



ONLINE COMMENTARY
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COMMENTARY ON

Art. 98 CO

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2. Obligation to act or refrain from action

Art. 98

¹ Where the obligation is to take certain action, the obligee may without prejudice to his claims for damages obtain authority to perform the obligation at the obligor's expense.

² Where the obligation is to refrain from taking certain action, any breach of such obligation renders the obligor liable to make amends for the damage caused.

³ In addition, the obligee may request that the situation constituting a breach of the obligation be rectified and may obtain authority to rectify it at the obligor's expense.

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I. CONTEXT & PURPOSE

- 1 Whereas Art. 97 CO provides for a first remedy in case of non-performance, i.e. the duty to pay damages, Art. 98 CO provides for another type of remedy depending on the nature of the obligation at stake, i.e. whether it consists in a duty to do something (active behaviour) or to refrain from doing something (passive behaviour).
- 2 As concerns a breach of a duty to do something, Art. 98 (1) CO provides the creditor with the right to entrust a third party with performance of the concerned obligation on behalf of the defaulting debtor (Art. 98(1) CO, so-called 'substitute performance' (*Ersatzleistung* | *Execution par substitution*)).
- 3 Thus, Art. 98(1) CO has the following two advantages compared to Art. 97 CO: (1) Art. 98(1) CO does not require the non-performing debtor to be at fault, and (2) the debtor can further be obliged to advance the costs of the substitute performance (Art. 98(1) CO). Thus, at first sight, Art. 98(1) CO may appear interesting because its primary purpose is to ensure due performance of the obligation at stake and to thereby prevent the occurrence of any damage in the first place.
- 4 However, the exercise of the right to substitute performance is subject to very strict conditions, in particular a prior judicial authorization (see below). As a result, Art. 98 CO is rarely used in practice.
- 5 In case of a breach of a duty to refrain from doing something, Art. 98(2) CO provides the creditor with a direct claim for damages based on the breach alone, and in Art. 98(3) with a claim for restoration of the situation as per contract.
- 6 Art. 98 CO is a dispositive legal provision. The parties to a contract may provide for a right to substitute performance by waiving the need for prior judicial authorization. As for duties to refrain from a certain behavior, the parties may provide for a liquidated damage clause in case of breach (see Art. 100 CO).

II. PREREQUISITES OF ART. 98(1) CO – OBLIGATION OF ACTIVE BEHAVIOUR

- 7 An obligation to do something involves actions such as performing a specific work or storing an item.
- 8 In order for a creditor to make use of the right to substitute performance under Art. 98(1) CO, he/she must fulfill following requirements: ¹
 1. The obligation to do something must remain unfulfilled despite the debtor's ability to perform. Contrary to Art. 97 CO, such non-performance does not need to be linked to a fault of the debtor.
 2. The performance of such obligation must be due. An additional reminder is not necessary, and it is sufficient that the contractual deadline for performance has elapsed. If no deadline was set, a notice to perform is however required.
 3. The performance of such obligation must be substitutable, meaning that Art. 98(1) CO does not apply in the case of highly personal services, such as artistic or scientific services, where the person of the debtor is key to the performance of the concerned obligation.
 4. The creditor must have 'obtained authorization', meaning that the creditor must first obtain a legally binding judgement on performance before resorting to substitute performance. The substitute performance as an enforcement instrument can be ordered directly by the court of first instance (Art. 236(3) and 337(1) CPC) or later by the court of enforcement (Art. 338(1) CPC)). The ordering of substitute per-

1. Gauch/Schluep/Emmenegger, N. 2507 ff.; BK-Emmenegger, Art. 98 CO N. 70 ff.; BGE 142 III 321 consid. 4.4.2.

formance is at the discretion of the court. The interests of the parties are weighed against each other, whereby the substitute performance must not be disproportionate or constitute an abuse of rights (Art. 2 CC, BGE 130 III 302, E. 3.3).

- 9 In summary, Art. 98(1) CO does not provide the creditor with an autonomous right to resort to substitute performance. Instead, the creditor must first obtain a legally binding order from a court. Thus, the remedy of substitute performance under Art. 98 CO is not a real contract remedy, but rather a means of enforcement. As a result, Art. 98(1) CO is rarely used in practice. Instead, it is common practice for parties wishing to resort to substitute performance to waive the requirement of judicial authorization and to design the modalities of a right to substitute performance in a more practical way.

III. PREREQUISITES OF ART. 98(2) CO – OBLIGATION OF PASSIVE BEHAVIOR

- 10 A duty to refrain from doing something is about refraining from carrying out certain actions based on a legal obligation or a contractual commitment. There are various types of passive behavior, e.g. an obligation not to disclose certain information, a commitment not to assign certain rights or obligations, a commitment not to compete, duties to tolerate certain acts or behaviors of the other party or third parties such as the use of an object by a tenant, etc.
- 11 Pursuant to Art. 98(2) CO, the breach of the duty to refrain from doing something is *per se* sufficient for the creditor to claim for damages, without the creditor having to file first an action for injunctive relief or a request for elimination of the unlawful situation. However, the claim for damages under Art. 98(2) CO is subject to the existence of a fault by the non-performance debtor, such fault being nevertheless presumed (same as for Art. 97 CO).

IV. PREREQUISITES FOR RESTORATION OF LAWFUL STATE (ART. 98(3) CO)

- 12 In addition to the claim for damages under Art. 98(2), Art. 98(3) CO also provides the creditor with a claim for removal of the unlawful situation, i.e. a claim for restoration of the contractual or legal condition. This claim can be asserted under the same requirements as under Art. 98(1) CO and does not require a faulty behaviour from the debtor.² If restoration is impossible, e.g. in the event of a breach of a confidentiality obligation, the creditor must demand compensation for damages instead of restoration.
- 13 Art. 98(3) provides that the debtor must bear the costs of the restoration of the contractual or legal condition, such costs can also be claimed as part of the performance damage under Art. 107(2) CO (applicable in case of qualified default of the debtor).³ Yet, in such case, the non-performance must have been a faulty one.

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2. Schwenzer/Fountoulakis, N. 61.10; Huguenin, N. 897; BSK-Wiegand, Art. 98 CO N. 10; BK-Emmenegger, Art. 98 CO N. 135; BGE 114 II 329 consid. 2a in which the court declared that a property purchase agreement is invalid if it violates a previously made division of estates agreement and ordered a land register correction.

3. Gauch/Schluep/Emmenegger, N. 2516; BSK-Wiegand, Art. 98 CO N. 2, 8; BGE 126 III 230 consid. 7a/bb.

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