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COMMENTARY ON

Art. 145 CO

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b. Objections by the debtors

Art. 145

¹ A joint and several debtor may raise against the creditor only those objections that are based either on his personal relationship with the creditor or on the nature of or collective reason for the joint and several obligation.

² Each joint and several debtor is liable to the others if he fails to raise the objections which all of them are entitled to raise.

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I. THE TERM OF THE OBJECTION IN ART. 145 CO

- 1 The term "objection" in Art. 145 CO includes objections in the technical sense that permanently or temporarily prevent the enforcement of a right (e.g. statute of limitations, deferment). Furthermore, it also covers defences, i.e. asserted facts that oppose the existence of the right maintained by the creditor (e.g. set-off, nullity of the contract, error).¹

II. PERSONAL OBJECTIONS

A. General remarks

- 2 A joint and several debtor can only – but still – oppose the creditor with those objections that stem from their personal relationship with the creditor (Art. 145 para. 1 CO). Since the relationship between the creditor and the various joint and several debtors may be different, a joint and several debtor may also be entitled to personal objections that are withheld from the others.² For example, a creditor may defer or even waive his claim against only one joint and several debtor. The corresponding objection of deferment or acquittal is therefore only available to the debtor in question and not the others.³ Other possible personal objections are the debtor's lack of capacity to act or the existence of a defect in consent.⁴
- 3 Raising objections that a joint and several debtor has against one of its co-debtors is not possible in the external relationship.⁵

B. Individual grounds for reduction

- 4 If the joint and several obligation is a claim for damages,⁶ the question arises whether a joint and several debtor can invoke the individual grounds for reduction under Art. 43 para. 1 and Art. 44 para. 2 CO. The court may reduce the obligation to pay compensation in the case of a low degree of culpability or financial hardship of the tortfeasor. However, these grounds for reduction are opposed by the premise of Art 144 para. 1 CO that the creditor may generally demand the whole from any joint and several debtor.⁷
- 5 The Federal Supreme Court is extremely conservative when applying individual reasons for reduction in situations of jointly and severally liable debtors. In cases of perfect joint and several liability, the sole nature of the joint and several obligation forbids the weakening of the creditor's position by limiting their claim.⁸ The application of Art. 43 et seq. CO is only possible – with great restraint⁹ – in cases of imperfect joint and several liability in which the chain of causation between the action of the

1. BGE 63 II 133 consid. 2.; BK-Kratz, mn. 12 et seq. to Art. 145 CO; BSK-Graber, mn. 1 to Art. 145 CO; CHK-Mazan, mn. 1 to Art. 145 CO; CR-Romy, mn. 2 to Art. 145 CO; Perritaz, mn. 121; von Tuhr/Escher, p. 305; ZK-Krauskopf, mn. 5 to Art. 145 CO.

2. BK-Kratz, mn. 29 et seq. to Art. 145 CO; CR-Romy, mn. 3 to Art. 145 CO; Gauch/Schluep/Emmenegger, mn. 3713; Geissbühler, mn. 1239; Perritaz, mn. 127; Schwenzer/Fountoulakis, mn. 88.20; ZK-Krauskopf, mn. 21 to Art. 145 CO.

3. BSK-Graber, mn. 4 to Art. 145 CO; Bucher, p. 494 fn. 39; CHK-Mazan, mn. 4 to Art. 145 CO; Tercier/Pichonnaz, mn. 1758; von Tuhr/Escher, p. 306. Cf. decision of the Federal Supreme Court 4P.155/2003 of 19 December 2003 consid. 5.

4. Cf. BK-Kratz, mn. 31 et seq. to Art. 145 CO and ZK-Krauskopf, mn. 15 to Art. 145 CO for further reference.

5. BGE 124 III 305 consid. 2a; CHK-Mazan, mn. 5 to Art. 145 CO; CR-Romy, mn. 5 to Art. 145 CO; Huguenin, mn. 2304; ZK-Krauskopf, mn. 26 to Art. 145 CO.

6. The claim for damages may have its origin in tort law or contract law (cf. Art. 99 para. 3 CO).

7. Cf. BK-Kratz, mn. 74 to Art. 145 CO; CHK-Mazan, mn. 2 to Art. 145 CO; Gautschi, mn. 227; Körner, mn. 467.

8. BGE 127 III 257 consid. 6b.; BGE 113 II 323 consid. 2b.; BGE 62 II 307 consid. 1.

9. BGE 93 II 317 consid. 2e/bb.

claimed wrongdoer is broken by an action of another wrongdoer.¹⁰ However, the Federal Supreme Court merely describes this as a theoretical eventuality.¹¹

- 6 The majority of the legal doctrine is of the opinion that individual grounds for reduction are to be admitted as objections in the external relationship.¹²

C. Liability under corporation law

- 7 Art. 752 et seq. CO regulate the liability of persons towards the corporation.¹³ According to Art. 759 para. 1 CO, in the case of multiple jointly and severally liable persons, each individual is only liable to pay compensation to the extent that the damage is personally attributable to them due to their own fault and the circumstances (so-called “differentiated joint and several liability”).¹⁴ In the external relationship, the individual person should not be liable for more than they would have to bear as the sole responsible person just because multiple persons are liable.¹⁵ The law therefore explicitly allows individual grounds for reduction in the external relationship according to Art. 43 para. 1 and Art. 44 para. 2 CO.¹⁶

III. COLLECTIVE OBJECTIONS

A. In principle

- 8 A joint and several debtor may raise all those objections that arise from the nature of or the collective reason for the joint and several obligation (Art. 145 para. 1 CO). These are therefore objections to which all joint and several debtors are entitled.¹⁷ They include formal or substantive defects of the contract (Art. 12 et seq. or Art. 19 et seq. CO), missing prerequisites based on the claim (e.g. lack of damage), circumstances attributable to the creditor (Art. 44 para. 1 CO)¹⁸ or the already-effected performance by a joint and several debtor (Art. 508 para. 2 analogously; cf. Art. 147 para. 1 CO).¹⁹
- 9 If a joint and several debtor has already unsuccessfully raised a collective objection against the creditor earlier in a lawsuit, the same objection remains open to the remaining joint and several debtors.²⁰ The ruling and thus also the court's assessment of the raised objection only binds the parties to the proceedings and not a joint and several debtor who was not involved in the proceedings. The risk that contradictory rulings may occur is explicitly accepted.²¹ Furthermore, a joint and several debtor can

10. Decision of the Federal Supreme Court 6S.346/2005 of 2 February 2006 consid. 2.1; BGE 127 III 257 consid. 6b.; BGE 93 II 317 consid. 2e.

11. BGE 112 II 138 consid. 4a: «l'éventualité théorique».

12. Bucher, p. 492; Casanova, p. 39 et seq.; Gauch/Schlupe/Emmenegger, mn. 3728; Huguenin, mn. 2307; Körner, mn. 464; Schwenzer/Fountoulakis, mn. 88.19. Different opinion BSK-Graber, mn. 9 to Art. 51 CO; CR-Romy, mn. 6 to Art. 144 CO; Gautschi, mn. 218; Perritaz, mn. 130. Cf. also BK-Kratz, mn. 78 et seq. to Art. 145 CO and ZK-Krauskopf, mn. 197 et seq. to Art. 144 CO for further reference.

13. Namely the members of the board of directors or the executive board and the external auditors.

14. BK-Kratz, mn. 166 to Art. 145 CO; Böckli, § 18 mn. 486; BSK-Graber, mn. 1 to Art. 144 CO; Hablützel, p. 50.

15. BGE 127 III 453 consid. 8b; Böckli, § 18 mn. 491.

16. BGE 132 III 564 consid. 7; BGE 127 III 453 consid. 8b; decision of the Federal Supreme Court 4A_468/2011 of 4 January 2012 consid. 1.3.; Böckli, § 18 N 489. Criticising Hablützel, p. 153 et seq.

17. BSK-Graber, mn. 2 to Art. 145 CO; Casanova, p. 14; Tercier/Pichonnaz, mn. 1757; ZK-Krauskopf, mn. 31 to Art. 145 CO.

18. BGE 130 III 591 consid. 5.5.1; BGE 98 II 102 consid. 4.

19. BK-Kratz, mn. 112 et seq. to Art. 145 CO; CHK-Mazan, mn. 6 to Art. 145 CO; CR-Romy, mn. 4 to Art. 145 CO; ZK-Krauskopf, mn. 32 to Art. 145 CO.

20. BK-Kratz, mn. 151 to Art. 145 CO; BSK-Graber, mn. 6 to Art. 145 CO; KUKO-Jung, mn. 3 to Art. 145 CO; ZK-Krauskopf, mn. 139 to Art. 145 CO.

also raise the same collective objections against the joint and several debtor taking recourse in the recourse proceedings.²²

B. Liability for failure to raise the objection

- 10 If a joint and several debtor claimed by the creditor does not raise an objection even though it would have been available to all debtors collectively, they are liable to the other joint and several debtors (Art. 145 para. 2 CO). The consequence is a total or partial loss of the right of recourse.²³ The extent of the loss is determined by that part of the claim that the joint and several debtor could have denied to the creditor if the objection had been raised.²⁴
- 11 Analogous to Art. 502 para. 3 CO, it is required that the debtor in question is at least negligent in failing to raise the collective objection. Ignorance of a collective objection through no fault of the debtor is not detrimental in the context of the compensation claim.²⁵
- 12 Ultimately, a joint and several debtor can be held liable if they satisfy the creditor in whole or part and subsequently fails to inform their co-debtors. If they pay the creditor again and the latter ultimately receives more than they are entitled to, the right of recourse of the first-performing joint and several debtor lapses (Art. 508 para. 2 CO analogously).²⁶

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21. BGE 93 II 329 consid. 3b.; BSK-Graber, mn. 6 to Art. 145 CO; CHK-Mazan, mn. 9 to Art. 145 CO; CR-Romy, mn. 6 to Art. 145 CO. The same applies to collective objections raised in recourse proceedings between the joint and several debtors; BGE 57 II 518 consid. 1.

22. BK-Kratz, mn. 151 to Art. 145 CO; BSK-Graber, mn. 6 to Art. 145 CO; CHK-Mazan, mn. 9 to Art. 145 CO; CR-Romy, mn. 6 to Art. 145 CO; ZK-Krauskopf, mn. 139 to Art. 145 CO.

23. BSK-Graber, mn. 5 to Art. 145 CO; Bucher, p. 494; CHK-Mazan, mn. 7 to Art. 145 CO; CR-Romy, mn. 5 to Art. 145 CO; Gauch/Schluep/Emmenegger, mn. 3748; Geissbühler, mn. 1241; Huguenin, mn. 2304; Perritaz, mn. 135; Tercier/Pichonnaz, mn. 1757.

24. BSK-Graber, mn. 5 to Art. 145 CO; von Tuhr/Escher, p. 306; ZK-Krauskopf, mn. 125 to Art. 145 CO.

25. BGE 57 II 518 consid. 4.; cf. also BGE 108 II 490 consid. 3.; BK-Kratz, mn. 149 to Art. 145 CO; BSK-Graber, mn. 5 to Art. 145 CO; CR-Romy, mn. 5 to Art. 145 CO; KUKO-Jung, mn. 2 to Art. 145 CO; von Tuhr/Escher, p. 306; ZK-Krauskopf, mn. 124 to Art. 145 CO.

26. BSK-Graber, mn. 5 to Art. 145 CO; CHK-Mazan, mn. 8 to Art. 145 CO; Gauch/Schluep/Emmenegger, mn. 3748; Huguenin, mn. 2312; KUKO-Jung, mn. 2 to Art. 147 CO; von Tuhr/Escher, p. 306 fn. 67. Different opinion ZK-Krauskopf, mn. 134 et seq. to Art. 145 CO.

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