



Paul Varul

Professor, University of Tartu

Performance and Remedies for Non-performance: Comparative Analysis of the PECL and DCFR^{*1}

1. Introduction

Surely both performance and remedies for non-performance are among the central categories in the Draft Common Frame of Reference.^{*2} A large proportion of disputes arise from the question of how obligations should be duly carried out and which remedies can be taken up in the event of non-performance. The articles concerning performance are contained in DCFR Book III Chapter 2; those governing remedies for non-performance can be found in Chapter 3 of the same book. The DCFR's Books I–III are based on the Principles of European Contract Law.^{*3} The same applies to performance and remedies for non-performance — DCFR Book III's Chapters 2 and 3 are expansions of the PECL's Chapters 7, 8, and 9. The changes may be divided into three classes: 1) terminological, 2) structural, and 3) substantive. Most of the substantive changes and corrections have been made in DCFR Book III Chapter 3, concerning remedies for non-performance; there are relatively few changes in Chapter 2 concerning performance in comparison to the PECL. The fact that fewer substantive changes were needed in such important parts as the material on performance and remedies for non-performance shows the high quality level of the PECL material, which has indeed stood the test of time.

On the basis of Estonia's experience, we can assure that the PECL articles have justified themselves in real situations. The PECL served as one of the main sources for the Estonian Law of Obligations Act^{*4}, which, in turn, is the most important and the lengthiest part of Estonia's new Civil Code.^{*5} The Law of Obligations Act, the General Part of which is based on the PECL, has been in force since 2002. Considerable judicial practice has developed since then, proving that no major mistakes, discrepancies, or gaps in the regulation have been

¹ The article is based on the presentation "Performance and remedies for non-performance" that was presented by the author at the conference "The Draft Common Frame of Reference" in Ljubljana on 28–29 April 2008. The conference was organised by the Academy of European Law (co-ordinator Dr. Angelika Fuchs) in co-operation with the Ministry of Justice of the Republic of Slovenia, in the framework of the Slovenian Presidency of the Council of the EU.

² Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Interim Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). C. von Bar, E. Clive, H. Schulte-Nölke, H. Beale, J. Herre, J. Huet, P. Schlechtriem †, M. Storme, S. Swann, P. Varul, A. Veneziano, F. Zoll (eds.). Munich: Sellier 2008.

³ Principles of European Contract Law. Parts I and II. Combined and Revised. Prepared by the Commission on European Contract Law, Chairman: Professor Ole Lando. O. Lando, H. Beale (eds.). The Hague, London, Boston: Kluwer Law International 2000; Principles of European Contract Law. Part III. Prepared by the Commission on European Contract Law, Chairman: Professor Ole Lando. O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.). The Hague, London, New York: Kluwer Law International 2003.

⁴ Law of Obligations Act (võlaõigusseadus), adopted on 26 September 2001. – RT I 2001, 81, 487 (in Estonian).

⁵ The new Estonian Civil Code consists of five parts; in addition to the Law of Obligations Act they are: General Part of the Civil Code Act (tsiviilseadustiku üldosa seadus), adopted on 25 June 1994. – RT I 1994, 53, 889 (in Estonian); Law of Property Act (asjaõigusseadus), adopted on 9 June 1993. – RT I 1993, 39, 590 (in Estonian); Family Law Act (perekonnaseadus), adopted on 12 October 1994. – RT I 1994, 75, 1326 (in Estonian) and Law of Succession Act (pärimisseadus), adopted on 15 June 1996. – RT I 1996, 38, 752 (in Estonian).

revealed in the application of the provisions of the Law of Obligations Act, which are similar to the PECL articles. Therefore, on the basis of Estonia's experience, we can recommend the DCFR as a good source, especially for those countries that are now preparing their new civil codes.

The scope of one article does not enable analysis of all articles of the DCFR concerning performance and remedies for non-performance in this paper. Neither will such an analysis be necessary in this case. The paper will focus mainly on the principal substantive changes that have been made in the DCFR as compared to the PECL.⁶

2. Performance

2.1. General remarks

Since the main purpose of the DCFR is to specify principles, definitions, and model rules, it pays more attention to principles and definitions than the PECL material does. The central concept is 'obligation', which does not only mean a contractual obligation; rather, it has a broader definition — **an obligation** is a duty to perform that one party to a legal relationship, the debtor, owes to another party, the creditor (DCFR, III.–1:101, paragraph 1).

Performance of an obligation is the doing by the creditor of what is to be done under the obligation or the not doing by the debtor of what is not to be done (DCFR, III.–1:101, paragraph 2). The definition makes it clear that 'performance' covers both positive and negative obligations.

DCFR Book III Chapter 2, 'Performance', is not the only basis for defining due performance of an obligation. Firstly, general principles such as good faith and fair dealing (DCFR III.–1:103) and obligation of co-operation (DCFR III.–1:104) have to be taken as the basis; these principles are also contained in the PECL (articles 1:201 and 1:202). As a new principle, DCFR III.–1:105 sets forth the non-discrimination rule, according to which Chapter 2 ('Non-discrimination') of Book II applies with appropriate adaptations to the performance of any obligation to provide access to, or to supply, goods, services, or other benefits that are available to members of the public.

Another important principle that needs to be taken into account when one is analysing and applying the DCFR articles on performance and remedies for non-performance is the party autonomy principle (DCFR II.–1:102), according to which parties may exclude the application of any of the following rules relating to contracts or other juridical acts, or the rights and obligations arising from them, or derogate or vary their effects, except as otherwise provided.

2.2. Specific rules concerning performance

As mentioned above, the articles of DCFR Chapter 2 are largely based on the relevant provisions of PECL Chapter 7. The most important rules concerning performance are those regulating the place, time, and order of performance, and the method of payment. The place of performance has been defined in the DCFR's article II.–2:101 in accordance with the same main rule as in the PECL — if the place of performance of an obligation cannot be otherwise determined from the terms regulating the obligation, it is:

- a) in the case of a monetary obligation, the creditor's place of business and;
- b) in the case of any other obligation, the debtor's place of business.

Naturally, it should be kept in mind that very often the place of performance is fixed or otherwise determinable by a contract. When compared to the PECL article 7:101, DCFR III.–2:101 contains an additional rule: if a party causes any increase in the expenses incidental to performance by change in place of business or habitual residence subsequent to the time when the obligation was incurred, that party must bear the increase. However, the parties may agree otherwise.

When it comes to the **time** of performance, the wording of DCFR III.–2:102 is somewhat different from that of PECL article 7:102, but the content has remained unchanged; the same applies to early performance — a creditor may reject an offer to perform before performance is due unless the early performance would not cause the creditor unreasonable prejudice (DCFR III.–2:103 and PECL article 7:103).

The DCFR has no essential changes when compared to the PECL as regards the order of performance (DCFR III.–2:104 and PECL article 7:104) and alternative performance (DCFR III.–2:105 and PECL article 7:105).

⁶ The main sources for this article are the PECL Chapters 7, 8 and 9 with commentaries and DCFR Book III Chapters 2 and 3 with draft commentaries.

The provisions governing **performance by a third party** (DCFR III.–2:107 and PECL article 7:106) have been somewhat changed. The basic rule remains the same — where personal performance by the debtor is not required, the creditor cannot refuse performance by a third party, if:

- a) the third party acts with the assent of the debtor; or
- b) the third party has a legitimate interest in performing and the debtor has failed to perform or it is clear that the debtor will not perform at the time performance is due.

The rule that performance by a third party discharges the debtor also remains the same; however, the DCFR sets forth a new exception to this rule, that the debtor will remain not discharged to the extent that the third party takes over the creditor's right by assignment or subrogation. Another new provision is DCFR III.–2:107, paragraph 3, according to which, if personal performance by the debtor is not required and the creditor accepts performance of the debtor's obligation by a third party, although the creditor could refuse such performance, the debtor is discharged but the creditor is liable to the debtor for any loss caused by that acceptance. Whether the third party who discharges the debtor's obligation has any recourse against the debtor will depend on the circumstances and on other rules on benevolent intervention and the law on unjustified enrichment.

The rules on method of payment and on currency of payment, as well as imputation of performance, property not accepted, money not accepted, and costs of performance are essentially the same in the DCFR and in the PECL.

A new article not contained in the PECL is DCFR III.–2:114, 'Extinctive Effect of Performance', which sets out the following rule: full performance extinguishes the obligation if it is:

- a) in accordance with the terms regulating the obligation; or
- b) of such a type as by law to afford the debtor a good discharge.

It is obvious that full performance in accordance with the terms regulating the obligation will extinguish the obligation. Therefore, performance that is not full or not in conformity with the terms regulating the obligation will not extinguish the obligation. This, however, is subject to the qualification that there are various situations wherein the rules of the DCFR provide for the debtor obtaining a good discharge even if performance is not strictly in accordance with the obligation. For example, the rules on assignment sometimes enable the debtor to obtain a good discharge by paying the 'wrong' creditor in good faith.

3. Remedies for non-performance

3.1. General remarks

DCFR Book III Chapter 3 ('Remedies for Non-performance') is based on the PECL Chapters 8 and 9, but, when it is compared to Book III Chapter 2 ('Performance'), major changes have been made and the structure of the articles has been revised. In fact, the PECL Chapters 8 and 9 are already well-structured — the general bases for applying remedies are followed by provisions concerning particular remedies. The Estonian Law of Obligations Act follows exactly the same structure, which has justified itself very well in practice.

The general provisions on remedies are primarily based on the principles set forth in the PECL — such as the principle of excusability and of accumulation of remedies, and rules excluding or restricting remedies. There are two important changes when this material is compared to PECL Chapter 8 in the general provisions on remedies: concerning notice (III.–3:106 and III.–3:107) and cure (III.–3:202 through III.–3:204).

According to DCFR article III.–3:106, if the creditor gives notice to the debtor because of the debtor's non-performance of an obligation or because such non-performance is anticipated, and the notice is properly dispatched or given, a delay or inaccuracy in the transmission of the notice or its failure to arrive does not prevent it from having effect. The notice has effect from the time at which it would have arrived in normal circumstances. This is an exception to the general rule, according to which notice takes effect when it reaches the addressee. However, article III.–3:106 makes an exception, placing the risk of loss, mistake, or delay of transmission of the message with the defaulting debtor rather than with the creditor. This dispatch rule does not apply to notice that is to be given by the defaulting debtor.

DCFR article III.–3:107 is also new in comparison to the PECL content. According to this article, if, in the case of an obligation to supply goods or services, the debtor supplies goods or services that are not in conformity with the terms regulating the obligation, the creditor may not rely on the lack of conformity unless the creditor gives notice to the debtor within reasonable time.

A debtor who has not performed at all knows the position and does not need to be notified, and the creditor should not lose any remedies by not providing notification. The only effect of the failure to notify is that the person supplied loses the right to rely on the non-conformity.

The above rules do not apply if the creditor is a consumer.

As mentioned above, remedy by the debtor of non-conforming performance is regulated in much greater detail than in the PECL. The debtor's possibility for remedy has been extended in DCFR article III-3:202 also in the event that the debtor offers such remedy immediately after the creditor has provided notification about the lack of conformity. In such case, the creditor cannot exercise any other remedies for non-performance save for withholding performance during the time reasonably needed for remedy. At first sight, this rule seems very favourable to the debtor. However, this rule is heavily qualified by the restrictions in the next article — in DCFR article III-3:203, on when the creditor need not allow the debtor an opportunity to provide remedy. For example, the creditor may not allow the debtor a period in which to attempt to render remedy if:

- 1) failure to perform a contractual obligation within the time allowed for performance amounts to fundamental non-performance;
- 2) the creditor has reason to believe that the debtor's performance was made with knowledge of the non-conformity and was not in accordance with good faith and fair dealing; or
- 3) the creditor 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.

The consequence for the creditor of allowing the debtor an opportunity to render cure is that during the period allowed for cure the creditor may withhold performance of reciprocal obligations but may not resort to any other remedy. If the debtor fails to effect cure within the time allowed, the creditor may resort to any available remedy.

3.2. The right to enforce performance

The right to enforce performance may be regarded as the most important legal remedy. The creditor's main interest is presumed to lie in the debtor's performance of the debtor's obligation. Enforcement of performance is essentially different from all other remedies and the most important of them. Monetary obligations and non-monetary obligations should be distinguished when one is speaking about enforcement of performance.

3.2.1. Monetary obligations

As a rule, it is always possible to enforce monetary obligations. Monetary obligation refers to every obligation to make a payment of money, regardless of the form of payment or the currency. This includes even a secondary obligation, such as the payment of interest or of a fixed sum of money as damages. But, in each case, the monetary obligation must be due before it can be enforced. The principle that monetary obligations always can be enforced is not quite so certain where the monetary obligation has not yet been earned via the creditor's own performance and it is clear that the debtor will refuse to receive the creditor's future performance. The creditor is normally entitled to perform and thereby to earn the price. The debtor's unwillingness to receive the creditor's performance is therefore, as a rule, irrelevant. However, according to DCFR article III-3:301, paragraph 2, there are two situations in which the above principle does not apply: firstly, cover transactions and, secondly, unreasonable performance. A cover transaction means that a creditor who can make a reasonable cover transaction without significant trouble or expense is not entitled to continue with performance against the debtor's wishes and cannot demand payment of the price for it.

Unreasonable performance means that before performance has begun, the debtor makes it clear that performance is no longer wanted. The feature common to these two cases is that the debtor is at risk of being forced to accept a performance that is no longer wanted.

3.2.2. Specific performance of a non-monetary obligation

The creditor is entitled to enforce **specific performance** of a non-monetary obligation by the debtor. This right is more limited than the right to enforce monetary obligations, while it is an especially important remedy, as the creditor has not only a substantive right to the debtor's performance but also a remedy to enforce this right specifically — e.g., by applying for an order or decision of a court.

The right to enforce specific performance of a non-monetary obligation applies not only where no performance at all is tendered by the debtor but also where the debtor has attempted to perform but the attempt does not conform to the terms regulating the obligation. This is made clear by paragraph 2 of article III-3:301. However, the right to enforce specific performance is subject to the exceptions in paragraph 3 and to the time limit in paragraph 4 of the same article.

Whether a creditor should be entitled to enforce specific performance of a non-monetary obligation is controversial. In England and Ireland, specific performance is regarded as an exceptional remedy, but in other European countries it is regarded as an ordinary remedy. There is reason to believe, however, that results in practice are rather similar under both theories. The DCFR takes a pragmatic approach, being based on the

same principles as the PECL article 9:102 and is at the same time an expression of a compromise between the different legal orders.

A general right to enforce specific performance has several advantages. Firstly, through specific relief, the creditor obtains as far as possible what is due; secondly, difficulties in assessing damages are avoided; and, thirdly, the binding force of obligations is stressed.

On the other hand, comparative research into the laws, especially commercial practices, demonstrates that the principle of allowing the enforcement of specific performance must be limited. The limitations are variously based upon natural, legal, and commercial considerations and are set out in paragraphs 3 and 4 of DCFR article III.–3:301. In all of these cases, other remedies, especially damages and — in appropriate cases — termination, may be adequate remedies for the creditor.

If the debtor attempts to perform but the attempted performance does not conform to the terms regulating the obligation, the creditor may choose to insist upon a conforming performance. This may be advantageous for both parties. The creditor obtains what is due, and the debtor obtains a discharge (and any price or other counter-performance that is due) and preserves a reputation as a person who fulfils obligations.

A conforming performance may be achieved in a variety of ways — for example, via repair, delivery of missing parts, or delivery of a replacement.

The right to enforce a conforming performance is, of course, subject to the same exceptions as the general right to enforce performance. Thus, a debtor cannot be forced by court order to accomplish a performance conforming to the obligation if this would be unduly burdensome or expensive or if the creditor has failed to demand performance within a reasonable time, or the performance is impossible or of a personal character.

For obvious reasons, there is no right to enforce performance if it is **impossible**. This is particularly true in cases of factual impossibility — i.e., if some act in fact cannot be carried out. The same is true if an act is prohibited by law. Similarly, specific performance is not available where a third party has acquired priority over the creditor with respect to the subject matter of the obligation.

If an impossibility is only temporary, enforcement of performance is excluded during that time.

Performance cannot be required if it would be **unreasonably burdensome or expensive** for the debtor. Here, ‘burdensome’ does not refer to financial burden. It is broader than that. It may cover something that involves a disproportionate effort or even something that was liable to cause great distress, vexation, or inconvenience. No precise rule can be stated as to when a performance would be ‘unreasonably’ burdensome or expensive.

In deciding whether performance would be unreasonably burdensome or expensive, it may be relevant to take into account whether the creditor could obtain performance easily from another source and claim the cost of doing so from the debtor.

It might be pointless to try to enforce specific performance of certain obligations of a highly personal character. In the main, however, this is based on respect for the debtor’s human rights. The debtor should not be forced to perform if the performance consists in the provision or acceptance of services or work that is of such a personal character or is so dependent upon a personal relationship that enforcement would infringe the debtor’s human rights. The criterion here is not simply the personal nature of the work or services to be provided. To exclude enforcement of specific performance of all obligations to provide work or services of a personal character would be far too broad. Instead, the criterion is whether enforcing performance would be unreasonable. In deciding that question, regard would have to be given to the debtor’s human rights and fundamental freedoms, including in particular the rights to liberty and bodily integrity. For example, an obligation to take part in a medical experiment involving surgical procedures performed on the debtor would not be specifically enforced. There is no reason, however, that a firm of professional carers should not be forced to perform their contracts to supply personal care services. And there is no reason that many ordinary employment contracts should not be enforced, although certain employment contracts requiring work or services of a highly personal nature from the debtor’s point of view, or the continuance of a highly personal relationship, might be covered by DCFR article III.–3:302, paragraph 2 (C). The position is similar in relation to partnership contracts and to contracts to form a company. Some might involve such a close personal relationship that the exception would apply. Others might not.

The expression ‘of a personal character’ does not cover services or work that may be delegated. However, a provision in a contract that work may not be delegated does not necessarily render that work of a personal character. If the contract does not need the personal attention of the contracting party but could be performed by employees, the term prohibiting delegation may be interpreted as preventing only delegation to another enterprise, such as a subcontractor. The signing of a document would not usually constitute performance of a personal character. An obligation to sign a document can be enforced in greatest part, since the debtor’s act can often be replaced by a court decree.

A request for performance of a non-monetary obligation must be made **within a reasonable time**. This provision is supplementary to the normal rules on notification of non-conformity and on prescription and is intended to protect the debtor from hardship that could arise in consequence of a delayed request for performance by

the creditor. The length of the reasonable period of time is to be determined in view of the rule's purpose. It is the debtor who will have to demonstrate that the delay in requesting performance was unreasonably long.

There could be a danger that a creditor, by insisting unreasonably on specific performance by the debtor when the creditor could easily obtain performance elsewhere, could inflate the damages payable for non-performance by the debtor or the amount of a stipulated payment for non-performance that is calculated by the day or week. One control on such abuse is the general provision that remedies must be exercised in accordance with the principles of good faith and fair dealing. Another, more specific, control is provided by paragraph 5 of DCFR article 3:302, which prevents the creditor from recovering damages or a stipulated amount for non-performance to the extent that the creditor has increased the loss or the amount of the payment by insisting unreasonably on specific performance in circumstances wherein the creditor could reasonably be expected to obtain performance from another source. This is also a new rule, not contained in the PECL.

3.3. Termination

Termination of an obligation is the second most important remedy after enforcement of performance. Without underestimation of other legal remedies, enforcement and termination are the most important ones, because a creditor first needs to make a principal choice between performance and termination. More changes have been introduced to the PECL rules when it comes to termination as compared to other remedies. The structure of DCFR Book III Section 5 ('Termination') has been fleshed out greatly when compared to PECL Chapter 9 Section 3 ('Termination of Contract'). DCFR Book III Section 5 is broken down into subsections covering the following: grounds for termination; scope, exercise, and loss of right to terminate; effects of termination; and restitution. Such greater structural articulation makes the regulation easier to follow and understand.

Unlike the other remedies, termination as a remedy in Section 5 of Book III of the DCFR applies only to contractual obligations and contractual relationships. There are two reasons for this. Firstly, it would be extremely unusual for the remedy of termination to be useful in relation to non-contractual obligations. The main usefulness of termination is that it frees the creditor to obtain goods or services elsewhere and, in certain situations, to recover what has been paid or provided already under the contract. In the case of reciprocal non-contractual obligations, other available remedies — withholding of performance, enforcement of specific performance, damages, and interest — should be adequate. Secondly, it could be regarded as inappropriate to allow private persons to terminate by notice obligations arising by operation of law.

The use of the word 'termination' leads to the question of what is terminated. The PECL speaks of 'termination of the contract'. However, in the context of these rules, the expression 'termination of the contract' is not strictly accurate. Once a contract as a juridical act has taken place, it is completed and cannot be terminated. It would be more accurate to say that it is the contractual relationship between the parties that is terminated. However, the relationship is not necessarily terminated completely. There may be cases in which, for example, only a separable part of the parties' obligations and rights under the contract is terminated. In such cases, aspects of the relationship may survive. This is why the relevant articles refer to termination of the contractual relationship in whole or in part.

The grounds for termination under the DCFR are essentially of two types. Firstly, there is fundamental non-performance by the debtor, regulated by article III.-3:502 (covering termination for fundamental non-performance). Secondly are what might be called equivalents to non-performance, regulated by the succeeding three articles. These are:

- 1) where the creditor has allowed the debtor further time to perform but the debtor has not performed within that time (article III.-3:503);
- 2) where there is an anticipated fundamental non-performance (article III.-3:504); and
- 3) where the debtor has failed to provide adequate assurance of performance when called upon to do so (article III.-3:505).

Termination may be effected by the act of the creditor alone; there is no need to bring action in court. Termination is effective only if notice of termination is given by the creditor to the debtor.

Whether, in cases of non-fulfilment of a contractual obligation, the creditor should have the right to terminate the contractual relationship in whole or in part depends upon a weighing of conflicting considerations. On the one hand, the creditor may desire broad rights of termination. For the debtor, on the other hand, termination usually involves a serious detriment. For these reasons, it is fundamental non-performance that will as a rule justify termination. In one respect, DCFR article 3:502 differs from the provision of the PECL that defines 'fundamental non-performance', article 8:103. PECL article 8:103 (a) provides that non-performance would also be fundamental if strict compliance with the obligation were 'of the essence' of the contract. This left it open to a court to treat an obligation as 'of the essence' so that any failure to perform it would give the other party the right to terminate the contractual relationship, even if the non-performance had no serious consequences for the other party. In some situations, the parties may wish certain obligations to be treated in that

way — for example, time provisions in commodity contracts. However, it does not seem appropriate to apply the same approach as a general rule to all contracts. If the parties wish non-performance of an obligation to have that effect, they remain to provide for it in their agreement.

Article III.–3:502, paragraph 2 (a), of the DCFR provides that where the effect of non-performance is substantially to deprive the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, then in general the non-performance is fundamental. This is not the case, however, where the debtor did not foresee and could not reasonably be expected to have foreseen those consequences.

Paragraph 2 (b) of the DCFR article III.–3:502 makes it clear that, even where the non-performance of an obligation does not substantially deprive the creditor of what the creditor could have expected to receive, the creditor may treat the non-performance as fundamental if it was intentional or reckless and gives the creditor reason to believe that the debtor's future performance cannot be relied on.

The terms of the contract will always be important in decision of whether or not a non-performance is fundamental. What a party is entitled to expect depends on what the contract provides. However, the parties may wish to go beyond merely indicating what the creditor is entitled to expect. They may wish to confer an express right to terminate for any non-performance, however minor, or even for something that is not non-performance at all. They are free to do so.

Similarly to the PECL, the DCFR sets out rules according to which, if an additional term is granted and the debtor still fails to fulfil the obligation, the creditor may terminate the obligation even if the breach was not fundamental. Also, the creditor has the right of termination for anticipated non-performance and for inadequate assurances of performance.

The right to terminate is exercised by way of a notice of termination, which must be given within reasonable time after the creditor's right of termination is created. DCFR article 3:508, paragraph 2, contains a new rule according to which, if the debtor has the right of cure, the creditor's right of termination is created after the time for cure has expired and the remedy has not been successful. If the notice is not given within reasonable time, the creditor loses the right to terminate.

Compared to the PECL, the DCFR lays down more specific rules on the effects on obligations under the contract (DCFR articles III.–3:511 to III.–3:515). As the main consequence, the parties no longer have the right of enforcement; however, they have rights and obligations concerning restitution. Certain rights and obligations arising from the contract survive; for example, termination does not affect any provision of the contract for the settlement of disputes. Restitution is not required where the performance was due in separate parts or was otherwise divisible and what was received by each party resulted from due performance of a part for which counter-performance was duly carried out.

3.4. Withholding of performance, price reduction, damages, and interest

The DCFR does not contain major substantive changes from the PECL when it comes to other remedies: withholding performance, price reduction, damages, and interest. There are, however, some new articles on interest — namely, III.–3:709 ('When interest to be added to capital') III.–3:710 ('Interest in Commercial Contracts'), and III.–3:711 ('Unfair Terms relating to Interest').

4. Conclusions

Performance and remedies for non-performance have central meaning in the law of obligations, especially in contract law, as they involve the rules that are often used for settlement of disputes. The rules on performance and non-performance have been thoroughly developed over a long period of time, first in development of the PECL and now in the preparation of the DCFR. Therefore, it may be said that both parts of the DCFR as analysed in this article — performance and remedies for non-performance — serve as a great example to states for legislative drafting as well as useful harmonised provisions of law for the European Union.