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COMMENTARY ON

Art. 150 CO

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B. Joint and several creditors

Art. 150

¹ Multiple creditors become joint and several creditors where the debtor states that he wishes to grant each of them the right to receive full performance of the debt and in the cases prescribed by law.

² Performance made to one joint and several creditor discharges the debtor as against all of them.

³ The debtor may choose which joint and several creditor he makes the payment to, provided none of them has initiated legal proceedings against him.

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I. DEFINITION AND DIFFERENTIATION

- 1 In the case of joint and several creditors, multiple creditors stand against one debtor. Each creditor has its own independent claim to fulfilment of the entire performance.¹ Accordingly, there are several claims of a single owed performance.² This is the inversion of the joint and several obligation.³ The debtor in turn is fully discharged vis-à-vis the other creditors by the full performance to only one joint and several creditor (Art. 150 para. 2 CO).⁴
- 2 The joint and several creditorship must be distinguished from other constellations in which a debtor faces several creditors. In the case of collective creditors,⁵ the creditors are entitled to the entire claim undividedly. They can only assert the claim collectively. At the same time, the debtor can only discharge him- or herself by performing collectively to all of the creditors.⁶ In the case of partial creditorship, each creditor can act alone but can only claim the part of the claim to which they are entitled. The partial claims finally form the owed whole.⁷ In the case of creditor cumulation, the debtor owes the same performance to several creditors. The creditors can be completely independent of each other. Whether the creditor can satisfy all creditors by a single performance depends on the nature of the contract.⁸ The type of creditorship in the individual case depends on the contractual agreement with the debtor.⁹

II. ORIGIN

A. By statement of intent

- 3 As Art. 150 para. 1 CO states, joint and several creditorship may arise if the debtor declares that they intend to entitle each creditor to the entire claim. Without such a declaration, only partial creditorship applies among the creditors, provided that the performance is divisible.¹⁰ However, the sole circumstance that several persons enter into a contract together does not establish joint and several creditorship by itself.¹¹ The declaration of intent may be expressed explicitly¹² or implied.¹³ It is not subject to any particular form (cf. Art. 11 para. 1 CO).¹⁴

1. Cf. BGE 118 II 168 consid. 2b; Bucher, p. 500; CHK-Mazan, mn. 2 to Art. 150 CO; Geissbühler, mn. 1268; Schwenger/Fountoulakis, mn. 89.10.

2. Baumgartner, p. 17.

3. KUKO-Jung, mn. 1 to Art. 150 CO. Cf. commentary on Art. 143 CO.

4. BK-Kratz, mn. 13 to Art. 150 CO; BSK-Graber, mn. 1 to Art. 150 CO; CHK-Mazan, mn. 2 to Art. 150 CO; CR-Romy, mn. 1 to Art. 150 CO; Gauch/Schlupe/Emmenegger, mn. 3663; Tercier/Pichonnaz, mn. 1781.

5. Examples are the community of heirs (Art. 602 para. 2 CC) or the simple partnership (Art. 544 para. 1 CO). BK-Kratz, mn. 44 to Art. 150 CO; Tercier/Pichonnaz, mn. 1779.

6. BGE 140 III 150 consid. 2.2.2; Gauch/Schlupe/Emmenegger, mn. 3672; Huguenin, mn. 2324; Schwenger/Fountoulakis, mn. 89.06 et seq.; Tercier/Pichonnaz, mn. 1780; ZK-Krauskopf, mn. 22 to Art. 150 CO.

7. BGE 140 III 150 consid. 2.2.3; Gauch/Schlupe/Emmenegger, mn. 3659; Huguenin, mn. 2319; ZK-Krauskopf, mn. 19 to Art. 150 CO.

8. ZK-Krauskopf, mn. 27 to Art. 150 CO.

9. BGE 140 III 150 consid. 2.3.

10. BGE 140 III 150 consid. 2.2.3; BGE 94 II 313 consid. 4.; BSK-Graber, mn. 3 to Art. 150 CO; CHK-Mazan, mn. 3 to Art. 150 CO; Schwenger/Fountoulakis, mn. 89.05.

11. Tercier/Pichonnaz, mn. 1780. Cf. Bron, p. 31.

12. Cf. BGE 94 II 313 consid. 4. «déposants solidaires» and «solidairement titulaires».

13. BSK-Graber, mn. 3 to Art. 150 CO; CHK-Mazan, mn. 3 to Art. 150 CO; CR-Romy, mn. 3 to Art. 150 CO.

14. BK-Kratz, mn. 62 to Art. 150 CO; ZK-Krauskopf, mn. 29 to Art. 150 CO.

- 4 Practical examples of joint and several creditorships are the joint account ("compte-joint") with several individual signatories,¹⁵ the joint deposit ("dépôt conjoint")¹⁶ or the joint tenancy agreement of spouses.¹⁷

B. By law

- 5 Even though Swiss civil law does not explicitly provide for joint and several creditors, there are a few individual legal provisions that do so implicitly. Thus, in the case of a majority of donors, each donor alone may demand the fulfilment of a provision from the recipient (Art. 246 para. 1 CO),¹⁸ the landlord and the tenant may both demand of the subtenant alone that they do not use the property in a manner that differs from that permitted to the tenant him- or herself (Art. 262 para. 3 CO; analogously in the case of usufructuary lease, Art 291 para. 3 CO).¹⁹ Furthermore, the principal may assert the claims to which the agent is entitled against a substitute directly against the latter (Art. 399 para. 3 CO).²⁰ Art. 70 para. 1 CO provides for a joint and several creditorship in the case of indivisible performance owed to several creditors. The performance can be claimed by each creditor alone.²¹ According to Art. 482 para. 1 CC, any interested party may demand the fulfilment of burdens and conditions of a testamentary disposition.²²

III. EXTERNAL RELATIONSHIP

- 6 If the debtor performs to a joint and several creditor, they are also discharged regarding the other creditors (Art. 150 para. 2 CO). Surrogate performances – including deposit or set-off – are equivalent to actual performance.²³ As already mentioned, each individual creditor may also demand performance as a whole or may dispose of it at their discretion. Acts of disposition only affect the claim of the individual creditor against the debtor. Acquittal, deferment, assignment, debt enforcement or lawsuits by a creditor have no influence on the claims of the other creditors.²⁴ Thus, the debtor can also only raise those objections against a creditor that concern the relationship between the two of them.²⁵ Finally, each claim may also have its own due date and a notice of default also only affects the relationship between the debtor and the acting joint and several creditor.²⁶
- 7 A creditor may not aggravate the position of the other joint and several creditors by their personal actions (Art. 146 CO analogously). An acceptance in lieu of performance, a novation or the acceptance of a change of debtor does not release the debtor in regard to the other joint and several creditors.²⁷

15. BGE 140 III 150 consid. 2.2.1; BGE 112 III 90 consid. 5.; BGE 110 III 24 consid. 3.; BGE 94 II 313 consid. 4.; BGE 94 II 167 consid. 3.; decision of the Federal Supreme Court 4A_630/2020 of 24 March 2022 consid. 5. (intended for publication). Cf. Baumgartner, p. 28 et seq., BK-Kratz, mn. 65 et seq. and Bron, p. 41 et seq. for further reference.

16. BGE 101 II 117 consid. 5.

17. BGE 118 II 168 consid. 2b.

18. Baumgartner, p. 21; CR-Romy, mn. 3 to Art. 150 CO; ZK-Krauskopf, mn. 34 to Art. 150 CO. Different opinion BK-Kratz, mn. 111 to Art. 150 CO.

19. Baumgartner, p. 20 et seq.; BSK-Graber, mn. 4 to Art. 150 CO; CHK-Mazan, mn. 4 to Art. 150 CO; CR-Romy, mn. 3 to Art. 150 CO; ZK-Krauskopf, mn. 35 to Art. 150 CO. Different opinion BK-Kratz, mn. 92 to Art. 150 CO.

20. Baumgartner, p.21 et seq.; BK-Kratz, mn. 94 et seq. to Art. 150 CO; Bucher, p. 499 fn. 72; CHK-Mazan, mn. 4 to Art. 150 CO; Schwenger/Fountoulakis, mn. 89.11; ZK-Krauskopf, mn. 36 to Art. 150 CO.

21. Gauch/Schluep/Emmenegger, mn. 3683; Geissbühler, mn. 1272; Huguenin, mn. 2326; Tercier/Pichonnaz, mn. 1786; ZK-Krauskopf, mn. 37 to Art. 150 CO.

22. BSK-Graber, mn. 4 to Art. 150 CO; Bucher, p. 499 fn. 72; KUKO-Jung, mn. 2 to Art. 150 CO.

23. Decision of the Federal Supreme Court 4C.4/2004 of 20 April 2004 consid. 4.; Baumgartner, p. 17; BSK-Graber, mn. 6 to Art. 150 CO; ZK-Krauskopf, mn. 75 et seq. to Art. 150 CO.

24. BK-Kratz, mn. 146 to Art. 150 CO; CR-Romy, mn. 5 to Art. 150 CO; von Tuhr/Escher, p. 322.

25. BSK-Graber, mn. 7 to Art. 150 CO; ZK-Krauskopf, mn. 39 to Art. 150 CO.

26. ZK-Krauskopf, mn. 59 to Art. 150 CO. Different opinion Bucher, p. 500.

However, if a joint and several creditor is in defaults of acceptance, the co-creditors are also affected by it. The debtor is not restricted by one creditor's default in his right to choose to which creditor they want to perform. If necessary, they may resort to a deposit according to Art. 92 CO (cf. Art. 150 para. 3 CO).²⁸

- 8 In principle, the debtor is free to choose to which creditor they want to perform.²⁹ However, this right of choice is suspended if the debtor has already been subjected to legal proceedings by a joint and several creditor (Art. 150 para. 3 CO). In this case, the debtor can only pay with discharging effect to the creditor who has raised a debt enforcement or a lawsuit.³⁰ A mere written demand for payment or a transfer order in case of a joint account³¹ is not sufficient to give effect to Art. 150 para. 3 CO.³² The debtor's right of choice is revived if the lawsuit of the one creditor suing is dismissed. If the debtor is subject to debt enforcement by a joint and several creditor, the debtor's right of choice is restored as of the time when the debtor filed an objection according to Art. 74 DEBA. If the creditor subsequently initiates clearance to proceed, the debtor's right to choose is again restricted.³³

IV. INTERNAL RELATIONSHIP

- 9 The law does not state how the internal relationship between the joint and several creditors is regulated if a joint and several creditor has received more than they are entitled to. The rights of recourse among the joint and several creditors are therefore governed by the underlying relationship according to which the joint and several creditorship was established.³⁴ The nature of legal relationship among the joint and several creditors or the internal division of the claim cannot be inferred from the joint and several creditorship.³⁵ Particularly in the case of indivisible performance, the satisfied creditor has a duty to compensate the other joint and several creditors. If no specific quotas can be determined in the absence of an agreement, or if the circumstances justify it, an equal apportionment is made (Art. 148 para. 1 CO analogously).³⁶
- 10 If damage occurs due to a default in acceptance for which a joint and several creditor is responsible, such damage shall be compensated internally.³⁷

27. BK-Kratz, mn. 150 to Art. 150 CO; BSK-Graber, mn. 7 to Art. 150 CO; KUKO-Jung, mn. 3 to Art. 150 CO; von Tuhr/Escher, p. 323; ZK-Krauskopf, mn. 89 to Art. 150 CO.

28. BSK-Graber, mn. 8 to Art. 150 CO; KUKO-Jung, mn. 4 to Art. 150 CO; ZK-Krauskopf, mn. 72 to Art. 150 CO. Different opinion von Tuhr/Escher, p. 322.

29. BK-Kratz, mn. 126 to Art. 150 CO; Bron, p. 37; BSK-Graber, mn. 8 to Art. 150 CO; CR-Romy, mn. 7 to Art. 150 CO; Huguenin, mn. 2322.

30. BGE 94 II 313 consid. 6; BK-Kratz, mn. 129 to Art. 150 CO; Bron, p. 37; BSK-Graber, mn. 8 to Art. 150 CO; CR-Romy, mn. 7 to Art. 150 CO; Schwenger/Fountoulakis, mn. 89.12. Cf. ZK-Krauskopf, mn. 63 et seq. to Art. 150 CO, who differentiates between debt enforcement and lawsuit.

31. Decision of the Federal Supreme Court 4A_630/2020 of 24 March 2022 consid. 7. (intended for publication).

32. BGE 94 II 313 consid. 6.; BK-Kratz, mn. 129 to Art. 150 CO; CR-Romy, mn. 7 to Art. 150 CO; KUKO-Jung, mn. 4 to Art. 150 CO.

33. BSK-Graber, mn. 8 to Art. 150 CO. Cf. ZK-Krauskopf, mn. 64 to Art. 150 CO.

34. BK-Kratz, mn. 169 to Art. 150 CO; CR-Romy, mn. 9 to Art. 150 CO; Geissbühler, mn. 1270; Schwenger/Fountoulakis, mn. 89.13; Tercier/Pichonnaz, mn. 1787; von Tuhr/Escher, p. 324. Cf. Baumgartner, p. 33 et seq. for further reference.

35. Cf. BGE 110 III 24 consid. 3.; BGE 94 II 313 consid. 4b; decision of the Federal Supreme Court 4A_630/2020 of 24 March 2022 consid. 5. (intended for publication).

36. BK-Kratz, mn. 179 to Art. 150 CO; BSK-Graber, mn. 10 to Art. 150 CO; ZK-Krauskopf, mn. 101 to Art. 150 CO. Different opinion Gauch/Schlupe/Emmenegger, mn. 3667.

37. BSK-Graber, mn. 8 to Art. 150 CO; KUKO-Jung, mn. 4 to Art. 150 CO.

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