

Different remedies for breach of contract under Dutch contract law

The general remedies are three separate alternatives: the injured party may choose **only one**.



THIS

OR

OR

1

Choose between one of the following remedies:

Article 3:296 DCC

Specific performance of the contractual obligation

Step 1
Assess the nature of the breach of contract and notify the debtor

- ✓ The obligation is due and has not been performed.
- ✓ Performance is not temporarily or permanently impossible.
- ✓ Breach can be either attributable to debtor or not attributable.

Action: object to debtor regarding the fault in the performance within a reasonable period of time after discovering the fault or after the fault should reasonably have been discovered.

Action: Check the contract for special provisions on performance (i.e. exemptions for performance or an extension clause).

Step 2
Demand specific performance of the breached contract

✓ **Action 1:** demand specific performance of the breached contract in writing to debtor.

Possibly: provide incentive for the party in breach to comply with its contractual obligations by suspending counterperformance "opschorting", i.e. payment.

Does the debtor perform its contractual obligation?

YES ✓

NO

Action 2: request a court order to enforce specific performance of the contract.

Possibly: Subject to a periodic penalty payment "dwangsom".

2

Articles 6:74 & 6:87 DCC

Damages as an alternative to performance

Step 1
Assess the nature of the breach of contract and notify the debtor

- ✓ The obligation is due and has not been performed.
- ✓ Breach is attributable
- ✓ Breach is not of minor importance and justifies conversion of the right to performance to a claim for damages.

Action: object to debtor regarding the fault in the performance within a reasonable period of time after discovering the fault or after the fault should reasonably have been discovered.

Action: Check the contract for special provisions on termination (i.e. termination clause).

Step 2
Determine whether a notice of default is necessary

Permanently impossible?

NO
Notice of default is **required**.

YES
Notice of default is **not required**.

Action: declare debtor in default by final, written notice with additional period for performance "ingebrekestelling";

Final notice exception

Step 3
Claim damages as an alternative to performance

✓ **Action 1:** written notification to debtor of conversion of right to performance to a claim for damages as alternative to performance.

Does the debtor comply with the request for damages?

YES ✓

NO

Action 2: request the court to grant the claim for damages as alternative to performance.

3

Articles 6:265 & 6:271 DCC

Termination of the contract and the obligation to reverse obligations already performed

Step 1
Assess the nature of the breach of contract and notify the debtor

- ✓ The obligation is due and has not been performed.
- ✓ Breach is either attributable to debtor or not attributable, but sufficiently serious to justify termination.

Action: object to debtor regarding the fault in the performance within a reasonable period of time after discovering the fault or after the fault should reasonably have been discovered.

Action: Check the contract for special provisions on termination (i.e. termination clause).

Step 2
Determine whether a notice of default is necessary

Permanently impossible?

NO
Notice of default is **required**.

YES
Notice of default is **not required**.

Action: declare debtor in default by final, written notice with additional period for performance "ingebrekestelling";

Final notice exception

Step 3
Terminate the breached contract

✓ **Action 1:** terminate the contract in whole or in part by written notification to debtor and request the reversal of obligations already performed, such as payment.

Does the debtor comply with the request to reverse obligations already performed?

YES ✓

NO

Action 2: request the court to rule that the contract has been terminated and that already performed obligations must be reversed.

Final notice exception

No additional period for performance is required if (non-exhaustive):

- (a) performance is temporarily impossible; or
- (b) the debtor's attitude suggests indicates that a final notice would be futile.

Final written notice is not required when the debtor is immediately in default, if (non-exhaustive):

- (a) a strict deadline for performance has passed; or
- (b) the obligation stems from a tort or the payment of damages and this is not immediately performed; or
- (c) the injured party is to infer from a statement by the debtor that the latter will breach the performance of the obligation.

Please note, these flow charts are intended to provide an abstract non-exhaustive overview of the general remedies, as the criteria and their interpretation depend on all the relevant circumstances, which differ on a case-by-case basis. Furthermore, special areas of law, such as consumer law, may provide certain additional criteria.