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COMMENTARY ON

Art. 147 CO

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2. Extinction of the joint and several obligation

Art. 147

¹ Where one joint and several debtor satisfies the creditor by payment or set-off, the others are discharged to that extent.

² Where one joint and several debtor is released from liability without satisfaction of the creditor, such release does not benefit the others save to the extent justified by the circumstances or the nature of the obligation.

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I. EFFECT OF THE CREDITOR'S SATISFACTION

- 1 When a joint and several debtor satisfies the creditor in full or part, the other joint and several debtors are discharged to the same extent pursuant to Art. 147 para. 1 CO (overall effect of debtor discharge).¹ The law specifically lists (monetary) payment and set-off as discharging acts. Not explicitly listed – but nevertheless with the same effect – is the provision of goods or services by a joint and several debtor. Ultimately, it depends on which contractual performance is owed.²
- 2 Further redemption options that result in the satisfaction of the creditor represent surrogate performances. In this case, a joint and several debtor does not perform the owed obligation, but with an equivalent substitute.³ As already mentioned, the law provides the set-off in particular (Art. 120 et seq. CO). It is irrelevant if a joint and several debtor or the creditor declares the set-off.⁴ Disputed claims may also be brought for offsetting.⁵ However, it is not possible for a joint and several debtor to declare a set-off in relation to a claim to which another joint and several debtor is entitled.⁶ In addition, performance in lieu or deposit are possible surrogate performances.⁷
- 3 In the event of only partial satisfaction by a joint and several debtor, the creditor's claim shall be reduced to the corresponding extent.⁸
- 4 Art. 147 para. 1 CO then only regulates the external relationship between the creditor and the joint and several debtors. Any rights of recourse among the joint and several debtors remain unaffected. The creditor's claim is not truly extinguished but passes to the performing debtor within the framework of subrogation according to Art. 149 CO.⁹

II. DISCHARGE WITHOUT THE CREDITOR'S SATISFACTION

- 5 According to Art. 147 para. 2 CO, the discharge of a joint and several debtor without satisfaction of the creditor only affects the other joint and several debtors if justified by the circumstances or the nature of the obligation. In contrast to para. 1, para. 2 governs the principle of individual discharge.¹⁰ The burden of proof concerning whether a discharge of an individual joint and several debtor has an overall effect lies with the joint and several debtor invoking it.¹¹

1. ZK-Krauskopf, mn. 5 to Art. 147 CO.

2. BK-Kratz, mn. 26 to Art. 147 CO; Bugnon, p. 25; ZK-Krauskopf, mn. 5 to Art. 147 CO.

3. ZK-Krauskopf, mn. 21 to Art. 147 CO.

4. BK-Kratz, mn. 29 to Art. 147 CO; ZK-Krauskopf, mn. 33 to Art. 147 CO. Cf. decision of the Federal Supreme Court 4A_82/2009 of 7 April 2009 consid. 4.2.

5. Decisions of the Federal Supreme Court 4A_536/2017 of 3 July 2018 consid. 7.3. and 4A_500/2013 of 19 March 2014 consid. 6.1; BSK-Graber, mn. 1 to Art. 147 CO.

6. Decision of the Federal Supreme Court 4P.155/2003 of 19 December 2004 consid. 5.; Schwenger/Fountoulakis, mn. 88.24.

7. BK-Kratz, mn. 30 et seq. to Art. 147 CO; BSK-Graber, mn. 1 to Art. 147 CO; Bugnon, p. 25 et seq.; CHK-Mazan, mn. 1 to Art. 147 CO; CR-Romy, mn. 2 to Art. 147 CO; Gauch/Schlupe/Emmenegger, mn. 3717; Huguenin, mn. 2308.; KUKO-Jung, mn. 2 to Art. 147 CO; Schwenger/Fountoulakis, mn. 88.24; Tercier/Pichonnaz, mn. 1753.

8. Cf. commentary on Art. 144 CO. BSK-Graber, mn. 3 to Art. 147 CO; Bucher, p. 495; CHK-Mazan, mn. 2 to Art. 147 CO; Geissbühler, mn. 1234; Schwenger/Fountoulakis, mn. 88.24; von Tuhr/Escher, p. 309; ZK-Krauskopf, mn. 21 et seq. to Art. 147 CO.

9. BK-Kratz, mn. 22 to Art. 147 CO; BSK-Graber, mn. 2 to Art. 147 CO; CHK-Mazan, mn. 1 to Art. 147 CO; KUKO-Jung, mn. 2 to Art. 147 CO.

10. BSK-Graber, mn. 4 to Art. 147 CO; ZK-Krauskopf, mn. 47 to Art. 147 CO.

11. Decisions of the Federal Supreme Court 4A_428/2014 of 12 January 2015 consid. 4.5. and 4C.27/2003 of 26 May 2003 consid. 3.5.2; BK-Kratz, mn. 43 and 45 to Art. 147 CO; BSK-Graber, mn. 4 to Art. 147 CO; CR-Romy, mn. 4 to Art. 147 CO; ZK-Krauskopf, mn. 123 to Art. 147 CO.

A. Discharge by legal acts

- 6 Legal acts generally only affect the creditor and the joint and several debtor involved. They include the acquittal (Art. 115 CO), the settlement and the novation (Art. 116 CO).
- 7 The acquittal or the settlement only release the joint and several debtor involved and only in the external relationship vis-à-vis the creditor. In the internal relationship, the other joint and several debtors may still take recourse against the exempted debtor.¹² If the creditor wishes the joint and several debtor to benefit from the acquittal or the settlement to the same extent in the internal relationship, they must grant the acquittal or conclude the settlement with discharging effect for all joint and several debtors together.¹³
- 8 Based on an explicit or implicit agreement, the effect can be extended to the other joint and several debtors. Whether this is presumed in an individual case depends on the intention of the parties and the interpretation of the contract.¹⁴ An overall effect is indicated if the creditor receives a benefit from the settlement,¹⁵ if the creditor issues a receipt¹⁶ or if they return the borrower's note.¹⁷ Another aspect taken into account is whether the creditor is aware that the other joint and several debtors can take recourse against the debtor involved in the settlement. The settlement concluded in favour of the contracting joint and several debtor would become illusory if the debtor were to be subject to the full compensation in the internal relationship.¹⁸
- 9 It is argued that a partial or full discharge of the debtor by the creditor should be interpreted as a duty of the creditor to treat the joint and several debt merely as a partial debt from thereon. The creditor may only claim the other joint and several debtors to the extent of their internal quotas. This would omit any recourse among the debtors.¹⁹
- 10 Finally, if the old debt is extinguished by the creation of a new debt (novation; Art. 116 CO), only the joint and several debtor who consents to the novation is discharged. Any different intention by the joint and several debtor involved and the creditor is reserved.²⁰

B. Discharge without legal acts

- 11 If the creditor assigns a claim against one of the joint and several debtors to the same debtor, the obligation is deemed extinguished by merger as the debtor acquired a claim against him- or herself (Art. 118 CO).²¹

12. BK-Kratz, mn. 67 to Art. 147 CO; CR-Romy, mn. 6 to Art. 147 CO; Gautschi, mn. 188; Geissbühler, mn. 1235; Perritaz, mn. 146; Stuber, mn. 203.

13. Perritaz, mn. 150; ZK-Krauskopf, mn. 55 to Art. 147 CO.

14. BGE 133 III 116 consid. 4.2; BGE 107 II 226 consid. 3. BSK-Graber, mn. 5 to Art. 147 CO; Bucher, p. 495; Gauch/Schluep/Emmenegger, mn. 3719a; Gautschi, mn. 185.

15. Decision of the Federal Supreme Court 4A_500/2013 of 19 March 2014 consid. 6.1 (unpublished consideration of BGE 140 III 344).

16. Decision of the Federal Supreme Court 4C.27/2003 of 26 May 2003 consid. 3.5.4.

17. BK-Kratz, mn. 77 to Art. 147 CO; BSK-Graber, mn. 5 to Art. 147 CO; CHK-Mazan, mn. 5 to Art. 147 CO; CR-Romy, mn. 4 to Art. 147 CO; Stuber, mn. 201; von Tuhr/Escher, p. 310; ZK-Krauskopf, mn. 73 et seq. to Art. 147 CO.

18. BGE 133 III 116 consid. 4.3; BGE 107 II 226 consid. 3b; BGE 34 II 80 consid. 5.; decision of the Federal Supreme Court 4C.27/2003 of 26 May 2003 consid. 3.6; BSK-Graber, mn. 5 to Art. 147 CO; CHK-Mazan, mn. 6 to Art. 147 CO; ZK-Krauskopf, mn. 110 et seq. to Art. 147 CO.

19. Decision of the Federal Supreme Court 4C.358/2005 of 12 February 2007 consid. 4.6 (unpublished consideration of BGE 133 II 116); KUKO-Jung, mn. 4 to Art. 147 CO; Perritaz, mn. 148; von Tuhr/Escher, p. 313 fn. 125. Cf. also Bucher, p. 497.

20. BGE 126 III 375 consid. 2f; BK-Kratz, mn. 80 to Art. 147 CO; BSK-Graber, mn. 6 to Art. 147 CO; Bugnon, p. 28; Stuber, mn. 218; von Tuhr/Escher, p. 310; ZK-Krauskopf, mn. 84 to Art. 147 CO.

21. BSK-Graber, mn. 9 to Art. 147 CO; Bucher, p. 496; Bugnon, p. 27 et seq.; Tercier/Pichonnaz, mn. 1758. Differentiating BK-Kratz, mn. 84 et seq. to Art. 147 CO; Stuber, mn. 261 et seq.; ZK-Krauskopf, mn. 87 et seq. to Art. 147 CO.

- 12 The impossibility of a performance by circumstances not attributable to the debtors releases all joint debtors in the external relationship as they can no longer perform (cf. Art. 119 CO).²² However, if other joint and several debtors are still able to perform in their capacity, they are not released but still have to fulfil their obligation to perform. Accordingly, there is still a claim for compensation in the internal relationship.²³
- 13 If the creditor refuses without good cause to accept the performance of a joint and several debtor, they are in creditor default (Art. 91 CO). The effects of the creditor's default under Art. 92 et seq. CO benefit all joint and several debtors. In particular, the depositing joint and several debtor releases the other debtors equally.²⁴
- 14 The prescription as well as the forfeiture of a claim only have an effect in relation to the debtor concerned as these periods run separately for each joint and several debtor. The creditor's claims against the other joint and several debtors are not affected.²⁵ By contrast, the interruption of the prescriptive period – if due to an act by the creditor – affects all joint and several debtors (Art. 136 para. 1 CO).²⁶

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22. Gauch/Schlupe/Emmenegger, mn. 3717; Stuber, mn. 267.

23. BSK-Graber, mn. 7 to Art. 147 CO; CHK-Mazan, mn. 7 to Art. 147 CO; Stuber, mn. 269; ZK-Krauskopf, mn. 91 to Art. 147 CO.

24. BK-Kratz, mn. 97 to Art. 147 CO; BSK-Graber, mn. 12 to Art. 147 CO; CHK-Mazan, mn. 9 to Art. 147 CO; Stuber, mn. 286; von Tuhr/Escher, p. 311; ZK-Krauskopf, mn. 157 et seq. to Art. 146 CO.

25. Decision of the Obergericht Lucerne 1B 11 38 of 20 December 2011 consid. 6.1.2., publ. in: Luzerner Gerichts- und Verwaltungsentscheide (LGVE) 2012 I Nr. 16. Cf. BGE 130 III 362 consid. 5.2; BK-Kratz, mn. 90 et seq. to Art. 147 CO; BSK-Graber, mn. 11 to Art. 147 CO; CHK-Mazan, mn. 8 to Art. 147 CO; CR-Romy, mn. 5 to Art. 147 CO; Huguenin, mn. 2308. Cf. ZK-Krauskopf, mn. 92 et seq. to Art. 147 CO for the resulting problem of the internal recourse among the debtors.

26. BSK-Graber, mn. 11 to Art. 147 CO; CR-Romy, mn. 5 to Art. 147 CO; Gauch/Schlupe/Emmenegger, mn. 3721.

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