III.-4:102: Solidary, divided and joint obligations

(1) An obligation is solidary when each debtor is bound to perform the obligation in full and the creditor may require performance from any of them until full performance has been received.

(2) An obligation is divided when each debtor is bound to perform only part of the obligation and the creditor may claim from each debtor only performance of that debtor’s part.

(3) An obligation is joint when the debtors are bound to perform the obligation together and the creditor may require performance only from all of them together.

COMMENTS

A. General remarks

The Article deals with three types of plural obligations - solidary obligations, divided obligations and joint obligations. Solidary obligations and divided obligations are known in all legal systems, with variations in terminology and detail, but not all laws expressly recognise joint obligations. Legal systems which do not recognise joint obligations sometimes have a category of “indivisible obligations” which covers much of the same ground. French law gives indivisibility a special role in the law of succession: i.e. a debt which is indivisible, in contrast to a solidary debt, is not divided among the heirs (CC 1217 ff). It goes without saying that the fact that a contract is governed by these rules does not prevent the parties, to the extent permitted by the law of succession, from supplementing a solidarity clause, covered by these rules, with a clause of indivisibility for the purpose of obtaining particular effects in relation to succession.

B. Solidary obligations

Paragraph (1) of the Article defines solidary obligations, which are the plural obligations most frequently encountered in practice. The definition reflects their characteristic features. The creditor can claim the whole performance from any one of the debtors, without being obliged to involve all the debtors or even warn them. The debtor against whom the claim is made cannot compel the creditor to divide the claim.

Illustration 1
A lends €10,000 to B and C. The contract contains a clause of solidarity. A can claim repayment of the loan from B or C according to choice.

Having the option of claiming the whole performance from any of the debtors, the creditor is in a position, if that debtor fails to perform, to put into operation right away the various remedies for non-performance provided by these rules. So, the creditor can terminate the contractual relationship in whole or in part if the selected debtor’s non-performance of a contractual obligation is fundamental. Similarly, the creditor can withhold performance of reciprocal obligations so long as the selected debtor has not performed or tendered performance. However, the other debtors can perform the obligation in order to put a stop to the termination or the withholding of performance. As this is a case where the other debtors have a legitimate interest in performance the creditor cannot refuse their performance.

C. Divided obligations

Paragraph (2) defines divided obligations. They are distinguished from solidary obligations in that each of the debtors is liable for only part of the performance due. The debtors have separate liability for their own shares. So the creditor cannot claim the whole performance from one of the debtors but must necessarily divide the claim.

Illustration 2

A lends €10,000 to B and C. The contract provides that B must repay €8000 and C €2000. A can claim only the agreed part from each.

The effects of non-performance by one of the debtors on the operation of the creditor’s right to withhold performance of reciprocal obligations or to terminate for fundamental nonperformance are very different in this case. Non-performance by one of the debtors leads, in principle, only to partial termination. Where a contract gives rise to divided obligations the situation falls within the rules on termination for fundamental non-performance in relation to obligations which are to be performed in separate parts or are otherwise divisible. Similarly, the creditor may not, as a general rule, withhold performance except partially. Where, however, the performance due by the creditor is indivisible, the debtors having only a joint right, the withholding will necessarily be total.
Illustration 3
Three farmers, A, B and C, order twelve sacks of winter wheat seed from a producer, D, for a price of €9000. The contract provides that each buyer is liable only for a onethird share (€3000). A becomes insolvent. D could terminate only the obligations relating to A’s share.

Illustration 4
Two farmers, A and B, order an agricultural machine from a manufacturer, C. The contract provides that the two buyers are to be under separate obligations for the price, payable on delivery. A and B having a joint right against C for delivery of the machine (see Article III.–5:202(3)), C can withhold delivery so long as A does not pay A’s part of the price.

D. Joint obligations
Paragraph (3) defines joint obligations, which are characterised by the unitary nature of the obligation binding the several debtors. Joint obligations are more rare in practice. They relate to performances which by their nature have to be rendered in common by several debtors, bound to the creditor by a single contract.

A joint obligation is distinguished from a solidary obligation in that the creditor in a joint obligation can take action only against all the debtors together. It is distinguished from a divided obligation in that the performance due by each debtor is not limited to an independent performance of that debtor’s own share of the obligation. The joint obligation is not simply a combination of isolated parts of an obligation. Each of the debtors is obliged to collaborate with the others to provide the common performance.

Illustration 5
A recording company enters into a single contract with several musicians who are to play a symphony with a view to making a record. In the event of non-performance, the recording company will have to take action against all the musicians.

Illustration 6
The owners of a piece of ground wish to have a house built. If they approach contractors in different trades, asking for a single performance (namely the construction of the house), and if the co-contractors agree to work together to achieve that result, the obligation will be a joint one.

The non-performance of one of the debtors in a joint obligation necessarily has an effect on the obligation as a whole. It follows that the creditor can terminate for fundamental nonperformance even if the non-performance is imputable to only one of the debtors. Similarly, the creditor can withhold reciprocal performance totally, even if the failure to give or tender the debtors’ performance emanates from only one of the debtors.

III.–4:103: When different types of obligation arise

(1) Whether an obligation is solidary, divided or joint depends on the terms regulating the obligation.

(2) If the terms do not determine the question, the liability of two or more debtors to perform the same obligation is solidary. Liability is solidary in particular where two or more persons are liable for the same damage.

(3) The fact that the debtors are not liable on the same terms or grounds does not prevent solidarity.

COMMENTS

A. General

This article sets out the situations where the different types of plural obligation arise. The basic rule is that the character of an obligation depends on the terms of the contract or other juridical act or rule of law giving rise to the obligation.

B. Default rule of solidarity

Often the terms regulating the obligation will not say whether it is solidary, divided or joint. In some cases that will not be a problem; the nature of the obligation or the circumstances of the case may provide an answer. It will almost always be obvious from the nature of the obligation or the circumstances when an obligation is joint. For example, a contract with 28 street entertainers for the construction of a human pyramid containing them all gives rise by
its very nature to a joint obligation. Sometimes the circumstances will indicate that an obligation is to be a divided one.

Illustration 1

A and B order, by one contract, a fixed quantity of fuel to be delivered to different tanks. The reason for the combined order is to benefit from a reduction in price. Their obligation to pay will be a divided one if the contract provides that each is to be liable for only half the price. The same result will follow if the parties have agreed that the supplier will send separate bills to A and B, that being a tacit indication that the parties wished to provide for a divided obligation.

In many cases, however, it will not be clear whether an obligation is solidary or divided. If A and B bind themselves to pay X €1000 and it is obvious that X is to receive no more than €1000 it is not clear whether the obligation is solidary or divided. It is necessary to have a default rule.

The laws of the Member States have different approaches on this question. However, the solidary obligation is clearly better from the creditor’s point of view and can perhaps be said to be the natural interpretation of provisions providing for plural liability for one obligation. If A and B say “We oblige ourselves to pay X €1000 but only €1000 in total is due” then that can reasonably be read as meaning that each is bound to pay the full amount provided that the total payable to X is only €1000. If they want to provide that each is liable for a part then they should say so. The same applies, although perhaps with less force, to obligations arising by operation of law. Paragraph (2) therefore provides for a default rule of solidary liability when there are two or more debtors but one single obligation. It is justified because the natural implication from the fact that A and B are both bound, without any qualification, to perform the same obligation is that each is bound to perform in full if called upon to do so.

Illustration 2

Several friends conclude a contract with a landlord for the rent of a holiday villa in the south of France. The landlord can claim the whole rent from one of the tenants under
the rule in paragraph (2).

Illustration 3

Several students come across a holiday chalet in the mountains and occupy it for two weeks without permission. They are liable under the law on unjustified enrichment to pay an equivalent of rent. Their liability will be solidary.

C. Solidarity when several persons liable for same damage

Paragraph (2) provides, in order to protect the victim of damage caused by several people, that the obligation of reparation arising out of damage is solidary. The victim can therefore claim reparation for the harm from any one of those responsible for it. This solidarity applies whatever the nature of the responsibility in question. One of those responsible could be bound contractually, the other non-contractually. (On recourse between the co-debtors, see III.–4:107 (Recourse between solidary debtors))

Illustration 4

A, an employer, and B, an employee, are bound by a contract of employment containing a lawful restrictive covenant. C employs B with full knowledge that this violates the contract. B and C will be solidarily liable to A. B is contractually liable for breach of the restrictive covenant and C is liable for wrongfully inducing the breach of contract.

D. Debtors not liable on same terms or grounds

Paragraph (3) deals with the case where the conditions required for solidarity are fulfilled but the liability of one or more of the debtors is subject to a qualification, such as a condition or a time limit. The existence of this qualification does not prevent solidarity. The same rule applies when the liability of one of the debtors, but not others, is backed by a security.

Illustration 5

A, B and C borrow funds to buy a building from D. B’s liability is subject to the condition that a purchaser can be found for B’s present house within a year. This
condition affecting B’s liability does not prevent the debt of A, B and C from being solidary. Similarly, the solidary character of the obligation is not excluded if A’s debt is secured and the debts of B and C are unsecured.

More generally, the fact that the debtors are not liable on the same terms or grounds does not prevent solidarity. For example, one might be liable as a debtor and the other as a security provider (see e.g. IV.G.–2:105 (Solidary liability of security provider) or one might be directly liable and the other vicariously liable (see e.g. VI.–6:105 (Solidary liability)).

III.–4:106: Apportionment between solidary debtors
(1) As between themselves, solidary debtors are liable in equal shares.
(2) If two or more debtors have solidary liability for the same damage, their share of liability as between themselves is equal unless different shares of liability are more appropriate having regard to all the circumstances of the case and in particular to fault or to the extent to which a source of danger for which one of them was responsible contributed to the occurrence or extent of the damage.

COMMENTS
A. Default rule of equality
In providing a default rule of equal sharing, paragraph (1) adopts a natural and logical rule in line with III.–4:104 (Liability under divided obligations).

Illustration 1
A lends €10,000 to B and C. The contract contains a clause of solidarity. If B has paid the €10,000 to the creditor, B will be able to reclaim €5000 from C.

The rule of equal sharing is laid down only as a general rule. Unequal sharing may result from an express or implied provision of the contract or other juridical act or from the rule of law regulating the obligation.

Illustration 2
A and B order from C, by a contract including a clause of solidarity, a fixed quantity of fuel to be delivered into two tanks of different volume. 10,000 litres are to be delivered to A and 5000 to B. C claims payment from A who pays the whole amount. A will have a right of recourse against B but there is in the circumstances an implied provision of the contract that this will be only for the price of 5000 litres.

Illustration 3
D lends €60,000 to A, B and C who are made solidarily liable. A is to receive €30,000. B and C are to receive €15,000 each. A pays the whole amount and can reclaim a share from B and C but again there is in the circumstances an implied provision of the contract that A can reclaim from each of B and C only the amount of their part of the loan, namely €15,000, and not €20,000.

B. Rule for cases of damage
Paragraph (2) contains a special rule for cases of solidary liability resulting from causing the same damage, a matter which is treated rather differently in the various laws. The starting point is equal liability as between the solidary debtors but this applies only if another method of sharing is not more appropriate in the circumstances having regard in particular to fault or to the extent to which a source of danger for which one of them was responsible contributed to the occurrence or extent of the damage.

Illustration 4
Three companies are liable for loss caused to another company by unfair competition consisting of the release of products on to the market. The three companies are not equally at fault. They submit their dispute to arbitration. The arbitrator could apportion the liability between them according to the degree of seriousness of their respective wrongdoing.

III.–4:107: Recourse between solidary debtors
(1) A solidary debtor who has performed more than that debtor’s share has a right to recover the excess from any of the other debtors to the extent of each debtor’s unperformed share, together with a share of any costs reasonably incurred.
(2) A solidary debtor to whom paragraph (1) applies may also, subject to any prior right and interest of the creditor, exercise the rights and actions of the creditor, including any supporting security rights, to recover the excess from any of the other debtors to the extent of each debtor’s unperformed share.

(3) If a solidary debtor who has performed more than that debtor’s share is unable, despite all reasonable efforts, to recover contribution from another solidary debtor, the share of the others, including the one who has performed, is increased proportionally.

COMMENTS

A. General
This Article gives the solidary debtor who has paid or performed more than that debtor’s share a right of recourse against the co-debtors to the extent that they, or any of them, have not paid or performed their shares. The Article does not give a right of recourse before performance. However, the co-debtors are bound by the general duty of good faith which may, in certain situations, oblige them to contribute to the settlement of the debt before it has been satisfied by the debtor who is pursued by the creditor.

This Article should be read along with the following three Articles.

B. Personal right of recourse
Paragraph (1) deals with the debtor’s personal action, generally recognised by national laws on the basis of mandate, benevolent intervention in another’s affairs (negotiorum gestio) or unjustified enrichment. The text makes it clear that costs reasonably incurred can be added to the principal claimed.

C. Subrogatory recourse
Paragraph (2) allows the solidary debtor to exercise, in the context of the right of recourse, the rights and actions of the creditor. The rule therefore recognises what is known in a number of national systems as subrogatory recourse, by virtue of which the debtor who has performed more than a proper share benefits from securities obtained by the creditor. The debtor can choose the most advantageous course of action. The Article makes it clear, however, that the exercise of this right of subrogatory recourse must not prejudice the creditor. Such prejudice might occur because of a potential competition between the creditor who has not yet been
fully paid and the debtor subrogated to the creditor’s rights. The rule gives effect to the adage that subrogation should not operate against the subrogated person - “nemo contra se subrogare censetur”.

Illustration 1
Bank A agrees to a loan of €200,000 to a customer, B. The loan is secured by a real security and by a solidary obligation undertaken by C. C pays €150,000 for which C is subrogated to A. B being insolvent, the building subject to the real security is sold for €100,000, to be shared between A and C. By virtue of the rule in paragraph (2), the exercise by C as paying solidary debtor of the rights and actions of the creditor cannot prejudice A, the creditor, who will take €50,000. Without this rule the price might have been shared proportionately between the two holders of the real security, ranking equally - that is, €25,000 for A and €75,000 for C. A would then have lost €25,000.

D. Effect of inability to recover
Paragraph (3) contains a rule based on equitable considerations and commonly recognised. The risk of non-payment by one of the solidary debtors should be shared proportionally among the solvent debtors. The burden of the risk should not depend on which debtor the creditor chooses to pursue.

Illustration 2
A, B and C are under a solidary obligation to repay a sum of €12,000, A being liable for €6000, and B and C for €3000 each. The creditor claims the full amount from A who pays the full €12,000. B is insolvent. The shares of the two solvent debtors, A and C, are then increased in proportion to their respective shares. The ratio of A’s share to C’s share is 2:1. So, of the €3000 due by B, €2000 is apportioned to A and €1000 to C, which increases A’s share to €8000 and C’s to €4000.