**LAW OF OBLIGATIONS**

**Introduction**

Obligation is a legal bond by which a person (called debtor) is obliged to render performance to another (called creditor). The latter may claim performance only from the debtor→ His right is personal not real. The debtor is bound to render performance in good faith also giving consideration to business usage (AK 288). Obligation does not mean only the owing of a performance but also the liability for not rendering it. Thus, in case of non-performance the creditor has the right to bring an action for performance and if the debtor denies to fulfill it, the creditor may resort to enforcement proceedings and satisfy his claim. Liability is based on fault. A debtor is responsible for any shortfall in the performance resulting from willful misconduct or negligence imputable to him or his agents. Fault is presumed. The general rule is that the debtor who fails to perform is liable, unless he proves that he is not to blame for the non-performance.

**Relativity (Privity) of obligations**

The Principle and its exceptions

It is a principle which provides that an obligation develops its effects between the parties (inter partes). A promissory [contract](https://en.wikipedia.org/wiki/Contract) cannot confer rights nor impose its obligations upon any person who is not a party to the contract. They, and not any third party, can sue each other (or be sued) under the terms of the contracts. By way of contrast rights in rem, e.g. real rights, right to personality, have absolute effect (erga omnes), i.e. everybody is bound to respect them. A strict application of the relativity of obligations does not satisfy the needs of our times. Sometimes the interests of third parties from an obligation of others deserve to be protected. Below are some exceptions from the relativity of obligations: Anyone who causes prejudice intentionally and contrary to morality is obliged to compensation (AK 919). If prejudice occurs because a person who is not party to a contract acts intentionally to the detriment of the creditor, the offendor –though not obliged to respect contractual rights of others- is liable for damages, e.g. A destroys intentionally the thing which S sold to B, so that B shall be deprived of its use. According to the oblique action a creditor (C) may seek from his debtor’s (D) debtor (A) payment to his debtor (D) so that the latter will become creditworthy and A will be more easily satisfied from D’s property. The institution of defrauding of creditors (see below) introduces also an exception to relativity. In the case of contracts for the benefit of a third party in principle it is the promisee who may demand performance in favor of the third party but if the parties so intended the third (not contracting) party may directly demand performance from the promisor. Also some EC Directives put aside the doctrine of relativity. Apart from the Directive on the liability of a producer of defective goods, which provides for the liability of the producer for prejudice arising from a defect in one of his products even if the injured party (e.g. a consumer) had not stipulated a contract with the producer, also the Directive on consumer credit breaks the principle. If a consumer is funded by a credit institution (e.g. a bank) in order to acquire goods or services and the latter are not finally given to him or they are given but in a manner contrary to the contract, the consumer is entitled to take action against the credit institution, if the supplier of the goods is linked by contract with the credit institution.

Actio pauliana (defrauding of creditors)

Third parties who acquire assets of property from the debtor have no liability as against the creditor, even if the alienation causes insolvency of the debtor, i.e. insufficiency of the debtor’s remaining estate to satisfy the creditor. Third parties are not obliged to take into account the rights of the creditor (privity of obligations). Under certain conditions, however, -the alienation must have taking place with an intention of prejudicing the creditor, the third party to whom alienation was made must be aware that the debtor intended to prejudice his creditor- the creditors have the right within five years from the alienation to contest it (AK 939 et seq.). Result of the contest is that the alienated right (e.g. ownership) is not transferred back ipso jure to the estate of the debtor but the person to whom the right was transferred has an obligation to restore the status quo ante. If the third party further transferred the alienated asset, the successor has a similar liability as against the creditor, if he was aware of the intent of the debtor.

Transfer of contractual rights and debts

In earlier times obligation had force only between a concrete creditor and a concrete debtor. In order to change either of these persons it was necessary to agree on the extinction of the old obligation and decide for the stipulation of a new obligation (see the Roman novatio). Today contractual rights and debts are transferable. This is very important, because e.g. in the case of transfer of a claim, the securities -real and personal- of the claim are maintained. The transfer of a claim, which is called assignment, is effected by a contract between the original and the new creditor, while assumption of a debt is the change of the debtor. It is achieved by a contract between the creditor and the new debtor by which the latter assumes the debt thus becoming debtor. We distinguish two kinds of assumption of debts: privative and cumulative. In the former the old debtor is released, while in the latter the original debtor is not released so that the creditor from then on has two creditors (joint debtors), who are jointly and severally liable to fulfill the performance (AK 481).

**Non-performance of obligations**

The Greek civil code provides only for two categories of non-performance, which it regulates in detail: impossibility and default. Other possible defects in performance are not treated by the law. However in certain specific contracts (e.g. sale, lease, contract for work) the law regulates other defects in performance, such as defects and lack of promised qualities.

Impossibility

AK regulates both initial and subsequent impossibility in the same way (see the modified BGB). The important issue is who is responsible for the impossibility: if it is the debtor, he is liable to pay damages (AK 335, 336), if it is the creditor, the debtor is freed and may demand what was promised to him (AK 381). If neither party is to blame, both parties are freed (AK 336, 363).

Default of the debtor

If performance is possible but it has not been rendered in time (performance has fallen due), the creditor may seek compensation for delay, if he puts the debtor in *default.* To do so, the creditor must give warning to the debtor, call him to fulfill the performance, presupposition which is not necessary, if a fixed date of performance was agreed in the contract. The debtor must be at fault. His fault for the lateness of performance is presumed AK 342. The debtor is exempted from responsibility, if he proves that delay in performance is not imputable to him.

Default of the creditor

A creditor is in default when he does not accept the performance which is offered to him(AK 349). The offer must be real (effective, not simple words) and appropriate. For example the creditor is not in default, if the plumber who has undertaken to repair the heating system of a building comes to the place of performance without bringing the necessary tools. Fault is not a condition for creditor’s default as it is for debtor’s default. In the case of the creditor’s default the debtor has the right to make a deposit with a public body (AK 427), provided that the owed things are susceptible of deposit e.g. money, jewellery. If the things owed are movables that are not suitable for deposit e.g. fruit, the debtor may sell them by public auction. If the owed thing is an immovable, the debtor may request the court to appoint a sequestrator (custodian, person appointed to hold property in sequestration).

Other cases of breach of contract: improper performance

All instances in which the debtor fails to perform his obligation without there being impossibility of performance or default are covered by a third category of breach of contract. It consists in the following instances: defective performance e.g. the sold object is defective and thus inappropriate for use, infringement of collateral duties e.g. the vendor delivers the thing to the purchaser but he does not give him the instructions for use with the result that the object suffers damages from mishandling, repudiation of contract i.e. before the performance falls due the debtor declares that he will not fulfill his performance e.t.c. Since AK does not regulate these instances of non-performance, there is a lacuna which is filled by analogy of law. The courts apply by analogy the provisions relating to impossibility and delay.

Unforeseen change of circumstances (frustration of contracts)

Article 388 AK provides for the possibility of judicial dissolution or revision of a reciprocal contract, if the performance of the contract became excessively onerous for one of the parties due to an unforeseen change in circumstances after the conclusion of the contract e.g. currency devaluation. It is a special expression of good faith. This provision is one of the most forward-looking of the AK (in Germany until the reform of 2002 there was no provision corresponding to AK 388. Today see §313 BGB Wegfall des Geschaeftsgrundlage. See also the modified French CC which has adopted la théorie de l’ imprévision).

Remedies for non-performance

The primary remedy for non-performance (in contrast to the Anglo-Saxon system, which recognizes only by way of exception and at the discretion of the court the remedy of specific performance) is a *claim to performance* in kind, if performance is still possible. If performance is not possible, the creditor may only bring an action for damages. A party to a two-sided contract after the conclusion of the contract may refuse to perform until the other party renders his own performance, unless he is bound to perform first (AK 374).

*Damages*: In the cases of impossibility of performance, default or improper performance of the contract due to *fault* a right of compensation is given to the innocent party. In the case of contractual liability, non-pecuniary (moral damage) is not recognized. Compensation is given only for pecuniary damage (prejudice to property), in contrast with delictual liability, where moral prejudice is also compensated. If the injured party has contributed with his conduct to the causing or to the extent of the damage, the court may either not award compensation or reduce its sum (AK 300).

*Rescission* (only in two-sided contracts): It is recognized in all instances where the debtor through his *fault* (no fault needed in the modified BGB) fails to fulfill his duties. Exceptionally no fault is required in the case of fixed-dated contracts (AK 401). Rescission is exercised by a unilateral juridical act addressed to the other party. Effect of rescission is that the mutual obligations arising from the contract are extinguished and the parties are obliged to return to each other whatever they received by virtue of the provisions on unjust enrichment. For example if the seller of a car who also transferred ownership to the buyer exercises the right of rescission from sale, ownership is not reverted ipso jure to him. The buyer is obliged to retransfer ownership on the car to the seller. In addition to rescission the creditor may seek reasonable, which means reduced, compensation. The Greek legislator did not decide for the cumulative exercise of rescission and full compensation, as for example the French Civil Code did (now also BGB after its modification).

Apart from the action for performance which is independent of fault, the other remedies for non performance presuppose fault. There are two degrees of fault depending on its gravity: intent (dolus), when the debtor willed or accepted the unlawful result of his conduct and negligence, when the debtor did not pay the attention which he could and ought to give to avert the unlawful result.

*Bibliography*

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