perform, he is in default as a result of the warning notice.*

Bringing an action for performance and serving a demand for payment in summary debt proceedings for recovery of debt have the same effect as a warning notice.

(2) There is no need for a warning notice if

1. a period of time according to the calendar has been specified,
2. performance must be preceded by an event and a reasonable period of time for performance has been specified in such a way that it can be calculated, starting from the event, according to the calendar,
3. the debtor seriously and definitively refuses performance,
4. for special reasons, weighing the interests of both parties, the immediate commencement of default is justified.

(3) The debtor of a claim for payment is in default at the latest if he does not perform within thirty days after the due date and receipt of an invoice or equivalent statement of payment; this applies to a debtor who is a consumer only if these consequences are specifically referred to in the invoice or statement of payment. If the time at which the invoice or payment statement is received by the debtor is uncertain, a debtor who is not a consumer is in default at the latest thirty days after the due date and receipt of the consideration.

(4) *The debtor is not in default as long as the performance is not effected as a result of a circumstance for which he is not responsible.*

(5) In case of an agreement to the default of the debtor otherwise provided than in (1) to (3), § 271a (1) to (5) apply with the necessary modifications.

**§ 287** **Liability during default**  
*While he is in default, the debtor is responsible for all negligence.* He is liable for performance in the case of a fortuitous accident as well, unless the damage would have occurred even if performance had been made in good time.

[...]

## **Division 2. Contractual obligations**

### **Title 1. Formation and contents of contract**

#### **< Duty of care under § 241 (2) before conclusion of contract >**

##### **§ 311 Obligations formed by judicial acts and other similar transactions**

(1) In order to form an obligation by judicial act and to alter the contents of an obligation, a contract between the parties is necessary, unless otherwise provided by statute.

(2) *An obligation with duties under § 241 (2)* also comes into existence by

1. the beginning of *contract negotiations*
2. the initiation of a contract where one party, with regard to an already existing contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or
3. similar business contacts.

(3) *An obligation with duties under § 241 (2)* may also come into existence in relation to persons who are not themselves intended to be parties to the contract.

#### **< Initial impossibility or other obstacles of performance >**

##### **§ 311a Obstacle to performance when contract is entered into**

(1) *A contract is not prevented from being effective* by the fact that *the debtor does not need to perform under § 275 (1) to (3)* and *the obstacle to performance already exists when the contract is entered into*.

(2) The creditor may, at his option, demand damages in lieu of performance or reimbursement of his expenses in the extent specified in § 284. This does not apply if the debtor was not aware of the obstacle to performance when entering into the contract and is also not responsible for his lack of awareness. § 281 (1) sentences 2 and 3 and (5) apply with the necessary modifications.

[...]

### **Title 2. Reciprocal contract**

#### **< Rescission of contract >**

##### **§ 323 Rescission for non-performance or for performance not in conformity with the contract**

(1) *If, in the case of a reciprocal contract, the debtor does not effect performance in due time or does not effect it in conformity with the contract, then the creditor may rescind the contract* under the condition that he has unsuccessfully set a reasonable period for the debtor for performance or cure.

(2) Setting a period of time for performance or cure is not necessary if

1. the debtor seriously and definitively refuses performance,
2. the debtor does not effect performance by a date specified in the contract or within a period specified in the contract, in spite of the fact that, according to a notice given by the creditor to the debtor prior to conclusion of the contract or based on other circumstances attending at the time of its conclusion, the performance as per the date specified or within the period specified is of essential importance to the creditor, or
3. in the case of work not having been carried out in accordance with the contract, special circumstances exist which, when the interests of both parties are weighed, justify immediate rescission.

(3) If the nature of the breach of duty is such that setting a period of time is out of the question, a warning notice is given instead.

(4) The creditor may rescind the contract before performance is due if it is obvious that the requirements for rescission will be met.

(5) If the debtor has performed in part, the creditor may rescind the whole contract only if he has no interest in partial performance. In the case where the debtor has not effected performance in conformity with the contract, the creditor may not rescind the contract if the breach of duty is trivial.

(6) Rescission is excluded if the creditor is solely or very predominantly responsible for the circumstance that would entitle him to rescind the contract or if the circumstance for which the debtor is not responsible occurs at a time when the creditor is in default of acceptance.

**§ 324 Rescission for breach of a duty under § 241 (2)**

*If the debtor, in the case of a reciprocal contract, breaches a duty under § 241 (2), the creditor may rescind the contract* if it can be no longer reasonably expected that he would uphold the contract.

**§ 325 Damages and rescission**

*The right to demand damages in the case of a reciprocal contract is not excluded by rescission.*

**< Release from duty of counter-performance and Rescission >**

**§ 326 Release from counter-performance and rescission where the duty of performance is excluded**

(1) *If the debtor is released from duty to perform under § 275 (1) to (3), he has no entitlement to counter-performance*; in the case of partial performance, § 441 (3) [Price reduction] applies with the necessary modifications. Sentence 1 [Price reduction in case of partial performance] does not apply if the debtor, in the case of failure to perform in conformity with the contract, is released from duty to perform cure under § 275 (1) to (3).

(2) If the creditor is solely or very predominantly responsible for the circumstance due to which the debtor is released from duty to perform under § 275 (1) to (3), or if the debtor is not responsible for this circumstance and it occurs at a time when the creditor is in default of acceptance, the debtor retains the entitlement to counter-performance. However, he must allow to be credited against him what he saves due to release from duty to perform or acquires or willfully fails to acquire from other use of his labor.

(3) If the creditor demands, under § 285, return of reimbursement obtained for the object owed or assignment of the claim to reimbursement, he remains obliged to effect counter-performance. However, the latter is reduced under § 441 (3) to the extent that the value of the reimbursement or of the claim to reimbursement falls short of the value of the performance owed.

(4) If the counter-performance has been effected though it is not owed under this provision, it may be claimed back under §§ 346 to 348 so far as really performed.

(5) *If the debtor is released from duty to perform under § 275 (1) to (3), the creditor may rescind the contract*; § 323 applies with the necessary modifications to the rescission as in a case where setting a period of time is not necessary.

[...]



## Division 8. Particular types of obligations

### Title 1. Purchase, exchange

#### Subtitle 1. General provisions

#### § 433 **Typical contractual duties in a purchase agreement**

(1) By a purchase agreement, the seller of a thing is obliged to deliver the thing to the buyer and to procure ownership of the thing for the buyer. The seller *must procure the thing* for the buyer *free from material and legal defects*.

(2) The buyer is obliged to pay the seller the agreed purchase price and to accept delivery of the thing purchased.

#### § 434 **Material defects**

(1) The thing is free from material defects if, upon the passing of the risk, the thing has the agreed quality. To the extent that the quality has not been agreed, the thing is free of material defects

1. if it is suitable for the use intended under the contract,
2. if it is suitable for the customary use and its quality is usual in things of the same kind and the buyer may expect this quality in view of the type of the thing.

[...]

#### § 435 **Legal defects**

The thing is free of legal defects if third parties, in relation to the thing, can assert either no rights, or only the rights taken over in the purchase agreement, against the buyer. It is equivalent to a legal defect if a right that does not exist is registered in the Land Register.

[...]

#### § 437 **Rights of buyer in the case of defects**

*If the thing is defective, the buyer may*, provided the requirements of the following provisions are met and unless otherwise specified,

1. under § 439, *demand cure*,
2. *rescind the contract* under §§ 440, 323 and 326 (5) or *reduce the purchase price* under § 441, and
3. under §§ 440, 280, 281, 283 and 311a, demand damages, or under § 284, *demand reimbursement of useless expenses*.

[...]

#### § 439 **Cure**

(1) As cure the buyer may, at his choice, demand that *the defect is repaired* or *a thing free of defects is supplied*.

(2) The seller must bear all expenses required for the purpose of cure, especially transport, workmen's travel, work and materials costs.

(3) Without prejudice to § 275 (2) and (3), the seller may refuse to provide the kind of cure chosen by the buyer, if this cure is possible only at disproportionate expense. [...]

(4) If the seller supplies a thing free of defects for the purpose of cure, he may demand the return of the defective thing in accordance with §§ 346 to 348.

[...]



#### § 440

#### Special provisions on rescission and damages

Except in the cases set out in § 281 (2) and § 323 (2), it is also not necessary to specify a period of time if the seller has refused to carry out both kinds of cure under § 439 (3) or if the kind of cure that the buyer is entitled to receive has failed or cannot reasonably be expected of him. A cure is deemed to have failed after the second unsuccessful attempt, unless the nature of the thing or of the defect or other circumstances lead to a different conclusion.

#### § 441

#### Reduction of price

(1) Instead of rescission of the contract, *the buyer may*, by declaration to the seller, *reduce the purchase price*. The ground for exclusion under § 323 (5) sentence 2 does not apply.

(2) If more than one person comprises either the buyer or the seller, price reduction may be declared only by all or to all of them.

(3) In the case of a price reduction, *the purchase price is to be reduced in the proportion* in which *the value of the thing free of defects would*, at the time when the contract was entered into, *have had to the actual value*. To the extent necessary, the price reduction is to be established by appraisal.

(4) If the buyer has paid more than the reduced purchase price, the excess amount is to be reimbursed by the seller. § 346 (1) and § 347 (1) apply with the necessary modifications.

[...]

#### § 443

#### Guarantee

(1) In the case where *the seller, the producer or some other third party enters into obligation*, in addition to his statutory liability for defects, by way of making a declaration or in relevant advertising that was available prior to the purchase agreement being concluded or at the time of its conclusion, especially such obligation *to reimburse the purchase price, to exchange the thing, to repair it or to provide services in this context*, if the thing does not exhibit such a quality or not fulfill such requirements other than those concerning its freedom from defects as specified in the declaration or in the relevant advertisement (guarantee), then *the buyer shall be entitled*, notwithstanding his statutory claims, *to the rights under the guarantee* in relation to the person who has given the guarantee (guarantor).

(2) To the extent that the guarantor gives a guarantee as to the thing having a specified quality for a specified period (guarantee of durability), the presumption will be that a material defect which appears during the guarantee period triggers the rights under the guarantee.

[...]

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