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COMMENTARY ON

Art. 143 CO

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Title Four: Special Relationships relating to Obligations

Section One: Joint and Several Obligations

A. Joint and several debtors

I. Requirement

Art. 143

¹ Debtors become jointly and severally liable for a debt by stating that each of them wishes to be individually liable for performance of the entire obligation.

² Without such a statement of intent, debtors are joint and severally liable only in the cases specified by law.

CONTENT

I. Definition of the joint and several obligation 3

II. Differentiation..... 3

III. Origin 4

 A. By statement of intent 4

 B. By law 5

IV. Consequences..... 5

Bibliography 6

I. DEFINITION OF THE JOINT AND SEVERAL OBLIGATION

- 1 A joint and several obligation comprises at least two joint and several debtors on the debtors' side.¹ The creditor can request not only partial performance of an obligation but also full performance of the entire debt of each individual joint and several debtor (Art. 144 para. 1 CO). All debtors remain under the obligation until the entire claim has been redeemed (Art. 144 para. 2 CO). It is at the creditor's discretion against which debtor and to what extent he or she chooses to claim.² The internal compensation among the joint and several debtors does not affect the creditor's claim.³ However, the creditor may not be satisfied to more than full performance in total. The creditor's full or partial satisfaction by one joint and several debtor discharges the others to the same extent (Art. 147 CO).
- 2 The creditor may simultaneously claim full performance from each joint and several debtor. Therefore, multiple individual claims against each debtor exist.⁴ Due to the aforementioned principle that the creditor may not be satisfied to more than full performance, the claims compete against each other ("claim competition").⁵ Despite the multitude of claims, they effectively only figure as a single item in the creditor's assets.⁶ This competition among the claims does not hinder the creditor from disposing of each claim against each joint and several debtor individually. The creditor may cede a claim, remit the debt of or grant deferment to a single joint and several debtor at his or her discretion.⁷ A payment reminder and default only affect the addressed joint and several debtor.⁸ Each claim has its own legal fate.⁹
- 3 Regarding the differentiation between perfect and imperfect joint and several liability by the Federal Supreme Court,¹⁰ Art. 143 et seq. CO only govern the perfect joint and several liability in which two or more persons have collectively caused a damage and consequently are jointly and severally liable (Art. 50 CO). By analogy, most of the regulations of Art. 143 et seq. CO are also applicable to cases in which several debtors are liable for the same damage but on different legal grounds (imperfect joint and several liability, Art. 51 CO).¹¹

II. DIFFERENTIATION

- 4 It is necessary to distinguish the joint and several obligation from other legal relationships with multiple debtors.
- 5 In a group of **partial debtors**, only partial performance can be requested from each debtor. Unlike with a joint and several obligation, the creditor may not claim full performance of a single partial debtor but only the individually owed partial performance of said debtor.¹²

1. Gautschi, mn. 11; Weiss, p. 10.
 2. Tercier/Pichonnaz, mn. 1750; ZK-Krauskopf, mn. 2 to Art. 143 CO.
 3. BGE 93 II 329 consid. 3a.; Bucher, p. 491.
 4. BGE 94 II 313 consid. 4.; BGE 93 II 329 consid. 3b; CR-Romy, mn. 3 to Art. 143 CO; Gautschi, mn. 13.
 5. In German «Anspruchskonkurrenz», in French «concours d'actions». Perritaz, mn. 23 et seq.; ZK-Krauskopf, mn. 38 to Art. 143 CO.
 6. Gautschi, mn. 19; KUKO OR-Jung, mn. 4 to Art. 143 CO; Schwenzer, mn. 88.18; von Tuhr/Escher, p. 297.
 7. BGE 129 III 702 consid. 2.1; decision of the Federal Supreme Court 4A_599/2010 of 14 February 2011 consid. 4.2; BSK-Graber, mn. 1 to Art. 143 CO; Gauch/Schluep/Emmenegger, mn. 3735.
 8. Bucher, p. 494 et seq.; Gautschi, mn. 14; von Tuhr/Escher, p. 297 et seq.
 9. CR-Romy, mn. 3 to Art. 143 CO; ZK-Krauskopf, mn. 8 to Art. 143 CO.
 10. BGE 130 III 591 consid. 5.5.1; BGE 127 III 257 consid. 6. Cf. commentary on Art. 50 CO for further reference.
 11. BGE 133 III 6 consid. 5.3.4; decision of the Federal Supreme Court 4C.27/2003 of 26 May 2003 consid. 3.4; BSK-Graber, mn. 3 to Art. 143 CO. Cf. commentary on Art. 51 CO for the exceptions.
 12. Gauch/Schluep/Emmenegger, mn. 3686; Schwenzer, mn. 88.03; Tercier/Pichonnaz, mn. 1728.

- 6 With a **contract of suretyship** (Art. 492 et seq. CO), the creditor faces a principal debtor and a surety. While the principal debtor promises to perform his or her obligation, the surety is only liable if the principal debtor is either declared bankrupt, obtains a debt restructuring moratorium or is the object of debt enforcement proceedings by the creditor that have resulted in the issue of a definitive certificate of loss (simple suretyship, Art. 495 CO). With the phrase “joint and several” or an equivalent phrase, a person may enter a joint and several suretyship. The creditor may already resort to the surety before the principal debtor is declared bankrupt. The surety is liable for full performance if the principal debtor has defaulted in his or her debt and has been issued with payment reminders (Art. 496 CO). Contrary to the joint and several obligation, the suretyship is therefore only subsidiary to the principal obligation.¹³ Another difference lies in the accessoriness of the suretyship. Any abolition of the principal obligation such as an acquittal also eliminates the suretyship.¹⁴
- 7 If somebody **guarantees a performance by a third party**, he or she is liable in damages for the non-performance by said third party (Art. 111 CO). In contrast to a contract of surety, the guarantee is not accessory to the main debt. Unlike the joint and several obligation, the non-performance of the main debtor only leads to the creditor’s claim for damages against the guarantee and not to a claim for full performance of the original obligation.¹⁵

III. ORIGIN

A. By statement of intent

- 8 A joint and several obligation can arise by statement of intent. In this regard, each debtor promises the creditor to perform the full debt individually (Art. 143 para. 1 CO). The statement of intent may be declared explicitly by stating each debtor to be liable to the full performance (e.g. “débiteurs solidaires”¹⁶, “débiteurs pour le tout”¹⁷ or “einer für alle, alle für einen”¹⁸).¹⁹ It is not subject to a particular form (cf. Art. 11 para. 1 CO).²⁰
- 9 Under certain circumstances, a conduct implying such a statement of intent may likewise form a joint and several obligation under the principle of reliance.²¹ The sole fact that a group of debtors collectively concluded a contract does not assume a joint and several obligation by itself.²² However, in practice, the joint signing of a contract is a considerable indication.²³ In case of doubt, partial obligation is assumed instead.²⁴ Thus, the burden of proof lies upon the creditor if he or she claims full performance of an alleged joint and several debtor (cf. Art. 8 CC).²⁵ Case law examples where joint and several liability was presumed by the court include the simultaneous and joint sale of an unspecified

13. BSK-Pestalozzi, mn. 1 to Art. 495 CO.

14. BGE 113 II 434 consid. 2b; BSK-Pestalozzi, mn. 13 to Art. 492 CO; Bucher, p. 492; Weiss, p. 48 et seq.

15. Gauch/Schlupe/Emmenegger, mn. 3920; Schwenger, mn. 86.28; Tercier/Pichonnaz, mn. 1119.

16. BGE 111 II 284 consid. 2.

17. CR-Romy, mn. 6 to Art. 143 CO.

18. BK-Kratz, mn. 164 to Art. 143 CO.

19. BK-Kratz, mn. 163 et seq. to Art. 143 CO; BSK-Graber, mn. 5 to Art. 143 CO; CR-Romy, mn. 6 to Art. 143 CO; Weiss, p. 39 et seq.; Zahnd, p. 23.

20. BK-Kratz, mn. 182 to Art. 143 CO; Gautschi, mn. 82; Weiss, p. 41 et seq.; ZK-Krauskopf, mn. 87 to Art. 143 CO.

21. BK-Kratz, mn. 164 to Art. 143 CO; Tercier/Pichonnaz, mn. 1744.

22. BGE 116 II 707 consid. 3.; decision of the Federal Supreme Court 4A_599/2010 of 14 February 2011 consid. 3.2; CR-Romy, mn. 7 to Art. 143 CO. Cf. decision of the Federal Supreme Court 4A_461/2018 of 20 March 2019 consid. 4 on the exception under Art. 403 CO.

23. Huguenin, mn. 2301; Schwenger, mn. 88.15; ZK-Krauskopf, mn. 89 to Art. 143 CO.

24. Bucher, p. 493; Gauch/Schlupe/Emmenegger, mn. 3686; Huguenin, mn. 2282; Schwenger, mn. 88.05.

25. BSK-Graber, mn. 6 to Art. 143 CO.

block of shares by several shareholders,²⁶ the joint purchase of real estate for co-ownership at an auction²⁷ or the unreserved signing of a lease contract by three persons as tenants.²⁸

- 10 Finally, a joint and several obligation can also be entered retroactively by a cumulative assumption of a debt. A second debtor obligates him- or herself towards the creditor by taking on an additional, independent commitment which arises next to the original commitment of the first main debtor.²⁹

B. By law

- 11 The cases in which the law specifies joint and several liability are manifold. The grounds for such specifications by law lie notably in contract law, tort law, company law, law on securities, the Civil Code or the Civil Procedure Code.³⁰
- 12 The Code of Obligations states various circumstances under which joint and several obligations by statement of intent are either statutorily presumed (e.g. Art. 70 para. 2, Art. 544 para. 3 CO) or even stipulated (e.g. Art. 308, Art. 403, Art. 478 CO).³¹ In such circumstances in which a statutory provision dictates the joint and several obligation among the parties of a contract, it is essentially a contractual claim of the creditor nonetheless.³² This is relevant to the determination of the compensation according to the recourse cascade in Art. 51 para. 2 CO.
- 13 Joint and several obligations based on liability law may be formed mainly by Art. 50 et seq. CO. Various special laws such as Art. 60 para. 1, Art. 61 para. 3 and Art. 75 para. 1 of the Road Traffic Act or Art. 7 of the Product Liability Act explicitly state a joint and several obligation.³³
- 14 The Civil Code notably dictates the heirs to be jointly and severally liable for the debts of the deceased (Art. 603 para. 1 CC). Further examples can be found in Art. 121 para. 2, Art. 342 para. 2 or Art. 639 CC. In case of multiple persons participating in the proceedings of a civil lawsuit, the court may hold the parties jointly and severally liable for the procedural costs (Art. 106 para. 3 CPC).
- 15 Finally, joint and several obligations can also be found in public law. In particular, the Federal Act on Direct Federal Tax prescribes in Art. 13 the joint and several obligation for married couples for their tax debt. Art. 143 et seq. CO are used analogously in situations where the federal public law does not itself govern the specifications of the internal recourse among the joint and several debtors.³⁴

IV. CONSEQUENCES

- 16 The legal consequences of a joint and several debt arising from statement of intent or legal provision are regulated in Art. 144 et seq. CO. The external relationship between the creditor and the joint and several debtor is governed in Art. 144 - 147 CO. The internal relationship among the joint and several debtors is governed in Art. 148 - 149 CO. The provisions of Art. 144 - 149 CO are not legally binding. Different terms may be agreed upon by means of a contractual agreement.³⁵

26. BGE 116 II 707 consid. 3.

27. BGE 47 III 213 consid. 2.

28. Decision of the Obergericht Lucerne OG 1992 15 of 9 July 1992, publ. in: Luzerner Gerichts- und Verwaltungsentscheide (LGVE) 1992 I Nr. 15.

29. CR-Romy, mn. 8 to Art. 143 CO; Schwenzer, mn. 91.33 et seq.; Tercier/Pichonnaz, mn. 1905; Weiss, p. 47; ZK-Krauskopf, mn. 93 et seq. to Art. 143 CO.

30. Cf. BK-Kratz, mn. 191 et seq. to Art. 143 CO and ZK-Krauskopf, mn. 96 et seq. to Art. 143 CO for further reference.

31. ZK-Krauskopf, mn. 90 to Art. 143 CO.

32. Cf. BSK-Graber, mn. 19 to Art. 51 CO; Zahnd, p. 24 et seq.

33. Cf. commentary on Art. 51 CO for further reference.

34. BGE 108 II 490 consid. 6. et seq.; KUKO OR-Jung, mn. 9 to Art. 143 CO.

35. BSK-Graber, mn. 9 to Art. 143 CO; CR-Romy, mn. 11 to Art. 143 CO; cf. BGE 116 II 512 consid. 2.

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