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COMMENTARY ON

Art. 146 CO

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c. Action taken by individual debtors

Art. 146

Unless otherwise provided, a joint and several debtor must not take any action which might impair the position of his fellows.

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I. PRINCIPLE OF INDIVIDUAL EFFECT

- 1 In virtue of Art. 146 CO, individual acts of a joint and several debtor cannot impair the position of the other joint and several debtors.¹ Accordingly, this means that the actions of a joint and several debtor generally only affect themselves. Only they have to answer to the creditor.²
- 2 As an individual action that solely affects the joint and several debtor concerned, the debtor's default (Art. 102 CO) comes into consideration first. If a joint debtor does not perform despite the due date and is formally reminded by the creditor, only they are in default. Correspondingly, the consequences of default apply to them exclusively, such as liability for accidental damage, default interest and excess damages (cf. Art. 103 et seq. CO).³ Contrariwise, the creditor must also formally remind all joint and several debtors individually if they want to put all of the debtors in default.⁴ Finally, the creditor only has the right of withdrawal according to Art. 107 et seq. CO if all joint and several debtors are in default.⁵
- 3 The principle of individual effect also applies to a positive breach of contract in the form of poor performance, a breach of an accessory obligation or a breach of a duty to refrain.⁶ Merely the joint and several debtor who is responsible for the improper performance is liable for the resulting damage. The others remain obliged to perform, should the performance still be owed.⁷ If performance becomes impossible due to the fault of a joint and several debtor, that debtor is liable under Art. 97 CO exclusively.⁸ The other joint and several debtors who are not responsible for the impossibility are discharged in accordance with Art. 119 CO.⁹
- 4 Should the joint and several obligation be a continuing obligation that can be dissolved by termination, a notice of termination by the creditor solely affects the addressed joint and several debtor.¹⁰ Similarly, a termination by an individual joint and several debtor only affects their own relationship with the creditor.¹¹

1. BSK-Graber, mn. 1 to Art. 146 CO; Bucher, p. 494; CR-Romy, mn. 1 to Art. 146 CO; Schwenger/Fountoulakis, mn. 88.21; Tercier/Pichonnaz, mn. 1755; von Tuhr/Escher, p. 306. While the unofficial English translation of the Code of Obligation says "must not", it is the understanding that a joint and several debtor cannot impair the position of his fellow debtors (cf. the German wording "kann nicht").

2. BK-Kratz, mn. 49 to Art. 146 CO; ZK-Krauskopf, mn. 15 to Art. 146 CO. Cf. decision of the Federal Supreme Court 4C.103/2006 of 3 July 2006 consid. 4.1.

3. BK-Kratz, mn. 31 to Art. 146 CO; BSK-Graber, mn. 2 to Art. 146 CO; Bucher, p. 494 et seq.; CR-Romy, mn. 2 to Art. 146 CO; Perritaz, mn. 139; ZK-Krauskopf, mn. 16 to Art. 146 CO.

4. BGE 129 III 702 consid. 2.1; decision of the Federal Supreme Court 4C.154/2002 of 10/17 December 2002 consid. 3.1; ZK-Krauskopf, mn. 79 to Art. 146 CO.

5. BSK-Graber, mn. 3 to Art. 146 CO; CHK-Mazan, mn. 4 to Art. 146 CO; CR-Romy, mn. 2 to Art. 146 CO; Gauch/Schluep/Emmenegger, mn. 3725; Huguenin, mn. 2305. Different opinion ZK-Krauskopf, mn. 87 to Art. 146 CO.

6. Cf. Gauch/Schluep/Emmenegger, mn. 2625 et seq.; Schwenger/Fountoulakis, mn. 67.01.

7. BSK-Graber, mn. 4 to Art. 146 CO; CHK-Mazan, mn. 3 to Art. 146 CO; CR-Romy, mn. 3 to Art. 146 CO; ZK-Krauskopf, mn. 28 to Art. 146 CO.

8. Decision of the Federal Supreme Court 4C.103/2006 of 3 July 2006 consid. 4.1; Bucher, p. 495; Gauch/Schluep/Emmenegger, mn. 3726.

9. BK-Kratz, mn. 24 to Art. 146 CO; BSK-Graber, mn. 5 to Art. 146 CO; CHK-Mazan, mn. 5 to Art. 146 CO; CR-Romy, mn. 3 to Art. 146 CO; Huguenin, mn. 2305; KUKO-Jung, mn. 2 to Art. 146 CO; ZK-Krauskopf, mn. 25 to Art. 146 CO. Cf. also the decision of the Federal Supreme Court 4A_562/2011 of 16 January 2012 consid. 4.3.

10. ZK-Krauskopf, mn. 87 to Art. 146 CO. Cf. BGE 15 I 282 consid. 4.

11. BSK-Graber, mn. 6 to Art. 146 CO; CHK-Mazan, mn. 6 to Art. 146 CO; Gauch/Schluep/Emmenegger, mn. 3727; Huguenin, mn. 2305; von Tuhr/Escher, p. 308. Cf. ZK-Krauskopf, mn. 58 et seq. to Art. 146 CO for further reference.

- 5 A joint and several debtor can interrupt the prescriptive period by acknowledging the creditor's claim only for themselves (Art. 136 para. 1 CO e contrario)¹² and the waiver of the prescription defence also affects only them (Art. 141 para. 2 CO).¹³
- 6 According to Art. 146 CO, individual contractual agreements between the creditor and a joint and several debtor do not bind the uninvolved joint and several debtors. This includes – for example – an extension of liability or the stipulation of a penalty clause.¹⁴

II. EXCEPTIONS

- 7 As Art. 146 CO explicitly indicates, there are also exceptions to the principle of individual effect.¹⁵ First, Art. 146 CO is dispositive in nature. This means that it can be contractually agreed upon that each joint and several debtor is liable for the fault of the others.¹⁶
- 8 Second, in addition to a stipulated aggravation of liability, a joint and several debtor may also be regarded as a vicarious agent of the other as a result of Art. 101 CO, provided that the joint and several debtors are jointly obligated based on a common contractual obligation.¹⁷ Any fault of a joint and several debtor acting as a vicarious agent is thus imputed to the joint and several debtor who has involved them.¹⁸ This implied involvement of a joint debtor as a vicarious agent is particularly to be assumed in cases in which simple partners have contracted jointly pursuant to Art. 544 para. 3 CO.¹⁹

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12. Cf. Weiss, p. 104 et seq. for the legal situation before 1 January 2020.

13. BK-Kratz, mn. 38 to Art. 146 CO; CHK-Mazan, mn. 7 to Art. 146 CO; CR-Romy, mn. 5 to Art. 146 CO; Schwenger/Fountoulakis, mn. 88.22; Weiss, p. 115.

14. BK-Kratz, mn. 37 to Art. 146 CO; BSK-Graber, mn. 1 to Art. 146 CO; Bucher, p. 494; CHK-Mazan, mn. 2 to Art. 146 CO; CR-Romy, mn. 1 to Art. 146 CO; Huguenin, mn. 2305; KUKO-Jung, mn. 1 to Art. 146 CO; Schwenger/Fountoulakis, mn. 88.21; Tercier/Pichonnaz, mn. 1755; von Tuhr/Escher, p. 306 et seq.; ZK-Krauskopf, mn. 168 to Art. 146 CO.

15. Cf. BK-Kratz, mn. 51 to Art. 146 CO.

16. BGE 116 II 512 consid. 2.; BK-Kratz, mn. 54 to Art. 146 CO; BSK-Graber, mn. 7 to Art. 146 CO; Huguenin, mn. 2305; KUKO-Jung, mn. 3 to Art. 146 CO; Perritaz, mn. 140; ZK-Krauskopf, mn. 74 to Art. 146 CO.

17. BGE 116 II 512 consid. 2.; BGE 82 II 525 consid. 5.; decision of the Federal Supreme Court 4C.103/2006 of 3 July 2006 consid. 4.2; BSK-Graber, mn. 8 to Art. 146 CO; CR-Romy, mn. 3 to Art. 146 CO; Schwenger/Fountoulakis, mn. 88.21; ZK-Krauskopf, mn. 9 to Art. 146 CO.

18. BK-Kratz, mn. 56 et seq. to Art. 146 CO; CHK-Mazan, mn. 8 to Art. 146 CO.

19. KUKO-Jung, mn. 2 to Art. 146 CO; von Tuhr/Escher, p. 308 fn. 75; ZK-Krauskopf, mn. 34 et seq. to Art. 146 CO. Cf. also BK-Kratz, mn. 88 to Art. 146 CO.

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