

ПРОЕКТ ОБЩЕЙ СИСТЕМЫ КООРДИНАТ ЕВРОПЕЙСКОГО ЧАСТНОГО ПРАВА (DCFR)

III.-2:107: Исполнение третьим лицом

(1) Если по условиям обязательства личное исполнение должником не требуется, кредитор не вправе отказаться от исполнения, предложенного третьим лицом, если:

(a) третье лицо действует с согласия должника; или

(b) третье лицо имеет основанный на законе интерес в исполнении, а должник не исполнил обязанность или очевидно, что он не исполнит ее в установленный срок.

(2) Исполнение, произведенное третьим лицом в соответствии с [пунктом \(1\)](#), освобождает должника от исполнения, за исключением случаев, когда третье лицо приобретает права кредитора в результате уступки или суброгации.

(3) Если личное исполнение должником не требуется и кредитор принимает исполнение обязанности должника, произведенное третьим лицом в случаях, не предусмотренных [пунктом \(1\)](#), должник освобождается от обязанности и при этом кредитор несет ответственность за любой ущерб, причиненный должнику принятием такого исполнения.

Официальный комментарий (на английском):

A. Scope

This Article addresses the questions, under what conditions does performance of a debtor's obligation by a third person constitute due performance in relation to the creditor who cannot then refuse performance, and under what conditions does the performance by a third person discharge the debtor vis-à-vis the creditor.

Nothing in the Article relieves the creditor of any obligations towards the debtor.

B. When will a tender constitute performance?

The third person making the performance may be acting on behalf of the debtor as the debtor's representative. In that situation the legal position is the same as if the debtor were performing. Even in the absence of representation, however, a third party who performs is often acting with the assent of the debtor. In such cases paragraph (1)(a) provides that the creditor cannot refuse performance, unless the terms regulating the obligation require personal performance.

However, performance by a third person may also be made without the volition of the debtor. The third person may have a legitimate interest in doing so. A surety pays a debt in order to avoid costly proceedings against the debtor which eventually the surety will have to pay. A tenant pays the mortgage in order to avoid a forced sale of the property. In the interests of the family, a wife pays the debt of her husband for which she is not liable. A parent company pays the debt of its subsidiary to save the latter's credit rating. In these cases it seems sensible to permit payment by the third person even though this is not allowed under the laws of all the Member States (where unauthorised payment by the third person will not have the effect of discharging the debtor). So paragraph (1)(b) has the effect that the creditor cannot refuse performance by the third person provided that the debtor has failed to perform when performance fell due or it is clear that the debtor will not perform at the time when it falls

C. Is the debtor discharged?

Due performance by the third person who is entitled to perform discharges the debtor. This is the effect of paragraph (2). Of course, the debtor will not be discharged to the extent that the third party takes over the creditor's right by assignment or subrogation.

It follows from the Article that the debtor remains responsible if a third person who has promised to perform and who has got the debtor's assent to performance fails to perform or makes a defective tender.

Where performance has been undertaken or carried out by a third person who has a legitimate interest in performance the debtor will also remain responsible if the third person fails to tender performance when it is due, or if the tender is refused because it is defective. The debtor will not be excused for a failure to perform by a third person unless the third person's non-performance was due to an impediment which would also have excused the debtor.

A creditor who refuses to accept a performance by a third person made in pursuance of paragraph (1) will normally have failed to perform a reciprocal obligation and will be precluded from exercising any of the remedies for non-performance.

D. When may a tender be refused?

There are, however, situations where the creditor is entitled to refuse performance by a third party. Such performance may be excluded by the terms regulating the obligation. There are also situations where it follows from the nature or purpose of the obligation that it cannot be performed vicariously.

Where in contracts for the performance of personal services it can be inferred that the debtor has been selected to perform because of skill, competence or other personal qualifications, the creditor may refuse performance by a third person. However, if it is usual in the type of contract to allow delegation of the performance of some or all of the services, or if this can be done satisfactorily by third persons, the creditor must accept such performance.

Where the third person cannot show any assent by the debtor or any legitimate interest the creditor is entitled to refuse the tender of performance. Thus the creditor can refuse payment from a person who attempts to collect claims against the debtor. If the debtor has not assented to the performance the creditor may also refuse performance by a friend of the debtor whose motive is unselfish.

E. Where creditor voluntarily accepts performance by third party Paragraph (3) deals with the situation where the contract does not require personal performance by the debtor but the creditor, although not bound to do so, voluntarily accepts performance of the debtor's obligation by a third party. In such cases it would be contrary to the requirements of good faith and fair dealing to allow the creditor to continue to hold the debtor liable. On the other hand there may be cases where the debtor suffers some prejudice as a result of the creditor's acceptance of performance by a third party. The paragraph therefore provides that the debtor is discharged but that the creditor is liable for any loss suffered by the debtor as a result of the creditor's acceptance of performance.

F. Recourse against the debtor

Whether the third party who discharges the debtor's obligation has any recourse against the debtor will depend on the circumstances and on other rules which may be applicable. If the third party is the debtor's representative then their internal relationship will regulate recourse. In other cases where the third party pays with the debtor's assent the matter may be regulated by a contract between the third party and the debtor. In certain other cases special subrogation rules applicable to particular relationships may apply. In yet others the rules on benevolent intervention may come into operation. Finally, there may be cases where the law on unjustified enrichment will apply. It should be noted, however, that under the rules on that subject a person who voluntarily, and without error, confers a benefit on another cannot normally recover.

NOTES

I. Debtor assents to vicarious performance

1. The legal systems all seem to agree that performance by a third person which is agreed to by the debtor before or after it is made (vicarious performance) is, in principle, admitted (for AUSTRIA see CC § 1423). However, it may not be permitted if it is against the interests of the creditor. This idea is expressed differently in the legal systems.

2. GREEK and PORTUGUESE law will not permit vicarious performance when it is prejudicial to the interests of the creditor, see Greek CC art. 317 *in fine* and PORTUGUESE CC art. 767(2). Under DUTCH law a third party may perform an obligation "unless this is contrary to its content or necessary implication", see CC art. 6:30.

3. Most of the laws exclude vicarious performance of obligations which have a personal character: DENMARK, see *Ussing*, *Obligationsretten*, 58; FINLAND, see *Saarnilehto, Hemmo & Kartio*, 171; FRANCE and BELGIUM, CC art. 1236, see *Malaurie & Aynès*, *Obligations* no. 962 and for Belgium Cass. 28 September 1973, RW 1973-74, 1158, RCJB 1974, 238 obs. *van Damme*; ENGLAND, *Treitel*, *Contract* 15-001 - 15-004; AUSTRIA, a generally acknowledged principle based on provisions for specific contracts: CC § 1153 (labour employment contract), § 1171 (work contract for work and services), etc.; GERMANY, see CC § 267(1); ITALY, CC art. 1180; GREECE: *Zepos* in *Ermak II/1* art. 317 no.13 (1949) *Georgiadou* in *Georgiadis & Stathopoulos* art. 317 no. 12, *Stathopoulos*, *Obligations* §17 no. 36; NETHERLANDS, CC art. 6:30(1); SCOTLAND, *McBryde* chap. 12.33-12.41; SLOVENIA, LOA § 271(3); SPAIN, CC arts. 1158, 1161 and see *Díez-Picazo II*, 481; SWEDEN, see *Rodhe*, *Obligationsrätt* 158; CZECH REPUBLIC, general rule of civil law, see *Jehlička, Švestka, Škárová a kol.*, *Občanský zákoník – komentář*, p. 711 and for commercial cases stated in *Ccom* art. 332; ESTONIA LOA § 78(1); POLAND CC art.356 § 1; and SLOVAKIA *Ccom* art. 332.

II. Performance without the consent of the debtor

4. Provided the performance by the third party is not excluded as being against the interests of the creditor under the rules discussed in note 1 above, most other systems seem to allow it on varying conditions. Under AUSTRIAN law, the debtor's consent is not necessary, if the creditor accepts performance by the third party (see CC § 1423). In GERMANY, CC § 267(2), ESTONIA, LOA § 78(2), SLOVENIA LOA § 271(4) and ITALY, CC art. 1180 the creditor must accept performance but may refuse if there is an actual interest in having the debtor perform personally, or if the debtor has notified an objection to the creditor. However, as this paragraph is an expression of the *favor creditoris* principle, if the debtor objects to it the creditor is not obliged to reject performance but has a choice whether or not to accept (but see the GERMAN exception of CC § 268 to protect some particularly interested third parties). This rule also applies in DENMARK, see *Ussing*, *Obligationsretten*⁴, 307; the NETHERLANDS, CC art 6:30(2); PORTUGAL, CC arts. 592(1) and 768(2); SWEDEN, *Rodhe*, *Obligationsrätt* 66; and probably SCOTLAND, *Gloag and Henderson* 3.22, although the Scottish law in this area is unclear. In FRANCE the debtor can oppose performance if it would be prejudicial, see *Malaurie & Aynès*, *Obligations*, no. 962. In BELGIUM the debtor cannot oppose performance, but the third party will not acquire the rights of the creditor by subrogation unless the third party acted with the debtor's consent or had a legitimate interest in performance, CC art. 1236.

5. Similarly, under ESTONIAN law, if a third party performs the obligation in order to avoid compulsory execution with regard to an object which belongs to the debtor but is in the lawful possession of the third party or for which the third party has some other right and if, in the case of compulsory execution, such possession or right would terminate, the creditor may not refuse to accept performance even if the debtor has objected to such performance (LOA § 78(3)).

6. Under SPANISH law the creditor must accept performance by a third party even if the debtor opposes it, but the third party will then not have a right of subrogation but only a claim for enrichment (CC arts. 1158(3) and 1159; *Díez-Picazo II*, 484; *Albaladejo II*, 1 § 24.3; TS 26 June 1925, 16 June 1969, 30 September 1987 and 12 November 1987).

7. In GREECE the creditor may not accept performance by a third party if the debtor opposes it, see CC art. 318.

8. Under POLISH law, as far as obligations to pay a sum of money are concerned, the creditor cannot refuse payment by a third party, even if made without the debtor's knowledge or consent (CC art. 356 § 2). CC art. 518 provides that in certain cases the third party will acquire the paid debt and will become the debtor's new creditor.

9. In ENGLISH law a performance made without the permission of the debtor is not admitted. This holds true when the effect would be a subrogation in favour of the third party: "a man cannot make himself the creditor of another without his knowledge or consent". The same seems even to hold true when there is no subrogation, see *Chitty* para. 29-093. It is probably now settled that payment by a third party will only discharge the debtor if the debtor authorized or subsequently ratified the payment, see *Goff and Jones* 17. There are, however, specific provisions allowing a subtenant of a lease to intervene to prevent forfeiture of the head lease, see Law of Property Act 1925, s. 146. Also in the CZECH REPUBLIC the debtor's agreement is necessary under civil law, (CC § 559 as construed by *Jehlička, Švestka, Škárková a kol.*, Občanský zákoník – komentář, p. 711) but not under commercial law (this is expressly stated by Ccom art. 332.1 as a general principle of commercial law).

10. Under SLOVAK law the consent of the debtor is not necessary if the third person secures the performance by guarantee or by other legal manner and the debtor did not perform the obligation (Ccom art. 332).

11. Under the HUNGARIAN CC § 286 the creditor must accept performance offered by a third person if the debtor has consented to this and the service is not bound to a specific person and does not require any expertise that is not possessed by the third person. The debtor's consent is not required if the third party has a lawful interest in completing performance. In such case, any security securing the right remains in force if the right passes to a third person who effects performance or if such third person is entitled to demand reimbursement from the debtor.