

RESPONSE FORM

DISCUSSION PAPER ON PENALTY CLAUSES

We hope that by using this form it will be easier for you to respond to the proposals or questions set out in the Discussion Paper. Respondents who wish to address only some of the questions and proposals may do so. The form reproduces the proposals/questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

Please note that information about this Discussion Paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

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.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gsi.gov.uk. Comments not on the response form may be submitted via said email address or by using the [general comments form](http://www.scotlawcom.gov.uk/contact-us#sendcomments) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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**List of Questions**

1. Do consultees know of information or statistical data or have comments on any actual or potential economic impacts of either the current law relating to penalty clauses or any proposed reform of that law? We would especially value information about why and how penalty clauses are used, the effects of their deployment, and their impact on small and medium-sized enterprises.

 (Paragraph 1.16)

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

2. Should the decision in *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Limited v Beavis* be left to ‘bed in’, with the further development of the law and its application being kept under review, but no specific law reform being recommended at this point?

(Paragraph 4.16)

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

3. Should the common law on penalties be abolished (i) outright; or (ii) in its application to contracts between parties all acting in the course of business; or (iii) in its application to consumer contracts?

(Paragraph 4.24)

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| **Comments on Question 3**«InsertTextHere» |

4. Should it be provided that the common law rule against penalties is abolished, to be replaced by a regime directed at regulating specified types of contract terms if they have excessively penal effects?

(Paragraph 4.36)

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| **Comments on Question 4**«InsertTextHere» |

5. Should a term of a contract be regarded as potentially subject to regulation for penality only if it becomes operational upon a breach of contract by the party to whom the penalty would be applied?

(Paragraph 5.11)

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

6. Or should the scope of the concept be extended to cover also terms

 (a) providing for early termination of the contract and/or

 (b) giving a party options between different ways of performing its obligations under the contract but the choice of one has relatively adverse consequences for the party compared to the other?

(Paragraph 5.11)

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

7. In the light of the proposed express provision making contractual penalties generally enforceable, do consultees agree that judicial control over contractual penalties that are excessively penal in their effects should be possible whatever form the penalty takes (e.g. a payment, a forfeiture, a transfer of property, a withholding of performance otherwise due)? Please explain any disagreement, including that relating to any particular kind of clause.

(Paragraph 5.20)

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

8. Is it un-necessary to empower the court to consider substance rather than form when deciding whether a clause is within the scope of the new rule against ‘excessive penality’?

(Paragraph 5.20)

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

9. Do consultees also agree that there should be provision exempting from judicial control penalties which are specifically provided for in other enactments or rules of law?

(Paragraph 5.20)

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

10. Do consultees agree that conventional irritancy clauses should be excluded from the controls against ‘excessive penality’?

(Paragraph 5.24)

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

11. Should it cease to be possible for a court to declare a clause unenforceable for excessive penality (apart from consumer cases)?

(Paragraph 5.32)

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| **Comments on Question 11**«InsertTextHere» |

12. Should the only sanction for the excessive penality of a clause (apart from consumer cases) be judicial modification?

(Paragraph 5.32)

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| **Comments on Question 12**«InsertTextHere» |

13. Would a useful guideline in determining excessive penality be a comparison between the stipulated penalty and the actual harm or hurt to the creditor’s legitimate interests, considered in the light of what the parties could reasonably assess on these matters at the time of contracting and all other relevant circumstances?

(Paragraph 5.53)

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

14. Should this guideline seek to spell out in a non-exhaustive way what may be a legitimate interest of the creditor in the penalty clause? This could include –

(a) actual performance of its obligations by the debtor,

(b) encouragement of prompt or early performance by the debtor,

(c) avoidance of litigation, and

(d) other commercial interests of the creditor.

(Paragraph 5.53)

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| **Comments on Question 14**«InsertTextHere» |

15. Views are invited on what more, if any, legitimate interests might be mentioned in such a list, such as –

(1) the protection of third parties who will suffer loss through breach or other performance-related event but who are not party to the contract and have no other means of recovering their losses;

(2) the promotion of wider societal goals favoured by the creditor in the obligation.

(Paragraph 5.53)

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| **Comments on Question 15**«InsertTextHere» |

16. Should contracting parties be encouraged to state in their contracts the interests which they seek to protect by their penalty clauses? Are there any interests apart from the punishment of the penalty-debtor which should be expressly excluded as illegitimate?

(Paragraph 5.53)

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

17. Would further useful guidelines be –

(a) whether the penalty clause had been negotiated between the parties at arms’ length;

(b) the availability of independent legal advice to the debtor under the penalty clause at the time of contracting;

(c) where the penalty clause was un-negotiated, the steps taken by the creditor to bring the penalty clause to the debtor’s attention at the time of contracting, or the extent to which the debtor was aware of the existence and effect of the clause;

(d) to take account of the actual or anticipated resources of the debtor as known to or reasonably anticipated by the creditor at the time of contracting?

(Paragraph 5.58)

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

18. Would another useful guideline be that in determining excessive penality a court should have regard to custom and practice in the relevant market?

(Paragraph 5.60)

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

19. Might there be a guideline that in cases where the penalty clause becomes operational on a breach of contract a court could have regard to whether or not the breach was trivial?

(Paragraph 5.61)

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

20. Views are invited on the most useful word or phrase (if any) with which to characterise the excessive penality that is to be subject to judicial control (e.g. ’manifestly’ or ’grossly excessive’, ’out of all proportion’, ’extravagant’, ’exorbitant’, ’unconscionable’), bearing in mind (1) that the exercise of judicial control is to be exceptional and not a matter of nice calculation in any particular case; and (2) the possible guidelines on what will constitute excessive penality set out in questions 13-19 above.

(Paragraph 5.62)

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

21. Should the court be empowered to grant any order that seems just in all the circumstances when it modifies an excessively penal clause (or holds it unenforceable if that sanction is retained)?

(Paragraph 5.68)

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

22. Should the court be encouraged to use the list of factors to be taken into account in determining excessive penality in making any order modifying the penalty in question?

(Paragraph 5.68)

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

23. Should it be more specifically provided that any order for modification of the excessive penalty should do no more than remove its excessive element?

(Paragraph 5.68)

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| **Comments on Question 23**«InsertTextHere» |

24. If the answer to the preceding question is affirmative, do consultees agree that the words from “in all cases” to “making the debt effectual” in section 5 of the Debts Securities (Scotland) Act 1856 should be repealed?

(Paragraph 5.68)

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| **Comments on Question 24**«InsertTextHere» |

25. Should the legislation provide specifically that clauses which provide for liquidated damages, i.e. are based on a genuine pre-estimate of the loss likely to be caused by a breach of contract, cannot be held to be penal, no matter what the later circumstances may be?

(Paragraph 5.70)

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| **Comments on Question 25**«InsertTextHere» |

26. Do consultees agree that only a party should be able to raise the issue of excessive penality?

(Paragraph 5.72)

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| **Comments on Question 26**«InsertTextHere» |

27. Should the court be required to modify a penalty found to be excessive, or should the remedy be at the discretion of the court?

(Paragraph 5.72)

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| **Comments on Question 27**«InsertTextHere» |

28. Do consultees agree that the initial onus of showing that a penalty is excessive should lie on the party so contending?

(Paragraph 5.77)

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| **Comments on Question 28**«InsertTextHere» |

29. Do consultees agree that it is not necessary to have legislative provision on the cumulation of a penalty and other remedies?

(Paragraph 5.82)

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| **Comments on Question 29**«InsertTextHere» |

30. Do consultees agree that in any law on penalty clauses it should be made clear that parties cannot contract out of the application of that law?

(Paragraph 5.83)

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| **Comments on Question 30**«InsertTextHere» |

31. Do consultees agree that the proposed rules on penalties should apply to such penalties provided for in bonds and other unilateral voluntary obligations in the same way as to those provided for in contracts?

(Paragraph 5.84)

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| **Comments on Question 31**«InsertTextHere» |

32. Do consultees agree that any new legislation (including outright abolition of the penalties rule, in whole or in part) should apply only to penalty clauses agreed after it comes into force?

(Paragraph 5.86)

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| **Comments on Question 32**«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.