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**SOLIDARY OBLIGATIONS  
IN THE REGULATIONS OF PRINCIPLES OF EUROPEAN CONTRACT LAW  
(PECL) AND DRAFT OF COMMON FRAME OF REFERENCE (DCFR)**

*An interest for the subject of pluralities of parties in obligations is completely expected and justified. This question has raised great attention and interest throughout centuries not only into the boundaries of law science, but as well in positive and comparative law. Some questions were left open long time ago and have been vital for law theory and legislative ever since.*

*Commission for developing Principles of European Contract Law has dedicated the chapter number ten for complex obligations with more parties. Under title „Pluralities of parties in obligation” by provisions of Principle solidary, separate and communal obligations are completely regulated. Chapter ten is divided into two sections whereas the first one is dedicated to obligations with more parties on debtors’ side that is passive solidary, separate and communal obligations, while the other section is dedicated to obligations with more parties on creditors’ side that is active solidary, separate and communal obligations.*

*Stady Group on a European Civil Code has dedicated the the Chapter four of Draft Common Frame of Reference (DCFR) for complex obligations with more parties (“Plurality of debtors and creditors”). Chapter four is divided into two section whereas the first one is dedicated to plurality of debtors (passive solidary, divided and joint obligations), while the other section is dedicated to obligations with more parties on creditors’ side that is active solidary, divided and joint rights.*

*Kay words: Principles of European Contract Law (PECL), Draft Common Frame of Reference (DCFR), Pluralities of parties in obligation, Solidary obligations, Solidary debtor, Solidary creditor.*

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## Introduction

Nowadays there is very common classification of complex obligations with more subjects on separate (divided-DCFR), solidary and communal (joint-DCFR) obligations.<sup>1</sup> Each of mentioned types produces different legal consequences, so there are some special rules for them. We can say that nowadays there is the unity in the aspect of defining the terms of complex obligations. Separate obligations are obligations with more parties and shared subject i.e. there are as many creditors as there are claims. Separate obligations are obligations in pluralities of parties and communal subject i.e. obligations where there are as many debtors as there are debts, i.e. as many creditors there are, the same credit amount there is. In theory there is the term of divided, but also very nice and picturesque expression – separate obligations.<sup>2</sup> It is considered that the obligations is divided if the debt can be divided and fulfilled in parts which have the same features as the entire subject, and if it does not lose anything from its value by that division.<sup>3</sup> Active separate obligations are the obligations where there are plurality of parties on creditor side and only one debtor, whereby each creditor only claims its part of debt, and the deeds of one creditor are not in favor to the rest of creditors. Passive separate obligations are obligations where one creditor claims more debtors, but in the way that each of debtors owes its part of the debt. When in some separate obligations there are more creditors or debtors, if it is not otherwise determined the obligation is shared on equal parts within debtors, each of them is responsible for its part of obligation, and each creditor claims the settlement of only its part of claim.<sup>4</sup>

Solidary obligations are obligations with more subjects i.e. creditors or debtors where each debtor is obligated to fulfill the entire debt, and every creditor can demand

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<sup>1</sup> Art. 421-444. Law on Obligations of Montenegro; Principles of European Contract law (PECL), Chapter 10, Section 1: Obligations with plurality of debtors, article 10:101.; Draft Common Frame of reference (DCFR), Chapter 4, III, 4:101-4:207. More details: Lazar Marković, Obligatory law, Službeni list, Belgrade, 1997., 304-330.; Mihailo Konstantinović, Draft Law on obligation and contracts, NIU Official Gazette of SRJ, Classics of Yugoslav Law, Belgrade, p.140-141.; Slobodan Perović, Commentary of Obligatory Relations Law, book I, Contemporary administration, Belgrade, 1995. p. 819-838; Slobodan Perović, Obligatory Law, Official Gazette of SFRJ, Belgrade, 1990., p.123-140.; Jakov Radišić, Obligatory law, Nomos, Belgrade, 2008. p.367-372.; Oliver Antić, Obligatory law, The Faculty of Law, Belgrade, 2010., p. 101-103.;

<sup>2</sup> Jakov Radišić, Obligatory law, Nomos, Belgrade, 2008., p. 366.

<sup>3</sup> Article 421. p.1. Law on Obligations of Montenegro

<sup>4</sup> Article 421. p.2. Law on Obligations of Montenegro

from any of debtors the fulfillment of entire obligation.<sup>5</sup> The term „solidary“ obligations comes from new latin word “*solidaris*” – meaning: two or more persons mutually help each other, supporting the members of the group belonging to, common, mutually responsible.<sup>6</sup>

Solidary obligations have three forms of appearing. Therefore, solidary obligations exist in the case when two or more debtors owes one obligation to one creditor and in a way when one debtor fulfill the obligation it ends for all the debtors (passive solidary obligation), when in obligation there are two or more creditors and each of them is authorized to demand the entire obligation fulfillment from the debtors, whereas the fulfillment of obligation to one of creditors liberates the debtor compared to others (active solidary obligation) and even though there are more parties on the creditors and debtors side. The subject of solidary obligations are legally indivisible performances. Solidarity can come out of law, agreement or will.

Communal obligations are obligations whose subject can not be separated and its value to stay the same, therefore, the subject is in fact indivisible. There are active common obligation when in obligatory relations on the creditor side there are more persons so that each creditor can demand the entire obligation fulfillment. Passive communal obligations are the obligations in which each of debtors are obligated to fulfill the entire obligation. When one of debtors fulfill the obligation he has the right to demand the payment of the rest of shares according to in advance fixed value from the rest of debtors, and in the case that the quantity i.e. value of parts is not fixed, it is considered that the obligation is divided on equal shares.

#### Solidary debtors (passive solidary obligations)

There are passive solidary obligations „when more debtors have to fulfill the same obligations, and creditor may demand the fulfillment of entire obligations from any of debtors.“<sup>7</sup>

Principles of European Contract Law after defining passive solidary obligations are predicting that “ if there are more debtors in obligation to fulfill one deed to the

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<sup>5</sup> Lazar Marković, cit. p. 314-324.; Slobodan Perović, cit. p. 822-837; Slobodan Perović, cit. p.123-140.; Jakov Radišić, cit. p.367-372.; Oliver Antić, cit., p. 101-103.

<sup>6</sup> Ivan Klajn, Milan Šipka – A dictionary of foreign words and phrases, Prometej, Novi Sad, 2008. p. 1161.

creditor from the contract, the debtors answer solidary, except in cases when it is otherwise predicted by the contract or law."<sup>8</sup> Therefore, Principles start from the rules that at passive solidary obligations solidarity of debtors are assumed. And that is not the only thing. The principles specify that "the fact that debtors answer under different conditions for the same debt it is not an obstacle for development of passive solidarity".<sup>9</sup>

When there are more parties on the debtors side the first question that arises is how they answer - each for himself i.e. separate or solidary? Next comes the question, if they answer solidary, does that solidarity have to be predicted or is it assumed?

Basically, there are two normative approaches to this question. According to one, when there are more persons on debtor's side, and contract obligation is divisible, debtors answer to the creditor solidary, if they did not expressly or impliedly exclude solidarity. Therefore, according to this solution solidarity is always assumed when more debtors owe separate obligations.<sup>10</sup> According to other approach<sup>11</sup>, solidarity is never assumed, but it is under contract, or specified by the law.<sup>12</sup> The question which of those

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<sup>7</sup> Principles of European Contract law, Chapter 10, Section 1: Obligations with plurality of debtors, article 10:102 (1); Draft Common Frame of reference (DCFR), Chapter 4, Section III, 4:103 – Solidary, divided and joint obligations.

<sup>8</sup> Principles of European Contract law, article 10:102: (1) The sources of solidary obligations. Solidary obligations also arise where several persons are liable for the same damage. (article 10:102: (2) The sources of solidary obligations). Draft Common Frame of reference (DCFR), Chapter 4, Section III, Article 4:102 (2).

<sup>9</sup> Principles of European Contract law, article 10:102: (3) The sources of solidary obligations; Draft Common Frame of reference (DCFR), Chapter 4, Section III, Article 4:102(3).

<sup>10</sup> This solution has been adopted in Italian Civil Law (article 1294.), German Civil Law (article 427). More details: Slobodan Perović, Comment...p.825-827.; Francesco Bartolini, Pietro Dubolino, *Il Codice civile, commentato con la giurisprudenza*, Casa editrice La Tribuna, Piacenza, 1997. p.281, 1326-1327., Professor Mihailo Konstantinović has introduced the solution into Draft Law on obligation and contract (article 334.) „when there are more debtors in certain communal obligations made by contract, they answer solidary to the creditor, unless the parties did not specifically eliminate solidary liabilities, or if their such a will comes out of circumstances of their work“.

<sup>11</sup> Article. 889. Austrian Civil Law, article. 421. p. 3. Law on obligatory relations of Montenegro. In the article 422. the Law has introduced assumption of solidary liabilities for separate obligation made by contract in economy, unless the parties did not specifically eliminate it. More details: Slobodan Perović, cit, p. 127-129.; Jakov Radišić, cit, p.368., Oliver Antić, cit, p.101-102;

<sup>12</sup> Slobodan Perović, Comment... p. 826.: The attitude and solution which was adopted by our legislator, who took over the provision of earlier applicable law on obligatory relations, was defended by following arguments: „If the one starts from the fact that passive solidarity, in fact, one of the measures of self-insurance where more persons take the obligation to pay out the whole debt to the creditor even though each of those persons does not use it entirely, then the selection of such an application could be found rather in the will of parties or the law than in assumed solidarity, i.e. in citizenship that as soon as there are more debtors in contract, they

two solutions is „better“, that is to which to submit, was the question upon which the members of Lando commission found themselves.

Principles of European Contract Law accepted the solution when on the debtor`s side there are more persons, and contract obligation is divisible, debtors answer to the creditor solidary, unless they did not exclude solidarity expressly or tacitly. Starting from position that the passive solidarity is measure of self insurance, Lando commission has brought the assumption of solidary liabilities of debtor into this type of complex obligation, considering it as logical solution which comes out from the term of passive solidary obligation itself. Thus, Lando commission has tried to find the answer to this question by analyzing dominant attitudes of law theory, but also applicable solutions in modern positive laws. The same provision can be found in Draft Common Frame of Reference.

And law science, facing many theoretical understandings of solidary obligations and their legal state, tried to establish so called “mutual element” which always has to be present in the relations of solidarity. One opinion, which comes from German doctrine, is based on the interests of creditors: all the relations are aiming for fulfillment of the same interest. Fulfillment of creditor interest comes from fulfillment of the co-debtors or co-creditors when the rest of relations end, and it would not come to that if there is not mutual interest itself. Second opinion is based on the goal as mutual and constitutive element of solidary obligations. All the obligations, the followers of this opinion claim, strive for realization of the same goal or achieving the same practical result. The fulfillment of one goal or to one person, that goal ceases to exist, and obligation as well. The next opinion finds mutual element of solidary obligations in the deed itself. Co-debtors or co-creditors have in their mind the same deed.<sup>13</sup>

However, all those opinions are judged as unilateral. The same interest, the same goal or the same benefit can be in the base of every communal obligation, and in the same way they do not imply that fulfillment have the power of ending all the individual relations. Modern doctrine finds the essence of solidary obligations in their specific content which says that fulfillment from one of many debtors as the result has the

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answer solidary. The emergence of solidarity, considering the nature and strict rules of this institution, should be foreseen by the will of parties or by the law, and not assumed in the case when parties or the law in that matter nothing foresee at certain cases. However, the another point would be accepted only at contract in economy, because the specificity of these contracts allows that.“

<sup>13</sup> Francesco Caringella, Guiseppa de Marzo, cit, p.212. and further.

fulfillment of all or to one of many creditors.<sup>14</sup> The fulfillment of obligation of one of co-creditors leads to ending the rest of relations, not because they have lost the sense or they are left without subject, but because the claim of creditor has entirely ended and in relations to everybody, by fulfillment of one co-creditor's entire deed.<sup>15</sup> Analogous to this, the fulfillment to one of co-creditors, release the debtor in relation to the rest of co-creditors.

In this theoretical explanation it is found the base for solution which is adopted in the Principles of European Contract Law and Draft Common Frame of Reference, and the solidarity of debtors to be premised, although by the concordance of the subjects or by expressly law regulation it can be excluded. Solidarity of creditors must always be made by contract or to be the result of the law.

In legal theory, from the same reasons, the presumptions are derived which are based on passive solidarity. Solidary liability of debtor will exist when obligations a) derive from the same source and b) have the same deed for the subject. From these presumptions follow that the relation of solidarity occurs on the basis of general conditions which are in demand for development of obligation. The action should be such that all the debtors are connected to the same action, i.e. to have the same content for everybody. The sameness of action does not mean that debtors cannot be obliged by different forms existing. On the contrary.<sup>16</sup>

Considering all the above mentioned Lando commission specified that "debtors of solidary obligation answer for the obligation in the equal parts, unless the contract or the law does not say otherwise."<sup>17</sup> DCFR specified: "As between themselves, solidary debtors are liable in equal shares".<sup>18</sup> It follows that at passive solidary obligations each debtor answer for the entire debt, but when one debtor fulfill the obligation, all the other debtors are liberated from obligation to creditor. The creditor can demand the

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<sup>14</sup> Massimo Bianca, cit, p. 702-703.

<sup>15</sup> Massimo Bianca, cit, p.703.

<sup>16</sup> The legal presumption of solidarity does not exist when the active solidary obligations are the matter. If the claims are coming from the same source and have the same subject they are divided between creditors. That is the reason why the development of active solidarity has to result from the contract or express provision of the law.

<sup>17</sup> The Principles of European Contract Law, article.10:105: Participation in obligation of co-debtor in solidary obligation. In paragraph 2 of the same article Principles specifies that "when two or more persons jointly and severally are responsible for damages based on Article 10:102:(2) their contribution to the damage incurred is determined according to the rules that regulate responsibility."

<sup>18</sup> Draft Common frame of Reference, Chapter 4, Section III, Article 4:106 (1) Apportionment between solidary debtors

fulfillment of obligation from any of debtors according to its choice and discretion. That kind of choice is irrevocable so that the creditor can ask the fulfillment from the rest of debtors until the complete fulfillment of obligation. Solidary debtors are the subjects of one obligation so that they are all responsible for fulfillment of obligation for one, and one for all.<sup>19</sup>

Passive solidary obligation can be fulfilled by one of debtors or all together, and in the same time the relationship between solidary debtors and creditors ends (external relationship). If the obligation is fulfilled by all of solidary debtors according to their rules of internal obligations, the obligation finally ends. If the obligation is fulfilled by only one or some of the debtors, the so called internal legal relationship develops, because debtor (or debtors) who fulfilled the entire obligation has the right of regress to the rest of the debtors. The debtor who fulfilled the entire obligation, becomes the creditor of the rest of the co-debtors. In the case when the fulfillment cannot be completed by one of the debtors, his part is equally shared among other co-debtors including the debtor who paid his debt to the creditor and the debtor to whom the creditor has forgiven the debt.<sup>20</sup>

PECLand DCFR specify that debtor, who fulfilled the obligation to creditor which overcomes his part of debt, has the right of regress to the rest of the debtors within the limits of the fulfilled obligation, as well as the right of costs compensation which he had regarding to fulfillment.<sup>21</sup> Solidary debtor to whom this rule is applied also can, in the scope of creditor's legal rights of solidary obligation, to exercise the right of creditor after fulfillment of the obligation, including secondary obligations, in order to fulfill (regress) from the co-debtors whose parts of debt he has paid.<sup>22</sup> If the co-debtor who has fulfilled his obligation which overcomes his part of obligation, despite the efforts undertaken, fails to regresses the other co-debtor, the parts of obligations of

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<sup>19</sup> Article 423. p.2. Law on Obligations of Montenegro. However, any of solidary debtors can owe with different forms i.e. different deadline, under different conditions and under different deviations in general

<sup>20</sup> Article 423. Law on Obligations of Montenegro

<sup>21</sup> Principles of European Contract Law, Article 10: 106 (1): The right of regress between the solidary debtors; Draft Common Frame of reference, Chapter 4, Section III, Article 4:107 (1) Recourse between solidary debtors.

<sup>22</sup> Principles of European Contract Law, Article 10: 106 (2): The right of regress between the solidary debtors; Draft Common Frame of reference, Chapter 4, Section III, Article 4:107 (2) Recourse between solidary debtors

all the debtors, including the one who has fulfilled the obligation to a creditor, are increased proportionally.<sup>23</sup>

The role of solidarity is to make safer and easier implementation of creditor's claims. This applies to obligations arising under the contract, as well as from those resulting from illegal actions. It allows to a creditor easier collection, but it gives the possibility to avoid any inconvenience or difficulty which he would have if each co-debtor had to ask the fulfillment of certain parts of the entire obligation.

The rule in case of passive solidary obligations is that a debtor cannot make the position of the other co-debtor difficult or worse by its actions. However, the solidary debtors are the subjects of singular obligation, so the effects of actions taken by one of the solidary debtors, as a rule, apply to all other debtors. The effect of passive solidary obligation consists in the fact that the creditor may demand payment of the entire debt of any of the debtor, and that by fulfillment of the obligation of one debtor the obligation of other debtors ends.

Principles of European Contract Law and Draft Common Frame of Reference regulate the impact of certain ways of extinguishing the obligations to solidary obligation.

The fulfillment or payment of one of the solidary debtors also effects to other debtors. The same applies in the case of compensation.<sup>24</sup> Principles specify that "payment or compensation by one solidary debtor or the compensation concluded with one of the solidary debtors also releases the other debtors to the extent of fulfilled payment, or compensation."<sup>25</sup>

In the case when in one person the characteristics of a creditor and of the debtor of the same solidary obligation are united, obligation of the rest of the debtors is reduced by the amount of the debtor's part who acquired the conditions for the union

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<sup>23</sup> The Principles of European Contract Law, article 10:106(3): The right of regress between solidary debtors; Draft Common Frame of reference, Chapter 4, Section III, Article 4:107 (3) Recourse between solidary debtors

<sup>24</sup> Article 424. The Law on obligations of Montenegro

<sup>25</sup> Article 10:107 (1) : Solidary obligations: payment, compensations and confusion; Draft Common Frame of reference, Chapter 4, Section III, Article 4:108 (1) Performance, set-off and merger in solidary obligations.

Our law also specifies that each solidary debtor may also call for compensation made by his co-debtor. (Article 424.p.1. Law on obligations of Montenegro) So, if a creditor files a suit against one of the debtors, he may reject him by the complaint of compensation made by one of the solidary debtors. However, each of the solidary debtors can make compensation of the creditor's claims, with what the creditor owes to his co-debtor, but only for the co-debtor's amount of the debt in solidary obligation (Article 424.p.2. Law on obligations of Montenegro).

(confusion).<sup>26</sup> Also, the text of the principles specifies that "confusion (union) that occurred in the relationship between creditor and one of the solidary debtors does not relieve the other co-debtors, but only the debtor himself."<sup>27</sup>

It is the rule that discharge of the debt made under an agreement with one of the solidary debtors, if it comes to discharge of the debt *in rem*, relieves the other debtors of the liability. However, if the release had the intention only to release only the debtor from the obligation with whom is performed (discharge of debt *in personam*), solidary obligation is reduced by the amount of the debt of that debtor, and the other debtors are solidary obligated for the rest of the obligation.<sup>28</sup> Principles specify that "if a creditor releases a debt to one solidary debtor ... the obligation of other debtors is reduced by the amount of his part of the debt."<sup>29</sup> The same applies for the settlement.<sup>30</sup>

Thus, the debtors are fully liberated by release or settlement of debt, if so provided.<sup>31</sup> In the relations between the solidary debtors, the debtor to whom the debt is discharged relieves of the debt according to the circumstances at the time of discharge of the debt, but not for the part that later was developed in accordance with Article 10:106: (3).<sup>32</sup> Namely, this rule applies to the case when the solidary debtor who fulfilled the obligation which overcomes his part of claim, despite the efforts undertaken, fails to regress the other co-debtors, so the parts of obligation of all debtors, including the one who has fulfilled his obligation to a creditor, are proportionally increased.<sup>33</sup>

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<sup>26</sup> Article 428. Law on obligations of Montenegro

<sup>27</sup> Article 10:107 (2): Solidary obligations: payment, compensation and confusion; Draft Common Frame of reference, Chapter 4, Section III, Article 4:108 (2) Performance, set-off and merger in solidary obligations.

<sup>28</sup> Article 425. Law on obligations of Montenegro

<sup>29</sup> Article 10:108 (1): Solidary obligations: discharge of debt, settlement; Draft Common Frame of Reference, Chapter 4, Section III, Article 4:109 (1) Release or settlement in solidary obligations

<sup>30</sup> Same. Article 427. Law on obligations of Montenegro

<sup>31</sup> Article 10:108 (2): Solidary obligations: discharge of debt, settlement; Draft Common Frame of Reference, Chapter 4, Section III, Article 4:109 (2) Release or settlement in solidary obligations

<sup>32</sup> Article 10:108 (3): Solidary obligations: discharge of debt, settlement; Draft Common Frame of Reference, Chapter 4, Section III, Article 4:109 (3) Release or settlement in solidary obligations

<sup>33</sup> The Law on Obligations of Montenegro stipulates that *novation* which the creditor made with a solidary debtor releases the other debtors if *novation* was made *in rem*, ie. with the intention to extinguish entire obligation. But, if the creditor and debtor limited *novation* to the part of the debtor's obligation (*novation in personam*), obligation of the other debtors does not end, but it is reduced by the part of that debtor (Article 426.). Law on Obligations has explained that an overdue of one solidary debtor does not have an effect in relation to other debtors (Article

The Principles of European Contract Law also specifies that a court decision concerning the debt of a solidary debtor in relation to the creditor has no effect:

a) in terms of the rights of a creditor to other debtors;

b) in relations between solidary debtors that is regulated by Article 10:106. i.e. when solidary debtor who has fulfilled his obligation which overcomes his part of obligation, despite the efforts undertaken, fails to regress from the other solidary debtors so the parts of all the debtors' obligations, including the one who has fulfilled the obligation to a creditor, are proportionally increasing.<sup>34</sup>

The obsolescence of the obligation of a solidary debtor has no legal effect:

(a) between the creditor and other solidary debtors;

(b) between the solidary debtors during the application of the above-mentioned Article 10:106.<sup>35</sup>

From the character and essence of solidary obligations also arises the rule that solidary debtor can point out any objections to a creditor which may be emphasized by each of the debtors, with the exception of personal objections. Highlighting the complaints has the legal effect to all other debtors. A debtor from whom the compensation is claimed can emphasize any personal objection in relation to a creditor, where such a debtor can point out to the creditor.<sup>36</sup>

### **Solidarity of the creditors (Active solidary obligation)**

The active solidary obligation (solidarity of the creditors) is the obligation in which on creditor's side there are more persons and in which each creditor is entitled to demand the debtor's fulfillment of their entire obligations, but when one of the creditors

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430.p.1.). From the fact that the solidary debtors can be bound with different deadlines comes the fact that the effect of obsolescence in the fulfillment of obligations counts separately for each. Anyway, termination and stagnation of obsolescence to one solidary debtor is not binding other debtors, but the debtor who had to fulfill the obligation has the right to regress debtors that were released from fulfillment due to obsolescence (Article 431.p.2.). Renunciation of one of the solidary debtors from the obsolescence does not have effect towards other debtors (Article 422.p.2.). Acknowledgement of debt made by a debtor does not have effect in relation to the other solidary debtors (Article 430.p.2.).

<sup>34</sup> The Principles of European Contract Law, Article 10:109 : Solidary obligations: the effect of legal decision; Draft Common Frame of Reference, Chapter 4, Section III, Article 4:110: Effect of judgment in solidary obligations

<sup>35</sup> The Principles of European Contract Law, Article 10:110 : Solidary obligations: obsolescence

<sup>36</sup> The Principles of European Contract Law, Article 10:111: Solidary obligations: the application of the rest of the legal means; Draft Common Frame of Reference, Chapter 4, Section III, Article 4:112 (1) Opposability of other defences in solidary obligations.

is settled the obligation is extinguished to all other creditors.<sup>37</sup> Active solidarity is not assumed, but only exists if it is under contract or provided by law.<sup>38</sup> The debtor, as a rule, can fulfill the obligation to a creditor of his own choice, until any of the creditors asks for a fulfillment.<sup>39</sup>

The basic effect of active solidarity is the obligation of the debtor to fulfill his entire obligation to one of the creditors, which exclude the possibility that the fulfillment can be made in parts. By fulfilling the obligation to one creditor the debtor is exempt of the duty in relation to all the creditors. Otherwise, the active solidary obligation ends either by the fulfillment, or by replacing the fulfillment or by depositing owed case to the court.

When the debtor fulfills the obligation to one of the creditors, the obligation ceased to exist. More precisely the so called outward or external relation ends, because by fulfilling the obligation by the debtor, the legal relations are made between the solidary creditors (the so called inner-internal relation). Namely, each solidary creditor may require to hand him over part of the claim which belongs to him from the creditor who received the fulfillment from the debtor. By debtor's obligation fulfilling, the creditor who received the fulfillment, becomes the debtor to other solidary creditors, who are entitled to demand from him to hand them over the parts of obligation they are entitled to claim. As a rule, if from the relations among the creditors a different solution does not come out, to every solidary creditor belongs the equal share.<sup>40</sup>

However, the practice shows that active solidary obligations, opposite to passive, have no greater significance. Namely, unlike the passive solidarity which also serves as a mean of ensuring of the obligation's fulfillment, the active solidarity does not have that kind of importance and role. It can be said that active solidarity carries a certain amount of risk in the payment of creditors, because the settlement of one of the creditors is no guarantee that the other creditors will be settled.<sup>41</sup>

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<sup>37</sup> Article 435.p.1. Law on Obligations of Montenegro.

<sup>38</sup> Article 434. Law on Obligations of Montenegro.

<sup>39</sup> Article 435.st.2. Law on Obligations of Montenegro.

<sup>40</sup> Article443. Law on obligations of Montenegro

<sup>41</sup>Article436. p.1. ZOO: „ The debtor can settle his obligation by the claim that the creditor requires the fulfillment“. Article436. p.2. ZOO: “The debtor may propose the settlement with what he owes to some of the other creditors in order to achieve compensation to one of the solidary creditors, but only up to the claims of solidarity, which belongs to the creditor“. Article 437. ZOO: „Agreement of discharge of the debt concluded between a debtor and a creditor leads to reduction of solidary obligation for the part of the creditor's claims. "The same applies for prenov (novation). Article 438. ZOO: „Settlement that one of the creditors concluded with the

Lando Commission has specified that the claims of creditors of divisible claims are divided into equal parts, unless it is otherwise predicted by the contract or by the law.<sup>42</sup> DCFR specify: "A right to performance is solidary when any of creditors may require from debtor and the debtor may perform to any of the creditors".<sup>43</sup>

If one of the creditors of common claims refuses or is unable to accept the fulfillment, the debtor may be released from obligation by depositing the things or the money to a third party in accordance with Articles 7:110 and 7:111 of the Principles.<sup>44</sup> Namely, the Principles predict that the party that remained in the possession of a movable thing, which is not money, because its contractor refused to accept the fulfillment or to re-take it, must properly take care of its security and protection.<sup>45</sup> It may be released from the obligation of delivering or returning of the things or by depositing of goods to a third party for safekeeping, of course, on reasonable terms, on behalf of other contracting party, with informing the other contracting party of the depositing. Contractor may be also released from obligation by selling things on reasonable terms after the other party is noticed about it and the net income from sale is deposited.<sup>46</sup> Namely, if the object is exposed to rapid deterioration or its preservation is unreasonable because of excessive costs, a contract party must take appropriate measures in order to ensure its sale. It may be released from the obligation of delivery or returning of the things by handing over net income received from selling things to

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debtor does not have effect in relation to other creditors, but they have the right to accept the settlement, except when it relates only to the part of creditors to which it was concluded." Article 439. ZOO: „When one of the solidary creditors acquires conditions for unity (confusion) as a way of termination of an obligation, each of the other solidary creditors has the right to require from him only a part of the claim.“ Article 441. ZOO: „Acknowledgement of debt to a creditor benefits to all the creditors of active solidary obligation.“ Article 440. ZOO: „Delay of a solidary creditor has an effect to other creditors - the debtor is in delay and to other creditors. Delay of a solidary creditor has an effect to other creditors. Article 442. ZOO: „when one of the solidary creditors suspend obsolescence or if the stagnation of obsolescence occurs towards him, it does not affect the other creditors and the obsolescence in their case is still. If the debtor waives the statute of limitation to a single creditor, the waiver is then effective towards other creditors.

<sup>42</sup> Article 10:201:(1)Apportionment of Separate Claims

<sup>43</sup> Draft Common Frame of Reference, Chapter 4, Section III, Article 4:202 (1): Solidary, divided and joint rights

<sup>44</sup> Article 10:203: Difficulties of Executing a Communal Claim; Draft Common Frame of Reference, Chapter 4, Section III, Article 4:203: when different types of right arise.

<sup>45</sup> Article 7:110: (1) Property Not Accepted

<sup>46</sup> Article 7:110: (2) Property Not Accepted

other contracted party.<sup>47</sup> The contracted party is entitled to compensation or refund of sales and all other reasonable costs.<sup>48</sup>

However, if and when a creditor refuses to accept the amount of money which a debtor has offered in appropriate way, the debtor may, after informing the creditor about it, be released of obligations by depositing the money in accordance with the law applicable in the place where the payment is made.<sup>49</sup> The Principles specify that each party shall bear the costs of fulfilling its obligations.<sup>50</sup>

The Principles specify that solidary creditors have the right to claim equal parts of debt unless the contract or the law indicates otherwise.<sup>51</sup> A creditor who settles his claims over the amount of claims have to provide the rest of it to the other creditors in proportion to their parts of claims.<sup>52</sup>

The Principles and DCFR specified that the discharge of the debt that has been made to the debtor by one solidary creditor does not have any effect to other creditors. The provisions of this chapter, therefore, that are related to payment, confusion, compensation, obsolescence and a right to file an objection, apply equally to active and passive solidary obligations.<sup>53</sup>

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<sup>47</sup> Article 7:110: (3) Property Not Accepted

<sup>48</sup> Article 7:110: (4) Property Not Accepted

<sup>49</sup> Article 7:111: Money not Accepted

<sup>50</sup> Article 7:112: Costs of Performance

<sup>51</sup> Article 10:204 (1) : Apportionment of Solidary Claims; Draft Common Frame of Reference, Chapter 4, Section III, Article 4:206 – Apportionment in case of solidary rights

<sup>52</sup> Article 10:204 (2) : Apportionment of Solidary Claims

<sup>53</sup> Article 10:205: Regime of Solidary Claims. Therefore, rules contained in articles 10:107, 10:109, 10:110 and 10:111(1), are applicable on solidary claims with necessary adjustments. Draft Common Frame of Reference, Chapter 4, Section III, Article 4:207 – Regime of solidary rights. Therefore, the rules contained in articles 4:108 (Performance, set-off and merger in solidary obligations), 4:110 (Effect of judgment in solidary obligations), 4:111 (Prescription in solidary obligations) and 4:112 (Opposability of other defences in solidary obligations) apply, with appropriate adaptations, to solidary rights to performance.

Др Снежана Миладиновић

**СОЛИДАРНЕ ОБЛИГАЦИЈЕ  
У ОДРЕДБАМА НАЧЕЛА ЕВРОПСКОГ УГОВОРНОГ ПРАВА (PECL) И  
ЗАЈЕДНИЧКОГ РЕФЕРЕНТНОГ ОКВИРА (DCFR)**

Интересовање за проблематику множине субјеката у облигацијама очекивано је и оправдано. Ово питање је кроз вијекове изазивало велику пажњу и интересовање не само унутар граница правне науке, већ и у позитивном и ујоредном праву. Одавно су ошворена нека од питања која и до данашњих дана заокуљају правну мисао.

Комисија за израду Начела европског уговорног права је десетко поглавље посветила сложеним облигацијама са више субјеката. Под насловом „Множина субјеката у облигацији“ одредбама Начела детаљно су регулисане солидарне, гјелјиве и негјелјиве облигације. Поглавље десетко је подјелено на два одјелка од којих је први посвећен облигацијама са више лица на дужничкој страни иј. пасивним солидарним, гјелјивим и негјелјивим облигацијама, док је други одјелак посвећен облигацијама са више лица на повјерилачкој страни иј. активним солидарним, гјелјивим и негјелјивим облигацијама.

Study Group on a European Civil Code је четврто поглавље Заједничког референтног оквира (DCFR) посветила сложеним облигацијама са више субјеката (“Облигације са више дужника и повјерилаца”). Поглавље четврти је подјелено на два дијела од којих је први посвећен облигацијама са више лица на дужничкој страни (пасивне солидарне, гјелјиве и негјелјиве облигације) а други облигацијама са више лица на повјерилачкој страни (активне солидарне, гјелјиве и негјелјиве облигације).

Кључне ријечи: Начела европског уговорног права (PECL), Заједнички референтни оквир (DCFR), множина субјеката у облигацијама, солидарне облигације, пасивне солидарне облигације, активне солидарне облигације.