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COMMENTARY ON

Art. 144 CO

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II. Relationship between creditor and debtor

1. Effect

a. Liability of the debtors

Art. 144

¹ A creditor may at his discretion request partial performance of the obligation from each joint and several debtor or else full performance from any one of them.

² All the debtors remain under the obligation until the entire claim has been redeemed.

CONTENT

I. Obligation of each joint and several debtor 3

 A. General remarks 3

 B. Partial joint and several liability 3

II. Civil procedure and debt enforcement 4

 A. Civil procedure 4

 B. Debt enforcement and bankruptcy 4

III. Duration of the obligation 5

Bibliography 5

I. OBLIGATION OF EACH JOINT AND SEVERAL DEBTOR

A. General remarks

- 1 The creditor is in the comfortable position to claim either partial or full performance of the individual joint and several debtors (Art. 144 para. 1 CO). It is at the creditor's discretion against which debtor they choose to proceed.¹ The fact that a group of debtors are jointly and severally liable does not impair the single debtor's duty to perform their obligation.² Usually, the creditor proceeds against the most solvent debtor or the debtor against whom the prosecution takes the least effort.³ Neither the internal compensation among the joint and several debtors nor the solvency of the individual debtors affect the creditor's claim in any way.⁴
- 2 However, there are certain restrictions on the creditor's right to choose against whom they want to proceed. Apart from contractual agreements that may restrict the creditor's choice,⁵ some legal provisions dictate from whom the creditor must claim first. If a debt of one joint and several debtor is not due yet, the creditor has to turn to a debtor whose debt is due.⁶ The jointly and severally liable partners are only liable subsidiarily in relation to the general partnership itself (Art. 568 para. 3 CO).⁷ The creditor of an indivisible performance can naturally not claim partial performance of a joint and several debtor (cf. Art. 70 para. 2 CO).⁸

B. Partial joint and several liability

- 3 Generally, each joint and several debtor is liable for the same amount. Due to contractual agreement or individual grounds for reduction,⁹ the individually-owed amount of each joint and several debtor may differ.¹⁰
- 4 The claim for full performance against a debtor is limited to their individual obligation towards the creditor. Subsequently, the joint and several obligation only consists up to the individually-owed amount of the claimed debtor.¹¹ This is referred to as partial joint and several liability. The debtors are only jointly and severally liable for the common debt. In such cases, the joint and several debtor of a smaller amount can only be claimed up to the amount owed by him or her. They are not liable for a higher obligation by another joint and several debtor. However, the claimed debtor is not discharged from their obligation if another debtor has not yet entirely performed their owed obligation (cf. Art. 85 para. 2 CO analogously). As long as the creditor has not received the individual full performance of a joint and several debtor, the creditor may proceed against any joint and several debtor up to the out-

1. Cf. BGE 114 II 342 consid. 2b; BK-Kratz, mn. 12 to Art. 144 CO; CR-Romy, mn. 1 to Art. 144 CO; KUKO-Jung, mn. 1 to Art. 144 CO; Perritaz, mn. 120; Tercier/Pichonnaz, mn. 1750; ZK-Krauskopf, mn. 3 et seq. to Art. 144 CO.

2. BGE 114 II 342 consid. 2b; BGE 93 II 317 consid. 2e. Cf. BGE 115 Ib 274 consid. 19a.

3. BK-Kratz, mn. 12 to Art. 144 CO; Geissbühler, mn. 1230; OFK-Müller, mn. 1 to Art. 144 CO. Cf. ZK-Krauskopf, mn. 344 to Art. 144 CO.

4. BGE 114 II 342 consid. 2b; BGE 112 II 138 consid. 4a; BGE 93 II 329 consid. 3a.; decision of the Federal Supreme Court 4C. 269/2003 of 15 December 2004 consid. 2.2.1.; BK-Kratz, mn. 13 to Art. 144 CO.

5. Bucher, p. 494; KUKO-Jung, mn. 3 to Art. 144 CO; ZK-Krauskopf, mn. 19 to Art. 144 CO.

6. Gauch/Schluep/Emmenegger, mn. 3708; ZK-Krauskopf, mn. 25 to Art. 144 CO.

7. Cf. similar provisions for limited partnerships in Art. 604 CO and for cooperatives in Art. 869 et seq. CO. ZK-Krauskopf, mn. 28 et seq. to Art. 144 CO.

8. BK-Kratz, mn. 18 to Art. 144 CO; ZK-Krauskopf, mn. 31 to Art. 144 CO.

9. Cf. commentary on Art. 145 CO for further reference.

10. BSK-Graber, mn. 6 to Art. 144 CO; CHK-Mazan, mn. 5 to Art. 144 CO; Gauch/Schluep/Emmenegger, mn. 3710.

11. BGE 106 II 250 consid. 3.; BSK-Graber, mn. 6 to Art. 144 CO; von Tuhr/Escher, p. 298; ZK-Krauskopf, mn. 9 to Art. 143 CO.

standing amount.¹² Ultimately, joint and several liability aims to strengthen the position of the creditor in any form.¹³

- 5 Example: The full performance amounts to 200. The joint and several debtors are A, B and C. A owes the full amount of 200, while B and C only owe 150 and 100, respectively. The creditor may not be satisfied to more than 200 and the partial joint and several liability among the debtors is limited to 100. If A performs 180, he or she primarily pays the individually exceeding amount of 50 that is not covered by B's debt of 150 compared to A's debt of 200. Thereafter, the remaining 130 is counted towards the joint and several obligation owed by B and C. B's obligation of 150 is reduced by 130. Hence, B still owes 20. C is completely discharged due to the partial joint and several liability only being 100.¹⁴
- 6 It is important to distinguish the partial joint and several liability from the internal compensation among the joint and several debtors. The former concerns the amount that the creditor may claim from all debtors regardless of their internal compensation. The latter regulates the recourse claim's amount of the debtor that paid more than their fair share.

II. CIVIL PROCEDURE AND DEBT ENFORCEMENT

A. Civil procedure

- 7 While a creditor may claim full performance of one joint and several debtor, the creditor may also split up the performance among the debtors and proceed simultaneously or consecutively against all debtors.¹⁵ In either way, the defendant may resort to a third party action to assess the internal recourse claims among the joint and several debtors in the same proceedings if the requirements of Art. 81 CPC are fulfilled.¹⁶ It should be noted that the court ruling only binds the debtors being party in the proceedings. The decision does not extend to the joint and several debtors against whom the creditor did not file a lawsuit.¹⁷ Finally, the creditor may sue all joint and several debtors collectively in one lawsuit (voluntary joinder, Art. 71 CPC).¹⁸

B. Debt enforcement and bankruptcy

- 8 The creditor may also enforce the claim by means of the Federal Act on Debt Enforcement and Bankruptcy (DEBA). As in the case of civil procedure, the creditor can pursue all joint and several debtors simultaneously or consecutively for the full amount.¹⁹ Should the creditor already be fully or partially satisfied, the debtor may raise the corresponding objection in the proceedings for clearance to proceed the debt enforcement (Art. 81 para. 1 and Art. 82 para. 2 DEBA).²⁰ On the same premise, the

12. BSK-Graber, mn. 7 to Art. 144 CO; ZK-Krauskopf, mn. 316 to Art. 144 CO. Different opinion: KUKO-Jung, mn. 1 to Art. 144 CO; von Tuhr/Escher, p. 298 fn. 13.

13. BGE 93 II 317 consid. 2e.

14. Cf. ZK-Krauskopf, mn. 319 to Art. 144 CO.

15. BGE 125 III 257 consid. 2b; BK-Kratz, mn. 19 to Art. 144 CO; BSK-Graber, mn. 3 to Art. 144 CO; Bucher, p. 494; Gauch/Schluemp/Emmenegger, mn. 3708; Gautschi, mn. 288; Huguenin, mn. 2303; von Tuhr/Escher, p. 304.

16. BK-Kratz, mn. 42 to Art. 144 CO; CR-Romy, mn. 1 to Art. 144 CO; von Tuhr/Escher, p. 304; ZK-Krauskopf, mn. 400 to Art. 144 CO.

17. BGE 93 II 329 consid. 3b; Gautschi, mn. 299. Cf. BK-Kratz, mn. 412 et seq. to Art. 143 CO for further reference.

18. BGE 93 II 239 consid. 3a; BK-Kratz, mn. 398 et seq. to Art. 143 CO; KUKO-Jung, mn. 2 to Art. 144 CO; ZK-Krauskopf, mn. 334 to Art. 144 CO. Cf. Dispatch of the Swiss Civil Procedure Code (CPC), p. 7281.

19. BK-Kratz, mn. 46 to Art. 144 CO; BSK-Graber, mn. 2 to Art. 144; CR-Romy, mn. 2 to Art. 144 CO. Cf. decision of the Federal Supreme Court 7B.27/2001 of 7 January 2001 consid. 2b.

20. BSK-Graber, mn. 2 to Art. 144 CO; CHK-Mazan, mn. 3 to Art. 144 CO. Cf. decision of the Federal Supreme Court 6B_1091/2009 of 11 March 2010 consid. 5.2.2.

debtor may file a motion to revoke or suspend the debt enforcement proceedings according to Art. 85 et seq. DEBA.²¹

- 9 If multiple joint and several debtors are declared bankrupt, the creditor may file for the full amount in each bankruptcy proceedings (Art. 216 para. 1 DEBA).²² If the allocations from the different bankruptcy estates exceed the amount of the creditor's entire claim, the surplus is reverted to the estates in accordance with the rights of recourse existing among the joint and several debtors (Art. 216 para. 2 DEBA).²³ Furthermore, if only one joint and several debtor is subject to bankruptcy, the creditor may file for the full amount even if partial payment has already been made (Art. 217 para. 1 DEBA).²⁴ Nonetheless, the creditor is obliged to declare the already-received partial payment with the effect that the creditor may not be satisfied to more than full performance according to Art. 147 para 1 CO.²⁵ Any surplus is reverted to the remaining joint and several debtors as recourse (Art. 217 para. 3 DEBA).²⁶

III. DURATION OF THE OBLIGATION

- 10 Art. 144 para. 2 CO states that all of the debtors remain under the obligation until the entire claim has been redeemed.²⁷ Partial performance by one debtor reduces the joint and several owed debt to the same extent (Art 147 para. 1 CO).²⁸ However, a creditor's partial satisfaction by a debtor does not hinder the creditor to proceed against the same debtor again. This applies even if the debtor's performance meets or exceeds the amount of the internal compensation among the joint and several debtors.²⁹
- 11 Only effective payments or surrogate performances³⁰ lead to the discharge according to Art. 147 para. 1 CO. A court decision solely obliging a joint and several debtor to pay or the clearance to proceed the debt enforcement by a court (Art. 80 et seq. DEBA) do not discharge the other joint and several debtors.³¹
- 12 If the performance is rendered impossible by circumstances not attributable to any of the joint and several debtors, the obligation is deemed extinguished (Art. 119 para. 1 CO).³²

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21. CR-Romy, mn. 2 to Art. 144 CO; von Tuhr/Escher, p. 304; ZK-Krauskopf, mn. 444 to Art. 144 CO.

22. BGE 113 III 128 consid. 3b; BK-Kratz, mn. 48 to Art. 144 CO; CHK-Mazan, mn. 3 to Art. 144 CO; CR-Romy, mn. 2 to Art. 144 CO; Gautschi, mn. 324; ZK-Krauskopf, mn. 458 to Art. 144 CO.

23. Cf. BGE 113 III 128 consid. 3b.

24. BSK-Graber, mn. 4 to Art. 144 CO.

25. Gautschi, mn. 328; ZK-Krauskopf, mn. 455 to Art. 144 CO.

26. BK-Kratz, mn. 48 to Art. 144 CO; Gautschi, mn. 324.

27. BGE 114 II 342 consid. 2b.

28. Gauch/Schluep/Emmenegger, mn. 3716; Geissbühler, mn. 1234.

29. BK-Kratz, mn. 16 to Art. 144 CO; Geissbühler, mn. 1234.

30. Cf. commentary on Art. 147 CO.

31. BGE 79 II 382 consid. 2.; BK-Kratz, mn. 37 to Art. 144 CO; BSK-Graber, mn. 7 to Art. 144 CO; CHK-Mazan, mn. 8 to Art. 144 CO; von Tuhr/Escher, p. 305.

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