

New Scheme of “Remedies for non-performance” in the Modernized German Law on Obligations

A. Basic principle of liability for breach of duty.....	1
B. Demand for damages caused by default.....	1
C. Demand for damages in lieu of performance (“Expectation interest”).....	2
[I] Damages in lieu of complete performance.....	2
(a) Non-performance (default).....	2
(b) Breach of duty of care under § 241(2).....	2
(c) Complete exclusion of the duty of performance under § 275.....	2
[II] Damages for partial non-performance.....	3
(a) Partial default.....	3
(b) Partial release from duty of performance (partial impossibility).....	3
[III] Damages for defective performance.....	4
(a) Defective performance (Recoverable defect).....	4
(b) Defective performance (Irrecoverable defect).....	4
F. Reimbursement of useless expenses (“Reliance interest”).....	4
G. Rescission of reciprocal contract.....	5
[I] Rescission for complete non-performance.....	5
(a) Non-performance (default).....	5
(b) Breach of duty of care under § 241(2).....	5
(c) Complete exclusion of the duty for performance under § 275.....	5
[II] Rescission for partial non-performance.....	5
(a) Partial default.....	5
(b) Partial release from duty of performance (partial impossibility).....	6
[III] Rescission for defective performance.....	6
(a) Defective performance (Recoverable defect).....	6
(b) Defective performance (Irrecoverable defect).....	6
G*. Demand for damages besides rescission.....	6

A. Basic principle of liability for breach of duty

§ 241 (2): *Duty of care for other parties*

Besides the duty to perform obligations, each party owes a **special duty to pay attention to the rights and interests of other parties** from the time of the first contact (in case of so-called “**culpa in contrahendo**” under § 311 (2), (3)). This duty of care covers also other rights or interests than the particular object of the obligation (in case of “**extended damages**”).

§ 242: *Duty of performance in good faith*

The debtor has a **duty to perform obligations** according to the requirements of good faith [...]

§ 280 (1): *Liability for damages caused by breach of duty*

Requirement: *No successful defense by the debtor against responsibility*

Principally, the creditor is always entitled to demand damages when he proves a breach of duty by the debtor, independently from the demand for complete performance.

For particular cases (default, impossibility, partial impossibility, defective performance etc.), the following provisions provide additional requirements ...



B. Demand for damages caused by default

The debtor does not effect performance in due time. Then ...

§ 286 (1): *Warning notice after arrival of the time of performance*

Requirement: No performance by the debtor, the warning is unsuccessful.

§ 286 (4): *No successful defense by the debtor against responsibility*

Then, the debtor is in default and ...

§ 287: Liability of the debtor during default

§ 280 (2): The creditor is entitled to demand damages caused by default.

Besides demand for damages, the creditor is still entitled to demand performance.

C. Demand for damages in lieu of performance ("Expectation interest")

[I] Damages in lieu of complete performance

(a) Non-performance (default)

The debtor did not perform at all in due time. Then ...

§ 281 (1): Setting a reasonable period for performance

Requirement: No performance at all by the debtor, the period elapses unsuccessfully.

At the moment, the creditor still has choice between Demand for performance under § 241 or Demand for damages under § 280(3).

However, if the creditor decides to demand damages, then ...

§ 280 (1): Liability for damages caused by breach of duty

Requirement: No successful defense by the debtor against responsibility

§ 280 (3) subject to § 281 (1): The creditor is entitled to demand *damages in lieu of the complete performance*.



(b) Breach of duty of care under § 241(2)

*The debtor breached the duty of care and destroyed the relationship of mutual trust between the parties.
Then ...*

§ 280 (1): Liability for damages caused by breach of duty

Requirement: No successful defense by the debtor against responsibility

§ 282: Damages in lieu of performance for breach of duty under § 241(2)

Requirement: The creditor proves that the performance by the debtor is unacceptable for him.

§ 280 (3) subject to § 282: The creditor is entitled to demand *damages in lieu of the complete performance*.



(c) Complete exclusion of the duty of performance under § 275

The debtor can not perform at all due to serious obstacles (impossibility or extreme difficulties ...).

§ 275: Exclusion of the duty of performance "to the extent that performance is impossible ..."

The debtor is completely released from his duty to perform. Then, the creditor may only demand damages ...

§ 280 (1): Liability for damages caused by breach of duty

Requirement: No successful defense by the debtor against responsibility

§ 283: Damages in lieu of performance for exclusion of duty of performance under § 275

§ 280 (3) subject to § 283: The creditor is entitled to demand *damages in lieu of the complete performance*.

[II] Damages for partial non-performance

(a) Partial default

The debtor did not perform at all in due time, or performed only partially. Then ...

§ 281 (1): *Setting a reasonable period for performance or for unfinished part*

Requirement: **Only partial performance** by the debtor, and the period elapses unsuccessfully.

At the moment, the creditor still has choice between Demand for performance under § 241 or Demand for damages under § 280(3).

If the creditor decides to demand damages, then ...

§ 280 (1): *Liability for damages caused by breach of duty*

Requirement: **No successful defense by the debtor against responsibility**

§ 280 (3) subject to § 281 (1): The creditor is entitled to demand **damages in lieu of the unfinished part (its costs).**

However, if the creditor decides to demand damages for the complete performance, then additionally ...

§ 281 (1) Sentence 2: "If the debtor has performed only in part ... "

Requirement: **The creditor proves that he has no interest in the partial performance.**

§ 280 (3) subject to § 281 (1): The creditor is entitled to demand **damages in lieu of the complete performance.**



(b) Partial release from duty of performance (partial impossibility)

The debtor performed only partially.

However, the unfinished partial performance is impossible for the debtor, then ...

§ 275: Exclusion of the duty of performance "**to the extent that performance is impossible ...**"

The debtor is released from duty of the performance, and the creditor may demand only damages for it. Then ...

§ 280 (1): *Liability for damages caused by breach of duty*

Requirement: **No successful defense by the debtor against responsibility**

§ 283: **Damages in lieu of performance for exclusion of duty of performance under § 275**

§ 280 (3) subject to § 283: The creditor is entitled to demand **damages in lieu of the impossible part (its costs).**

However, if the creditor decides to demand damages for the complete performance, then additionally ...

§ 283 refers to § 281 (1) Sentence 2: "If the debtor has performed only in part ... "

§ 281 (1) Sentence 2: "If the debtor has performed only in part ... "

Requirement: **The creditor proves that he has no interest in the partial performance.**

§ 280 (3) subject to § 281 (1): The creditor is entitled to demand **damages in lieu of the complete performance.**

[III] Damages for defective performance

(a) Defective performance (Recoverable defect)

*The debtor effected the performance in due time, but failed to perform as owed (defective performance).
If the defect is recoverable (the cure is possible), then ...*

§ 281 (1): *Setting a reasonable period for cure*

Requirement: No cure by the debtor, and the period elapses unsuccessfully.

At the moment, the creditor still has choice between Demand for cure under § 241 or Demand for damages under § 280(3).

If the creditor decides to demand damages, then ...

§ 280 (1): *Liability for damages caused by breach of duty*

Requirement: No successful defense by the debtor against responsibility

§ 280 (3) subject to § 281 (1): The creditor is entitled to demand damages in lieu of the cure (costs for the cure).

However, if the creditor decides to demand damages for the complete performance, then additionally ...

§ 281 (1) Sentence 3: "If the debtor has not effected performance as owed, ... "

Requirement: No successful defense by the debtor "the breach of duty is trivial"

§ 280 (3) subject to § 281 (1): The creditor is entitled to demand damages in lieu of the complete performance.



(b) Defective performance (Irrecoverable defect)

*The debtor effected the performance in due time, but failed to perform as owed (defective performance).
If the defect is irrecoverable (the cure is impossible), then ...*

§ 275: Exclusion of the duty of cure

The debtor is released from duty of cure, and the creditor may demand only damages for it. Then ...

§ 280 (1): *Liability for damages caused by breach of duty*

Requirement: No successful defense by the debtor against responsibility

§ 283 refers to § 281 (1) Sentence 3: "If the debtor has not effected performance as owed, ... "

§ 281 (1) Sentence 3: "If the debtor has not effected performance as owed, ... "

Requirement: No successful defense by the debtor "the breach of duty is trivial"

§ 280 (3) subject to § 281 (1): The creditor is entitled to demand damages in lieu of the complete performance.



F. Reimbursement of useless expenses ("Reliance interest")

§ 284: Reimbursement of useless expenses instead of damages in lieu of performance

In cases there the creditor may demand "Damages in lieu of performance", the creditor is also entitled to demand the reimbursement of useless expenses ("**Reliance interests**") in stead of damages in lieu of performance ("**Expectation interests**").

G. Rescission of reciprocal contract

[I] Rescission for complete non-performance

(a) Non-performance (default)

The debtor does not effect performance at all in due time. Then ...

§ 323 (1): Setting a reasonable period for performance

Requirement: **No performance** by the debtor, the period elapses unsuccessfully.

Then, the creditor may rescind the contract regardless of the responsibility of the debtor.



(b) Breach of duty of care under § 241(2)

The debtor breached the duty of care and destroyed the relationship of mutual trust between the parties.

Then ...

§ 324: Rescission for the breach of duty under § 241 (2)

Requirement: **The creditor proves that it is unacceptable for him to sustain the contract.**

The creditor may rescind the contract regardless of the responsibility of the debtor.



(c) Complete exclusion of the duty for performance under § 275

The debtor can not perform at all due to serious obstacles (impossibility or extreme difficulties ...).

§ 275: Exclusion of the duty of performance “to the extent that performance is impossible ...”

The debtor is completely released from his duty to perform. Then ...

§ 326 (1) Sentence 1: Release of the creditor from the duty of counter-performance

The creditor is completely released from duty of counter-performance.

At the same time ...

§ 326 (5) refers to § 323: Rescission of the contract where the debtor is completely released from duty to perform.

§ 323 (1): Rescission of the contract for non-performance (without setting a period of time)

The creditor may rescind the whole contract regardless of the responsibility of the debtor.



[II] Rescission for partial non-performance

(a) Partial default

The debtor effected performance in due time, but only partially. Then ...

§ 323 (1): Setting a reasonable period for the unfinished part

Requirement: **No complete performance** by the debtor, the period elapses unsuccessfully.

Then, the creditor may rescind the unfinished part regardless of the responsibility of the debtor.

§ 323 (5) Sentence 1: Rescission of the whole contract in case of partial performance

Requirement: **The creditor proves that he has no interest in the partial performance.**

Then, the creditor may rescind the whole contract regardless of the responsibility of the debtor.

(b) Partial release from duty of performance (partial impossibility)

The debtor performed only partially.

However, the unfinished partial performance is impossible for the debtor, then ...

§ 275: Exclusion of the duty of performance “*to the extent that performance is impossible ...*”

The debtor is released from duty of the impossible partial performance. Then ...

§ 326 (1) Sentence 1, 2nd Half-sentence refers to § 441 (3): Price reduction

The creditor is automatically released from duty of counter-performance for the impossible part.

At the same time ...

§ 323 (5) Sentence 1: Rescission of the whole contract in case of partial performance

Requirement: *The creditor proves that he has no interest in the partial performance.*

Then, the creditor may rescind the whole contract regardless of the responsibility of the debtor.



[III] Rescission for defective performance

(a) Defective performance (Recoverable defect)

The debtor effected the performance in due time, but failed to perform in conformity with the contract.

If the defect is recoverable (the cure is possible), then ...

§ 323 (1): Setting a reasonable period for cure

Requirement: No cure by the debtor, and the period elapses unsuccessfully.

§ 323 (5) Sentence 2: Rescission of the whole contract in case of defective performance

Requirement: No successful defense by the debtor “the breach of duty is trivial”

Then, the creditor may rescind the whole contract regardless of the responsibility of the debtor.



(b) Defective performance (Irrecoverable defect)

The debtor effected the performance in due time, but failed to perform as owed (defective performance).

If the defect is irrecoverable (the cure is impossible), then ...

§ 275: Exclusion of the duty of cure

The debtor is released from duty of cure. Then ...

§ 326 (1) Sentence 2 excludes the application of Sentence 1: No automatic “Price reduction” under § 441 (3)

§ 326 (5) refers to § 323: Rescission of the contract where the debtor is released from duty to perform.

§ 323 (5) Sentence 2: “If the debtor has not effected performance in conformity with the contract, ... “

Requirement: No successful defense by the debtor “the breach of duty is trivial”

Then, the creditor may rescind the whole contract regardless of the responsibility of the debtor.



G*. Demand for damages besides rescission

In the case where the creditor suffers damages caused by non-performance, he may demand damages besides rescission of the contract ...

§ 325: Damages and rescission

§ 280 (1): Liability for damages caused by breach of duty

Requirement: No successful defense by the debtor against responsibility

Besides rescission, the creditor may demand damages in lieu of performance (expectation interests).

Table of Contents

New Scheme of “Remedies for non-performance” in the Modernized German Law on Obligations.....	1
A. Basic principle of liability for breach of duty.....	1
B. Demand for damages caused by default.....	1
C. Demand for damages in lieu of performance (“Expectation interest”).....	2
[I] Damages in lieu of complete performance.....	2
(a) Non-performance (default).....	2
(b) Breach of duty of care under § 241(2).....	2
(c) Complete exclusion of the duty of performance under § 275.....	2
[II] Damages for partial non-performance.....	3
(a) Partial default.....	3
(b) Partial release from duty of performance (partial impossibility).....	3
[III] Damages for defective performance.....	4
(a) Defective performance (Recoverable defect).....	4
(b) Defective performance (Irrecoverable defect).....	4
F. Reimbursement of useless expenses (“Reliance interest”).....	4
G. Rescission of reciprocal contract.....	5
[I] Rescission for complete non-performance.....	5
(a) Non-performance (default).....	5
(b) Breach of duty of care under § 241(2).....	5
(c) Complete exclusion of the duty for performance under § 275.....	5
[II] Rescission for partial non-performance.....	5
(a) Partial default.....	5
(b) Partial release from duty of performance (partial impossibility).....	6
[III] Rescission for defective performance.....	6
(a) Defective performance (Recoverable defect).....	6
(b) Defective performance (Irrecoverable defect).....	6
G*. Demand for damages besides rescission.....	6