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COMMENTARY ON

Art. 149 CO

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2. Subrogation

Art. 149

¹ A joint and several debtor with right of recourse against his fellow debtors is subrogated to the rights of the creditor to the extent the latter has been satisfied.

² The creditor is liable if he favours the legal position of one joint and several debtor to the detriment of the others.

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I. THE SUBROGATION

A. Automatic transfer of the creditor's rights

- 1 As per Art. 149 para. 1 CO, the creditor's rights automatically pass from the creditor to the debtor by operation of law to the extent that the debtor has satisfied the creditor. This is an assignment by law according to Art. 166 CO.¹ Subrogation presupposes that the debtor has an independent right of recourse according to Art. 148 para. 2 CO.² Subsequently, the debtor entitled to recourse disposes of two parallel remedies that compete with each other: the right of recourse according to Art. 148 para. 2 CO and the subrogated creditor's rights pursuant to Art. 149 CO.³ The subrogated claim serves to facilitate and secure the recourse.⁴ The claim of the joint and several debtor against his co-debtor resulting from subrogation only exists to the extent of the right of recourse according to Art. 148 CO, i.e. the amount exceeding their internal liability quota.⁵
- 2 If applicable, it is necessary to convert the subrogated claim into a monetary claim if the debtor has provided a performance in kind or service to the creditor.⁶
- 3 The subrogation according to Art. 149 CO only applies in the case of perfect joint and several liability, not in the case of imperfect joint and several liability.⁷

B. EFFECT OF THE SUBROGATION

- 4 The difference compared to the independent right of recourse under Art. 148 para. 2 CO is that – on the one hand – all ancillary rights transfer to the debtor with the subrogation in addition to the main claim (cf. Art. 170 CO). The joint and several debtor can now benefit from any securities such as liens or guarantees, as they also pass on to them.⁸
- 5 On the other hand, the claim is transferred together with all objections against the creditor. In other words, the other joint and several debtors may then raise all objections in the internal relationship that would have also been open to them against the creditor, namely individual acquittals on the part of the creditor (Art. 507 para. 3 CO analogously).⁹ The current prescription period is also continued without interruption. This may result in the subrogation claim becoming time-barred before the re-

1. BK-Kratz, mn. 7 to Art. 149 CO; Bugnon, p. 89; CHK-Mazan, mn. 2 to Art. 149 CO; Perritaz, mn. 188; Schwenger/Fountoulakis, mn. 88.40; ZK-Krauskopf, mn. 167 to Art. 148/149 CO.

2. BK-Kratz, mn. 36 to Art. 149 CO; BSK-Graber, mn. 4 to Art. 149 CO; CR-Romy, mn. 2 to Art. 149 CO; ZK-Krauskopf, mn. 194 to Art. 148/149 CO.

3. BK-Kratz, mn. 36 to Art. 149 CO; Gautschi, mn. 151; Huguenin, mn. 2313; Tercier/Pichonnaz, mn. 1773; ZK-Krauskopf, mn. 188 to Art. 148/149 CO.

4. BGE 89 II 415 consid. 2; BGE 53 II 25 consid. 1.; Huguenin, mn. 2313; Perritaz, mn. 189; ZK-Krauskopf, mn. 168 to Art. 148/149 CO.

5. BGE 103 II 137 consid. 4d; BSK-Graber, mn. 4 to Art. 149 CO; CR-Romy, mn. 2 to Art. 149 CO; von Tuhr/Escher, p. 316; ZK-Krauskopf, mn. 176 to Art. 148/149 CO.

6. BK-Kratz, mn. 24 to Art. 149 CO; BSK-Graber, mn. 1 to Art. 149 CO.

7. BGE 133 III 6 consid. 5.3.3; BGE 130 III 362 consid. 5.2; BGE 115 II 42 consid. 2a; BK-Kratz, mn. 40 to Art. 149 CO; BSK-Graber, mn. 3 to Art. 149 CO; Bugnon, p. 89 et seq.; CHK-Mazan, mn. 1 to Art. 149 CO; CR-Romy, mn. 1 to Art. 149 CO; Gauch/Schluep/Emmenegger, mn. 3754; von Tuhr/Escher, p. 320. Different opinion Gautschi, mn. 179 et seq.; ZK-Krauskopf, mn. 191 to Art. 148/149 CO.

8. BK-Kratz, mn. 25 to Art. 149 CO; BSK-Graber, mn. 2 to Art. 149 CO; Bugnon, p. 92; CHK-Mazan, mn. 3 to Art. 149 CO; CR-Romy, mn. 2 to Art. 149 CO; Huguenin, mn. 2313; Schwenger/Fountoulakis, mn. 88.40; Tercier/Pichonnaz, mn. 1773; von Tuhr/Escher, p. 317; ZK-Krauskopf, mn. 179 to Art. 148/149 CO.

9. BK-Kratz, mn. 26 to Art. 149 CO; BSK-Graber, mn. 4 to Art. 149 CO; Bugnon, p. 91 et seq.; Gauch/Schluep/Emmenegger, mn. 3747; KUKO-Jung, mn. 1 to Art. 149 CO; von Tuhr/Escher, p. 317.

course claim or – if the debtor pays an already time-barred debt to the creditor – that the subrogated claim continues to be time-barred and therefore remains unenforceable.¹⁰

- 6 The other co-debtors are not jointly and severally liable to the entitled debtor. They are only liable for their individual quota in their internal relationship.¹¹

II. CREDITOR'S LIABILITY

- 7 Although the creditor is principally free to choose how much they claim from which joint debtor,¹² the creditor is nevertheless under a duty not to improve the legal position of one joint and several debtor to the detriment of the others (Art. 149 para. 2 CO). If this duty is not fulfilled, they are responsible for the damage caused accordingly.¹³
- 8 Cases of application arise when the creditor releases securities such as a lien and the joint and several debtor to whom the subrogation claim is transferred falls short because they were not sufficiently satisfied in the internal relationship (in the absence of a realisable lien).¹⁴ The same applies if the creditor does not hand over the promissory letter or other evidence pertaining to the debt (cf. Art. 170 para. 2 CO).¹⁵
- 9 A unilateral acquittal by the creditor in favour of a joint and several debtor is not a case of application of this favourable treatment within the meaning of Art. 149 para. 2 CO. The joint and several debtor taking recourse is still entitled to the undiminished recourse according to Art. 148 para. 2 CO against their co-debtors, as the acquittal generally has no effect in the internal relationship.¹⁶
- 10 The legal consequence of this breach of duty is a claim for damages under Art. 149 para. 2 CO by the debtor against the creditor. This can be asserted against the creditor either by way of an objection or by means of a lawsuit.¹⁷

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10. BSK-Graber, mn. 6 to Art. 149 CO; Huguenin, mn. 2313; KUKO-Jung, mn. 1 to Art. 149 CO; Schwenzer/Fountoulakis, mn. 88.40; ZK-Krauskopf, mn. 181 et seq. to Art. 148/149 CO. Different opinion BK-Kratz, mn. 27 to Art. 149 CO.

11. BSK-Graber, mn. 4 to Art. 149 CO; von Tuhr/Escher, p. 318; ZK-Krauskopf, mn. 173 to Art. 148/149 CO. Different opinion Perritaz, mn. 200.

12. Cf. commentary on Art. 144 CO.

13. BSK-Graber, mn. 7 to Art. 149 CO; CR-Romy, mn. 3 to Art. 149 CO; ZK-Krauskopf, mn. 197 to Art. 148/149 CO.

14. BK-Kratz, mn. 48 to Art. 149 CO; CHK-Mazan, mn. 6 to Art. 149 CO; CR-Romy, mn. 4 to Art. 149 CO; Huguenin, mn. 2313; KUKO-Jung, mn. 2 to Art. 149 CO; Perritaz, mn. 191; ZK-Krauskopf, mn. 199 to Art. 148/149 CO.

15. BSK-Graber, mn. 7 to Art. 149 CO; Bugnon, p. 92 et seq.; CR-Romy, mn. 4 to Art. 149 CO.

16. Decision of the Federal Supreme Court 4A_65/2008 of 3 August 2009 consid. 8.4; BK-Kratz, mn. 50 to Art. 149 CO; Bucher, p. 498; CHK-Mazan, mn. 5 to Art. 149 CO; CR-Romy, mn. 5 to Art. 149 CO; KUKO-Jung, mn. 2 to Art. 149 CO; ZK-Krauskopf, mn. 200 to Art. 148/149 CO. Cf. commentary on Art. 147 CO.

17. BK-Kratz, mn. 59 to Art. 149 CO; BSK-Graber, mn. 8 to Art. 149 CO; CR-Romy, mn. 6 to Art. 149 CO.

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