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The Structure of the Law on Multiparty-Situations in the 2009 Draft Common Frame of Reference

MATTHIAS E. STORME*

ABSTRACT: This article tries to analyse in a comparative manner the Draft Common Frame of Reference (DCFR) 2009 rules relating to various types of multiparty situations in the law of obligations. It analyses more specifically the structure of the legal relationships in case of representation, stipulation in favour of a third party, assignment, (personal) subrogation, and some other situations that can be seen as situations with a change on the side of the creditor. Attention is given especially to the question on how the three single relationships relate to each other, including the defences of the parties, as well as to the relationship between the proprietary and the obligational aspect of the relationship. The third part deals with situations where a new or additional debtor enters into the relationship, and again more specifically with the question on how the three single relationships relate to each other, including the defences of the parties (in these relationships, there are no relevant questions of property law). The analysis shows that the DCFR 2009 has rather coherent rules as to the multiparty relationships it expressly covers and is not yet fully developed as to some other similar relationships. The 'product' is benefiting highly from the fact that the contract has been replaced by the obligational relationship as central category and that both are clearly distinguished. The distinction between the proprietary and obligational aspects is fairly developed but could have been clearer.

RÉSUMÉ: Cet article tente d'analyser de manière comparée les règles du *Draft Common Frame of Reference* (DCFR) 2009 concernant les différentes situations multi-parties en droit des obligations. Il analyse plus spécialement la structure des relations juridiques en cas de représentation, stipulation en faveur d'autrui, cession de créance, subrogation (personnelle) et quelques autres situations qui peuvent être comprises comme situations de changement concernant le créancier. L'article examine comment les trois relations bipartites interagissent entre eux, y compris la question des exceptions que les parties peuvent invoquer, ainsi que la relation entre les aspects du droit des biens (la créance comme propriété). L'analyse montre que le DCFR 2009 a des règles expresses assez cohérentes concernant les situations tripartites ; il n'est pas encore pleinement développé s'agissant d'autres situations. Le 'produit' a bénéficié énormément du fait que le contrat a été remplacé comme catégorie centrale par celle de relation juridique (obligationnelle)

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et que ces deux notions sont bien distinguées. La distinction entre les aspects du droit des obligations et ceux du droit des biens est relativement bien développée, mais aurait pu être encore plus claire.

Zusammenfassung: Dieser Beitrag versucht vergleichenverweis zu analisieren wie die Regeln des *Draft Common Frame of Reference* (DCFR) 2009 die verschiedenen Arten von Mehrparteienverhältnissen im Schuldrecht behandeln. Er analysiert insbesondere (insb.) die Struktur der Rechtsverhältnissen beiVertretung, Verträge zugunsten Dritter, Abtretung, (persönliche) Subrogation und einige andere Situationen welche dadurch charakterisiert werden das ein neuer Gläubiger eintritt. Dabei wird insb. Untersucht wie die drei Verhältnisse sich zueinander verhalten, einschl. die Frage der Einwendungen der Parteien, und wie die sachenrechtliche und schuldrechtliche Aspekte sich verhalten. Der dritte Teil beschäftigt sich mit Fällen wo ein neuer oder zusätzlicher Schuldner im Schuldverhältnis eintritt, und wieder insb. mit der Frage wie die drei Verhältnisse sich zueinander verhalten, einschl. die Frage der Einwendungen der Parteien (in diesen Fällen gibt es keine relevante sachenrechtliche Fragen). Die Untersuchung zeigt, dass der DCFR 2009 kohärente Regeln in Bezug auf diejenigen Verhältnissen hat, die ausdrücklich geregelt werden, und noch nicht ganz entwickelt ist für andere vergleichbare Verhältnisse. Das „Produkt" hat deutlich profitiert von der Tatsache, dass der Vertrag als zentraler Begriff vom Schuldverhältnis ersetzt worden ist und das beide (Vertrag und Vertragsverhältnis) deutlich unterscheiden werden. Der Unterscheid zwischen schuldrechtliche und sachenrechtliche Fragen ist ziemlich gut entwickelt, hätte aber noch klarer sein können.

The purpose of this contribution is to provide a comparative analysis of the treatment of multiparty situations in the Draft Common Frame of Reference (DCFR).[1] Because such situations are more complex than simple bipartite relationships, their study reveals a lot about the structure and underlying way of thinking of a legal system.

A very important element in this respect is that the DCFR clearly distinguishes the contract as a juridical act from the obligational relationship between the parties resulting from a (valid) contract – the contractual relationship. This distinction is also expressed in the division between Book II (on contracts and other juridical acts) and Book III (addressing contractual and non-contractual obligations). This distinction is especially important for avoiding misconceptions concerning multiparty relationships or situations. In multiparty operations, there often is a contractual relationship between parties other than those having made the contract. However, in nearly all legal systems, the law of obligations was developed first for two-party relationships and only later for more complex situations. The discipline of multiparty operations is in many national systems covered with rules that are still determined by the idea

[1] All references are, unless otherwise stated, to the final version of the DCFR as published by Sellier Publishers in an Outline Edition in January 2009: *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference, Outline Edition*, eds Christian von Bar, Eric Clive, Hans Schulte-Nölke, Hugh Beale, Johnny Herre, Jérôme Huet, Peter Schlechtriem†, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano & Fryderyk Zoll, <www.storme.be/2009_02_DCFR_OutlineEdition.pdf>; sometimes I refer additionally to the Interim Edition of January 2008, published by Sellier Publishers, <www.storme.be/DCFRInterim.pdf>.

that a 'real' contractual relationship can only exist between the parties who made the contract. Some of them may have been useful as transitional in the development described but have since lost their utility. Some were originally in line with the general rules for bipartite relationships in their time but are no longer so because they have missed out on the developments of general contract law.[2]

This approach of the DCFR allows a more or less coherent treatment of the different multiparty situations. I will deal in this article with situations wherein three parties are involved, as they are sufficient to demonstrate the questions and proposed solutions. The main questions in this respect involve the relation among the different relationships, that is, to what extent one of the bipartite relationships is dependent upon one or more of the other bipartite relationships. The rules of the DCFR are, as in most national jurisdictions, the expression of a balancing of general principles, especially the principles of autonomy and of reliance.[3]

I will start the analysis with the rules on (direct) representation, continue with operations that can be seen as giving rise to a new creditor, and finally operations giving rise to a new debtor.

1. Direct Representation

In the rules on representation, the balancing of the different principles, especially the autonomy principle and the reliance principle, has applied a technique of 'separation', which is used to some extent (but less clear) in the rules on other institutions discussed below.

1.1 The Separation between the Authority and the Authorization/Mandate

The rules on (direct) representation start from the distinction and separation between the 'external relationship' and the 'internal relationship'. The rules on representation in Book II, Chapter 6, deal only with the external relationship, that is, the relationships between (1) the principal and the third party and (2) the representative and the third party (Article II.-6:101(1)), whereas the internal relationship will be governed by its own rules depending on the nature of that relationship (Article II-6:101(3) a contrario); the latter relationship will often be one stemming from a

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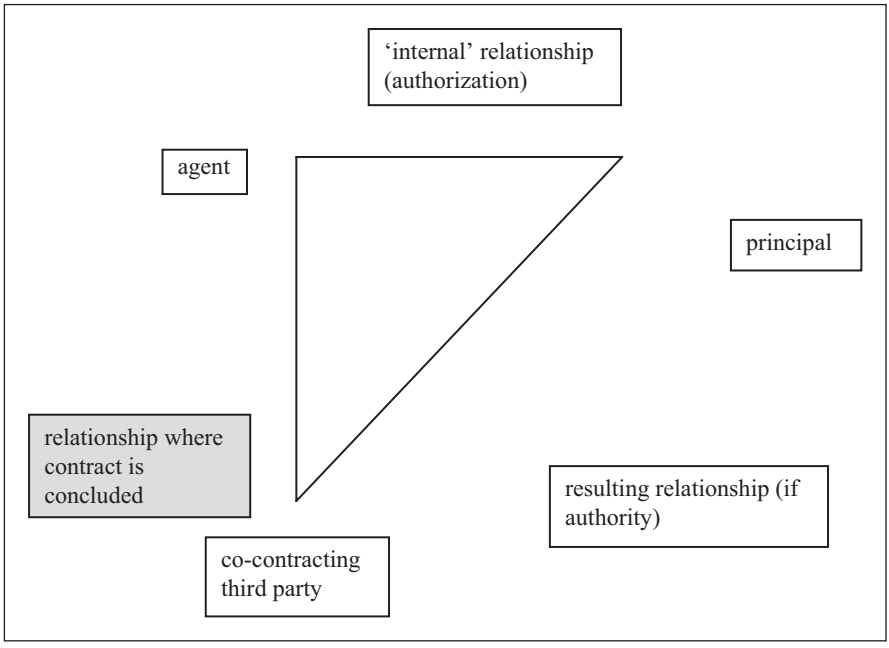
[2] Cf., on a partly different but from a legal theory perspective related topic, R. Dekkers, 'Les Méfaits de la Stipulatio', in *Mélanges Fernand de Visscher*, vol. III, Special issue of Revue internationale des droits de l'Antiquité, Office International de Librairie (Brussels, 1950), 361 ff., explaining how the specific rules of the 'stipulatio' as a form of contract remained influential even when a stipulation was no longer required for an innominate contract because of the acceptance of the general notion of contract.

[3] Some authors have criticized the DCFR for not being enough 'principled'. I have tried to respond to this criticism in my article 'Une Question de Principe(s)? Réponse à Quelques Critiques à L'égard du Projet Provisoire de Cadre Commun de Reference', *ERA Forum*, Suppl. 1 (2008), s65–s77 <http://storm.be/ERA-ForumTrier2008.pdf>.

contract of mandate, and the rules for such relationships as set forth in Book IVD will apply; but a different type of contractual relationship or even a non-contractual relationship could be involved.

The external relationship centres on the notion of authority, to be distinguished from the (act of) authorization and the directions that are elements of the internal relationship. It is the old distinction between *quod potest* and *quod licet*. Thus:

– Article II-6:102(2)[4] defines the 'authority' of a representative as 'the power to affect the principal's legal position' (especially to bind the principal by acts by which the principal will be bound as if he had made the act itself).
– Article II-6:102(3) defines the 'authorisation' of the representative as 'the granting or maintaining of the authority' (usually by the principal itself in a contract or other juridical act with the representative). Equally, Article IVD-1:102(a) juncto Article IVD-1:101(1)(a) gives as one of the possible contents of a 'mandate' of a representative 'the authorisation and instruction given by the principal to conclude a contract or otherwise directly affect the legal position of the principal in relation to a third party'.



[4] In the Interim version of the DCFR, the definition was equally found in Art. IVD-1:102(b); it was deleted in the final version because it merely repeated Art. II-6:102(2).

Given this approach,[5] the question on whether the act of 'authorisation' is separated from the (rest of the) contractual relationship itself between the principal and the representative (as it is constructed in, for example, German law) has lost most of its importance.

1.2 The Form and Features of This Separation

The exact nature of the separation can be seen more clearly when one analyses the rules on the coming into existence of authority and its ending.

1.2.1 Coming into Existence

The authority of a representative may be (1) granted by the principal (Article II-6:103(1)) or (2) granted by the law (Article II-6:103(1)) – this grant is also being called authorization – or (3) based upon appearance: If a person causes a third party reasonably and in good faith to believe that he has authorized a representative to perform certain acts, the person is treated as a principal who has so authorized the apparent representative (Article II-6:103(3)). In the latter case, the authorization is only 'apparent', but the authority is 'real': The agent has authority and not merely apparent authority.[6] The rule is an expression of the principle of reliance, which in the circumstances described receives priority over the pure autonomy principle.

The same applies as to the scope or extent of the authority. The rules of Articles II-6:103 and IVD-1:102(a) imply that directions given by the principal to the representative but not known to the third party do not limit the authority of the representative.

1.2.2 Ending of Authority

The same separation between authorization (in the internal relationship) and authority (in the external relationship) is found in the rules concerning the ending of one and the other.

The rules on the ending of authorization are found in the general rules of contract law, especially in Book III, supplemented by the specific rules in the Book on Mandate Contracts in Book IVD, which provide that a mandate can, moreover, be revoked at any time by the principal (Article IVD-1:104), except in specific cases of irrevocability where revocation is restricted to the grounds of termination as in general contract law and some additional grounds (see Article IVD-1:105).

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[5] That is also known in international private law: The conflict of law rule for the internal relationship is found in Regulation 593/2008 on the law applicable to contractual obligations (formerly the Rome-I Convention), which explicitly excludes from its scope (Art. 1, 2g) the question on whether an agent is able to bind its principal in relation to a third party. The conflict of law rule for that question is found in the Hague Convention on the law applicable to representation, especially Arts 11 to 15.

[6] This is basically a question of good drafting: An appearance can be a fact that is relevant at law, but it makes no sense to draft legal rules that spell out apparent legal effects.

The rules on the ending of authority, on the other hand, are found in Book II, specifically, in Article II-6:112. Again, the basic rule (paragraph 1) cites the apparent internal relationship as the criterion for the continuation or ending of the authority: 'The authority of a representative continues in relation to a third party who knew of the authority notwithstanding the ending or restriction of the representative's authorization until the third party knows or can reasonably be expected to know of the ending or restriction.'[7] This also implies that authority does not end retrospectively.

Paragraph 2 applies where the 'third party' is not really a third party; that is, 'Where the principal is under an obligation to the third party not to end or restrict the representative's authorization, the authority of a representative continues notwithstanding an ending or restriction of the authorization even if the third party knows of the ending or restriction.' This also means, *a contrario*: If there is no obligation towards the third party, authority is ended in the external relationship when the third party is notified or knows about the ending, even if the ending is not allowed in the internal relationship between the principal and the representative; whether the revocation is valid or not is for the third party a *res inter alios acta*.

1.3 Effect on the Resulting Relationship

The mechanism of representation in the DCFR implies, in conformity with the tradition, that the relationship between the principal and the third party is the relationship *as* concluded between the representative and the third party. Both parties are in relation to each other as well bound by that relationship as able to invoke it.

Thus, the relevant elements for interpretation of the concluded contract are to be found in the acts and minds of the representative and the third party (not of the principal). However, as the principal is considered to be a party to the relationship from the beginning (and not only at a later stage, as in the case of acquisition by assignment, for example), the mind and behaviour of the principal may be relevant for the application of certain rules relating to the formation and validity of the contract (e.g., bad faith of the principal). It would lead us too far to discuss the details here.

2. New Creditors

There are many situations wherein a person not being a party to a contract becomes a party to the contractual relationship. In this article, we analyse first the situations that can be seen as introducing a second creditor.

2.1 Stipulation in Favour of a Third Party

A first example is the stipulation in favour of a third party. I take it as the first example, because it bears some resemblance to representation, in that from the beginning it is

[7] In Art. 3:209 PECL, the grounds of ending were listed in the article itself; as the DCFR contains a Book on Mandate Contracts, they are now discussed there, as we mentioned.

intended that another party than the parties making the contract will become a creditor in the contractual relationship. In the stipulation in favour of a third party, there is no authority of the promisee/stipulating party to bind the third party beneficiary, and neither is the stipulation made in the name of the third party beneficiary. However, in other respects, there is some analogy, even if the analogy is much closer to 'indirect representation' (see *infra*): The third party acquires a right against the promisor by virtue of a contract between the stipulator and the promisor. The analogy is obscured because as well 'third party' as 'internal relationship' are traditionally used here in the opposite sense from that applied in the case of representation.

2.1.1 Rules on the Binding Character and Revocability in Conformity with General Contract Law

It is interesting to see that the DCFR has, differing from many national legal systems, applied the general rules of contract law to these stipulations in favour of a third party in a coherent manner.

First of all, the *creation* of a right of the third party beneficiary does not, as a matter of principle, depend on acceptance by the third party. According to Article II-9:302(a), '(...) in the absence of provision to the contrary in the contract, the third party has the same rights (...) as if the contracting party was bound to render the performance under a binding unilateral promise in favour of the third party'. It would indeed have been incoherent to accept the binding force of unilateral promises (following from Article II-1:103(2) DCFR) but not under the same conditions the binding character in relation to a beneficiary of a contract in favour of the beneficiary as long as the beneficiary has not accepted it. The beneficiary thus acquires the right or benefit as soon as the notice reaches the beneficiary (see Article II-1:106 'Notice'). Evidently, the parties may make the acceptance a precondition for the right of the beneficiary. In addition, where acceptance is not required, the beneficiary may, in conformity with general contract law, waive its right (see Article II-9:303(1), which states that 'The third party may reject the right or benefit by notice to either of the contracting parties', the sole specific rule being that upon such rejection without undue delay, the right or benefit is treated as never having accrued to the beneficiary).

Evidently, acceptance by the beneficiary (or authority of the stipulator to bind the beneficiary) is required where the beneficiary has to engage in some obligation itself. However, in such a case, there simply is a normal contract with the beneficiary, although its rights and obligations can still be made dependent upon the fate of another contract, such as an underlying contract between the stipulator and the promisor.

Fully coherent with the basic approach, the revocability or irrevocability of the right or benefit of the beneficiary depends upon the terms of the basic contract (between the stipulator and the promisor), see Article II-9:301(2) ('The nature of the third party's right or benefit is determined by the contract ...') and more explicitly

Article II-9:303(2) ('The contract determines whether and by whom and in what circumstances the right or benefit can be revoked or modified after that time'), as corrected by the reliance principle (in Article II-9:303(3)). I understand this in such a way that, if desired, any intended revocability after the time the beneficiary was notified has to be stipulated.

2.1.2 Effects in the Resulting Relationship (Promisor-Beneficiary) and Defences

As expressed in Article II-9:301(2), the modalities of the resulting relationship, that is, the obligation of the promisor towards the beneficiary, are fully dependent upon the contract and the relationship between the stipulator and the promisor, otherwise said the obligation is not abstracted from it: 'The nature and content of the third party's right or benefit are determined by the contract and are subject to any conditions or other limitations under the contract.' Article II-9:302 repeats the same idea by providing the following:

> (Where one of the contracting parties is bound to render a performance to the third party under the contract, then, in the absence of provision to the contrary in the contract):
> (a) the third party has the same rights to performance and remedies for non-performance as if the contracting party was bound to render the performance under a binding unilateral promise in favour of the third party; and
> (b) the contracting party may assert against the third party all defences which the contracting party could assert against the other party to the contract.

On the other hand, the relationship between the stipulator and the beneficiary is in principle not relevant for the relationship between the promisor and the beneficiary (in the rest of this article, I will call the latter relationship the 'valuta relationship' and the former the 'provision relationship' following the terminology well known in the law on bills of exchange and generalized by doctrine in some national jurisdictions[8]).

These rules are consistent with the general idea that the institution bears some analogy to an assignment of rights by the stipulator (the beneficiary can be compared to an assignee as new creditor) and not to an additional debtor of a possible obligation of the stipulator towards the beneficiary. This distinguishes the *stipulatio alteri* from a *delegatio (solvendi)*.

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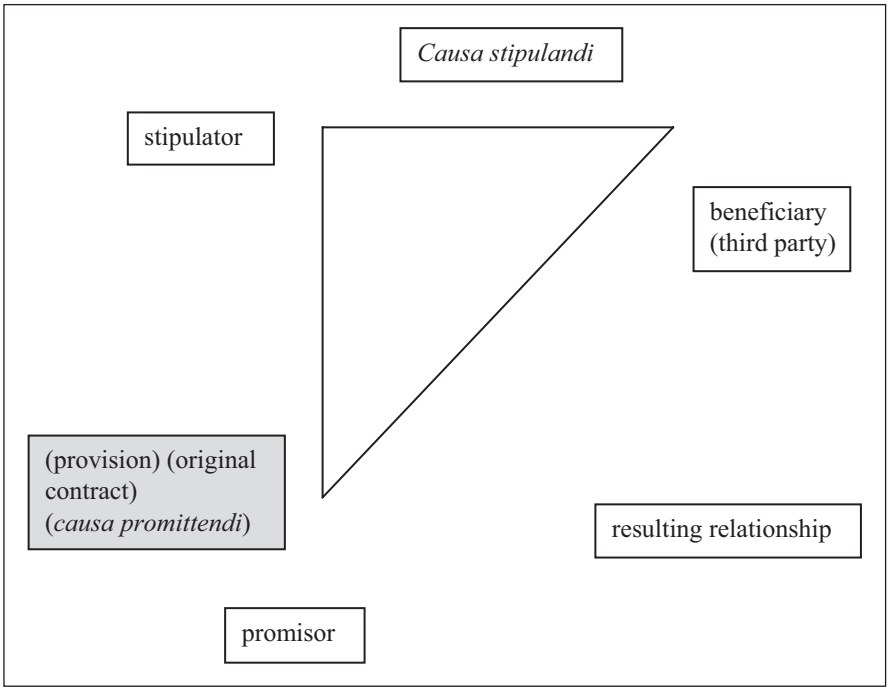
[8] The provision relationship is always the relationship where lies the reason why the debtor of the resulting relationship engaged itself. In case of a new creditor, it is the relationship to which there is a new creditor, in case of a new debtor, it is precisely not the original relationship to which there is a new debtor.



There are some differences from assignment, which can be explained when one keeps in mind that the right of the third party beneficiary is not, as in assignment, transferred to the beneficiary in a later stage but is at the beginning created as a right of the beneficiary. Thus, there is no transfer of property in an existing right.

Given the idea that a stipulation in favour of a third party is somewhat halfway between representation and assignment, the questions arises of whether the beneficiary can in some circumstances have better rights than the stipulator has or would have (this question also arises in assignment). The DCFR deals only with the case of a revocable right where the beneficiary believes it to be irrevocable: where the parties have led the beneficiary to believe this and the third party has acted in reliance on this, it is protected (Article II-9:303, paragraph III). However, the same should probably apply in regard to other elements of the obligation than revocability or irrevocability.

2.2 Assignment

In the DCFR, the assignment of a right to performance is first of all a transfer of property based upon the relationship between the assignor and the assignee: 'An "assignment" of a right is the transfer of the right from one person (the "assignor") to another person (the "assignee"' (Article III-5:102(1)). This is a clear difference

with representation and stipulation in favour of a third party, where no transfer of an existing asset takes place.

As a transfer of property, this would have been more logically a subject to be dealt with it in Book VIII, on transfer of property, with regulation in Book III covering only the effect (or absence of effects) of this transfer in relation to the *debitor cessus* (the 'internal relationship'). That is the approach taken in some of the most modern codes, such as the Dutch Civil Code of 1992.[9]

I would have preferred the Dutch approach, which is more coherent with the rules themselves and would have clarified a pattern that is now a bit hidden in the rules, and which can usefully be compared to the pattern of separation we have found in the case of representation.

2.2.1 Structure of the Relationships

Where there is no abstraction of the transfer of property from the underlying relationship between assignor and assignee,[10] there is at the same time in several respects a separation between the property situation (the effect of a transfer from the assignor to the assignee based upon their underlying relationship) and the 'internal' obligational relationship with the *debitor cessus*. On the other hand, the resulting relationship between the assignee and the debtor is basically dependent upon the original relationship between the assignor and the debtor; in other words, it is not a new relationship but the original relationship wherein another creditor is substituted for the original creditor.

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[9] The assignment as transfer of property is dealt with in Book III (especially 3:94) and the internal relationship in Book VI, Tit. 2, Art. 6:142 ff.

[10] In the published interim version, this was not very clear. Art. III-5:103(1) has since been modified to clarify this and now reads (in three paragraphs):

(1) The requirements for an assignment of a right to performance are that:
(a) the right exists;
(b) the right is assignable;
(c) the person purporting to assign the right has the right or authority to transfer it.
(d) the assignee is entitled as against the assignor to the transfer by virtue of a contract or other juridical act, a court order or a rule of law; and
(e) there is a valid act of assignment of the right.
(2) The entitlement referred to in paragraph (1)(d) need not precede the act of assignment.
(3) The same contract or other juridical act may operate as the conferment of an entitlement and as the act of assignment.
(4) (…).

Thus, the requirements for a transfer of property in a right to performance are parallel to those for the transfer of a corporeal movable (found in Art. VIII-2:101): The DCFR chooses a causal and not an abstract system of transfer.

The main aspects of this separation and dependency are the following (A and B):

A.

(1) The transfer cannot give, in principle, the assignee a right with a different content[11] from the right the assignor had against the debtor. However, it can give rise to a substitution of the creditor without the consent of the debtor.[12] There is neither a need for a prior modification of the internal relationship (consent of the debtor) nor the effect of a modification of the internal relationship other than the substitution of the creditor. That substitution is the consequence of the transfer rather than a prerequisite.

(2) There is an additional[13] element of separation in the rule of Article III-5:108, which provides that 'A contractual prohibition of, or restriction on, the assignment of a right does *not* affect the assignability of the right' (i.e., does not prevent the transfer of property; Article III-5:108(1)) but does, on the other hand, not deprive the debtor of:
   (a) its right to perform in favour of the assignor and be discharged by so doing; and
   (b) all rights of set-off against the assignor as if the right had not been assigned (Article III-5:108(2)),

   unless the debtor has consented or created reliance (Articles III-5:108(3)(a) and (b)).[14]

In other words, the property passes, but, in relation to the debtor, the creditor is only substituted for insofar as the debtor agrees or has caused reliance. That property passes also implies a priority for the assignee in relation to other creditors of the assignor (expressly in Article III-5:122).[15]

B. On the other hand, the substitution of creditor in the internal relationship does not fully coincide with the transfer of property. By substitution of creditor, I mean the effect that the debtor can be discharged by performing to someone different from the original creditor and can no longer be discharged by performing to the

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11 This does not exclude partial assignment of a right, see Art. III-5:107 on assignability in part.

12 Article III-5:104(2) in the interim version, now Art. III-5:104(4).

13 At least conceptually, the DCFR diverges here from most national jurisdictions, which provide that in case of a valid contractual prohibition, the right is in effect not assignable.

14 An additional exception is made in Art. III-5:108(3)(c) for 'rights to payment for the provision of goods or services' (i.e., receivables), as a matter of economic public policy.

15 (3) 'Where the debtor is discharged under III-5:108(2)(a) or III-5:119(1)' (i.e., by performing in favour of the assignor), 'the assignee's right against the assignor to the proceeds has priority over the right of a competing claimant so long as the proceeds are held by the assignor and are reasonably identifiable from the other assets of the assignor.'

original creditor, and its counterpart that a different person can (in its own right) claim performance and the original creditor can no longer claim performance (in its own right). Apart from the situation mentioned *supra* where a right is assigned in breach of a contractual restriction, there are other situations of divergence between transfer of property and substitution of creditor. One has to distinguish between cases where this follows from property law itself (not related to the rules on assignment), and cases where this follows from the rules of the law of obligations connected with the reliance principle and addressed in a more specific form in the rules concerned with assignment.

(1) The first type of case concerns the divergence between the ownership of the right and the authority to dispose of the right (also called entitlement to receive performance in Article III-5:119 (Article 5:118 in the interim version of the DCFR), which means entitled in the internal relationship between assignor/and assignee; such entitlement may follow from rules of property law but also from a mandate for indirect representation).
(2) The second type of case relates mainly to those addressed by Article III-5:119 (Article 5:118 in the Interim Edition):
   – on the one hand, according to paragraph 1, 'the debtor is discharged by performing to the assignor so long as the debtor has not received a notice of assignment from either the assignor or the assignee and does not know that the assignor is no longer entitled to receive performance';
   – on the other hand, according to paragraphs 2 and 3,[16] the debtor is discharged by performing in good faith to the person identified as the assignee in a notice of assignment from the assignor, c.q., if the creditor has caused the debtor reasonably and in good faith to believe that the right has been assigned to a person claiming to be the assignee in a notice of assignment, to that person.

The debtor will also be protected if the assignment was void or retroactively avoided, but this was not yet notified to the debtor at the time of performance.

In these cases, the same principle applies as in case of an authority to represent based on appearance: performance to the apparent creditor discharges the debtor; the apparent creditor has authority to receive the performance, although he is not authorized (not entitled according to his relationship with the owner of the right). The main criterion for this appearance is the notice given to the debtor.

As mentioned, I would have preferred to use here the same technique as with representation and mandate, where we dealt with both aspects in different places.

[16] A modification compared to the Interim Edition.

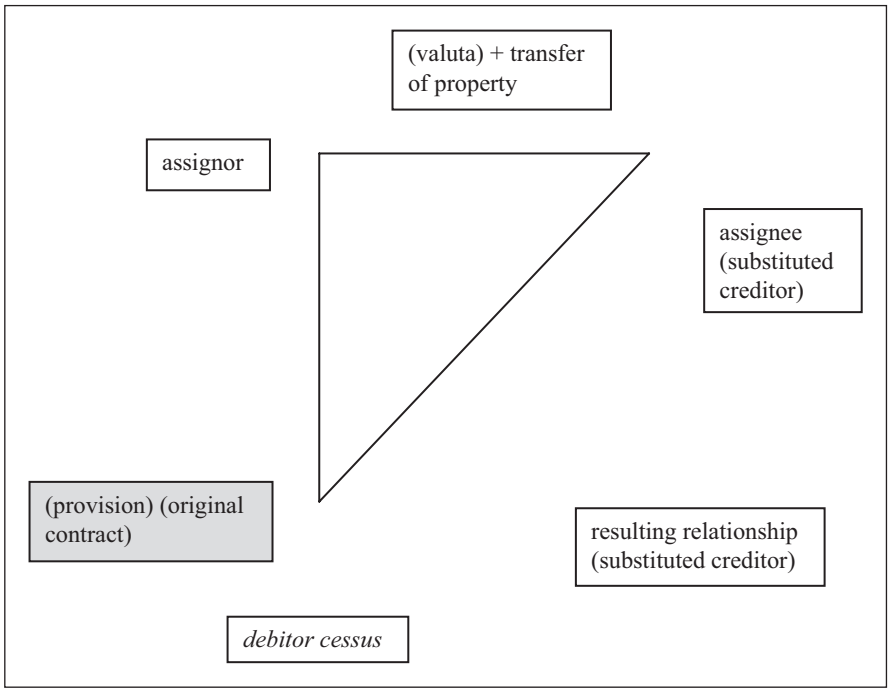
However, in English, assignment means both and is a well-established word, which made it difficult to convince the group to change this single term into two different words and speak, for example, of 'transfer of property in the right' on the one hand and 'substitution of creditor' on the other hand.

2.2.2 Effect in the Resulting Relationship and Defences

2.2.2.1 Defences Out of the Provision Relationship

In cases of assignment, the debtor has never promised anything to the assignee. Nevertheless, after assignment there will be a relationship between the debtor and the assignee of the same nature as the relationship that existed between the debtor and the assignor. If the assigned right is a contractual right, the contractual relationship continues to be of a contractual nature between the assignee and the debtor. It is coherent that this relationship is indeed dependent upon the original relationship (provision relationship); even more, it is the same relationship in which at some point in time the creditor is substituted.

The basic principle can thus only be that 'The debtor may invoke against the assignee all substantive and procedural defences to a claim based on the assigned right which the debtor could have invoked against the assignor' (Article III-5:116, paragraph I). The defences of the debtor can, in principle, not be modified without the consent of the debtor.



There are some exceptions to this rule, which are consequences of the general idea that rights are, in principle, transferable (expressed in Article III-5:105):

- unless there is a valid contractual prohibition of assignment,[17] the debtor can be obliged − by giving him sufficient notice[18] − to perform to a different creditor (Article III-5:113);
- where the obligation is an obligation to pay money, the debtor can also be obliged to pay it in a different place within the European Union, under deduction of the costs incurred by reason of this change in the place of performance (Article III-5:117(1)); and
- the debtor loses the possibility to invoke against the assignee a set-off with a right against the assignor, which did not yet exist at the time of notice and is not closely connected with the assigned right (Article III-5:116(3)).

Apart from these specific changes, the debtor retains all defences unless he has waived a defence or caused the assignee to believe that there was no such defence (Article III-5:116(2)(a), correction of the autonomy principle by the reliance principle, this time in favour of the assignor).

Finally, one has to take into account that, after assignment and the notification thereof, the relationship only exists between the debtor and the assignee, and all causes of extinction (not only performance) must relate to the assignee and no longer to the assignor in order for the debtor to be discharged (the set-off rule of Article III-5:116(3) proceeds from this idea).

2.2.2.2 Defences Out of the Valuta Relationship

The internal relationship between the assignor and the assignee is, in principle, a *res inter alios acta* for the debtor. He cannot invoke defences that the assignor may have against the assignee (e.g., that the assignee has not yet paid the price), unless their effect is that there is no assignment or that it has already been retroactively avoided.

2.3 Appropriation of a Right to Performance by the Principal in Cases of Indirect Representation

The PECL contained some provisions on indirect representation (Article 3:301 ff. PECL), which were missing in the Interim Edition of the DCFR because they were still under discussion. In the final DCFR, the so-called direct action of the principal against the third party in case of insolvency of the intermediary was maintained in

[17] With the exception of receivables, see *supra*.

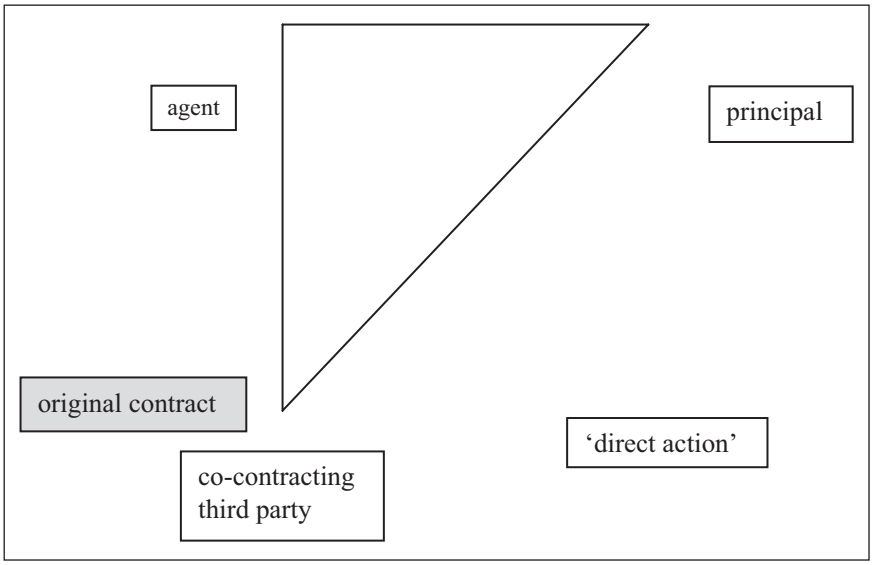
[18] See Art. III-5:120 (in the Interim Edition, Art. III-5:119) on adequate proof of assignment.

Article III-5:401, basically along the lines of Article 3:302 PECL, but with a counter-option of the third party added to it in Article III-5:402.

In the case of insolvency of the agent, the principal has the right to take over the rights of the agent by notice to the third party (paragraph 2). He will thus exercise against the third party the rights acquired on the principal's behalf by the agent, subject to any defences that the third party may invoke against the intermediary. The DCFR rule makes the analogy with assignment clearer by providing in paragraph 3 that the third party has the same forms of protection against the principal as a *debitor cessus* would have against the assignee.

One can indeed see the exercise of the so-called direct action by the principal as a form of assignment based upon a unilateral act of the principal, which he is entitled to do by law.

The position of the principal after such notice is thus in principle the same as the position of an assignee after notice.



However, because there is no voluntary assignment by the agent, the drafters of the DCFR – differing from PECL – judged that the situation is not fully equivalent to assignment and introduced a further element, which make it seem more like the transfer of contractual position by agreement (regulated by Article III-5:302): Where the principal has effectively taken over the rights of the agent, the third party may by notice to the principal and the agent opt to exercise against the principal the rights that the third party has against the agent, subject to any defences that the agent has against the third party. This is a change from PECL, where Article 3:303 provided that the third party may exercise against the principal the rights that the third party has against the intermediary, subject not only to any defences that the intermediary

may set up against the third party but also to those that the principal may set up against the intermediary. The *actio contraria* of PECL is thus of a different nature, which will be discussed *infra* in section 2.6.

2.4 (Personal) Subrogation

The rules on personal subrogation (or assignment *ex lege*) are still underdeveloped in the DCFR. On the one hand, only some of the possible cases of subrogation are explicitly mentioned. On the other hand, the consequences of subrogation are not fully explored. Nevertheless, it is possible to indicate the basic features on subrogation as they emerge from the rules found in the DCFR.

The DCFR does indeed spell out the most important cases of personal subrogation, namely in the Chapter on plurality of debtors and in the Book on Personal Security:

- According to Article III-4:107(2), a solidary debtor who has performed more than that debtor's share may, 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. Apart from this subrogation, the solidary debtor who has performed also has a right of recourse (Article III-4:107(1)).
- According to Article IVG-2:113, second sentence, the security provider[19] is subrogated, insofar as he has performed the secured obligation, to the creditor's rights against the debtor. Here also, the right acquired by subrogation is concurrent with the right to reimbursement or recourse. Paragraph 2 also provides that in cases of partial performance the creditor's remaining rights have priority over the rights to which the security provider has been subrogated.
- Articles IVG-1:108 and IVG-1:109 contain rules on subrogation for the situation of a plurality of security providers.
- For the case of payment by a third party who is not also a solidary debtor, Article III-2:107(2) mentions the possibility of subrogation, without spelling out, however, the further requirements.
- Where performance was made by an original debtor instead of the new debtor in case of incomplete substitution (Article III-5:206 ff.), the rule of Article IVG-2:113 should be applied with appropriate modifications in favour of the original debtor, thus granting him also a subrogation in the rights of the creditor against the new debtor.

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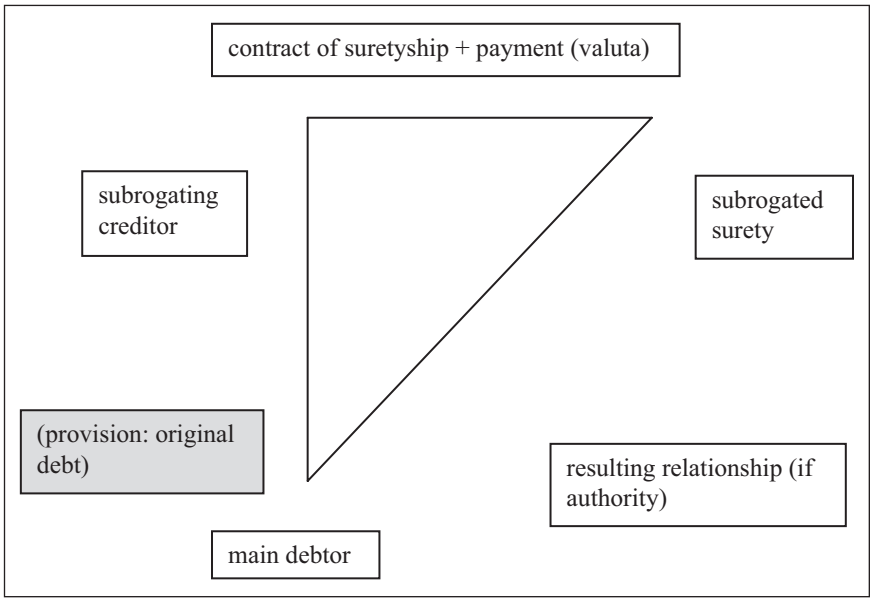
[19] Article IVG-2:113 applies as such only to dependent personal security, but according to Art. IVG-3:109 also with appropriate adaptations to independent personal security.

As in the case of assignment, personal subrogation entails as well a transmission of property in a right as a change in the relationship with the debtor. The rules of the DCFR do not yet really distinguish these two elements or spell out the associated specific rules. In my opinion, this means that the rules on assignment must be applied with appropriate adaptations.



Thus, it is clear that the debtor against whom a right is exercised after subrogation may invoke against the subrogated party, in principle, all defences that he could have invoked against the original creditor, with similar exceptions.

As for the relationship between the subrogating creditor and the subrogated creditor, the debtor can, in principle, only invoke it in order to limit the subrogation to the amount of performance by the subrogating party. Equally, the debtor should be discharged by performing to the subrogated creditor as long as he does not know that that person is no longer entitled to receive performance (compare Article III-5:119(1) DCFR (formerly Article III-5.118(1)).

2.5 Real Subrogation

The DCFR does not deal with real subrogation in general. Real subrogation is first of all an institution of property law, and Article VIII-1:101 explicitly mentions that it does not cover real subrogation in general. More study would have been necessary, and there is probably less common ground compared to the institutions of property law, that have been covered in Book VIII. The DCFR does, however, contain some specific applications of real subrogation, and I am mentioning them here insofar

as they deal with rights to performance (i.e., insofar as the subrogated party is subrogated in a right to performance and thus by way of subrogation becomes the new creditor instead of the subrogated party). I am not mentioning other cases and I am not dealing either with the Book on Trusts (Book X).

2.5.1 Real Subrogation Leading to Ownership of a Right to Performance

There is one case of real subrogation in Book III, namely in Article III-5:122 (Article III-5:108(3) in the Interim Edition): Where a right is assigned in breach of a contractual prohibition or restriction, and the debtor performs in favour of the assignor (as he is entitled to do), the assignee's claim against the assignor for the proceeds has priority over the right of a competing claimant so long as the proceeds are held by the assignor and are reasonably identifiable from the other assets of the assignor. Although the term 'real subrogation' is not used, that is what this rule amounts to. The traditional requirements for real subrogation are spelled out: The assignee's property in the right to performance is extinguished[20] but at the same time maintained because there is an identifiable *Ersatz* object and there is a causal link between the loss of the original object of the property right and the presence of the *Ersatz*.

On the other hand, there is no similar rule in Article III-4:206 for the event of a solidary creditor having received more than its share (it would be consistent to have a similar priority here).

2.5.2 Real Subrogation Leading to a Security Right in a Right to Performance

There are also cases where a right to performance replacing an encumbered asset (encumbered in favour of a secured creditor) is encumbered basically in the same way as was the encumbered asset it replaces. This form of real subrogation in rights to performance can be found in varying degrees in Book IX on security rights. It would lead us too far to discuss this here (see especially Articles IX-2:306, IX-2:308(2)(b), IX-4:104(1)(b), and IX-4:105).

2.6 Granting a Security Interest in a Right to Performance

The granting of a security right in a right to performance (the right to performance being the encumbered asset) can be seen as a *minus* of assignment rather than something totally different: The acquirer does not acquire ownership in the claim but a limited property right, a security right.

Several questions are basically the same as in the case of assignment: the requirements for the creation of the security right; the relationship among the creation of the right; and the internal relationship with the *debitor cessus*.

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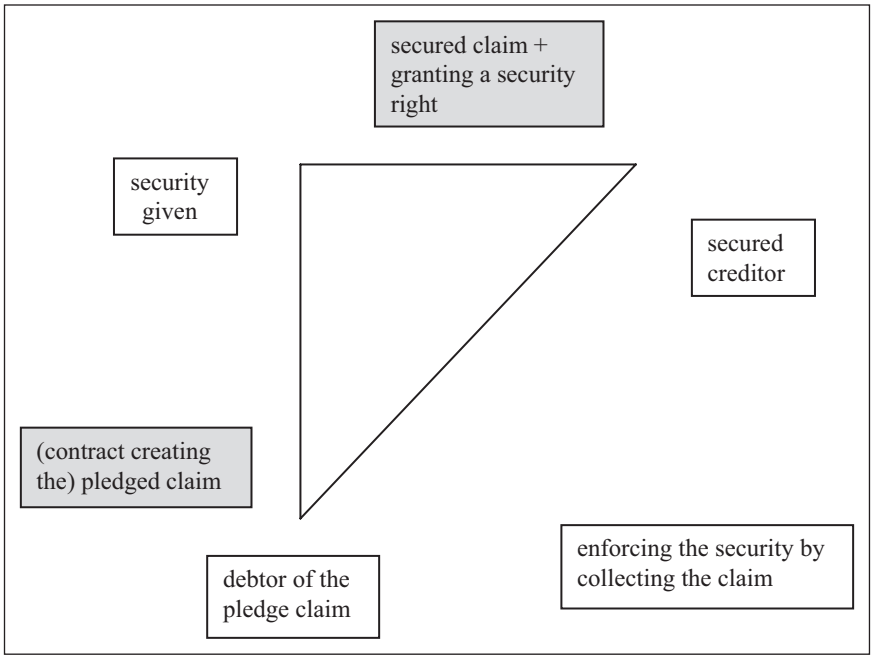
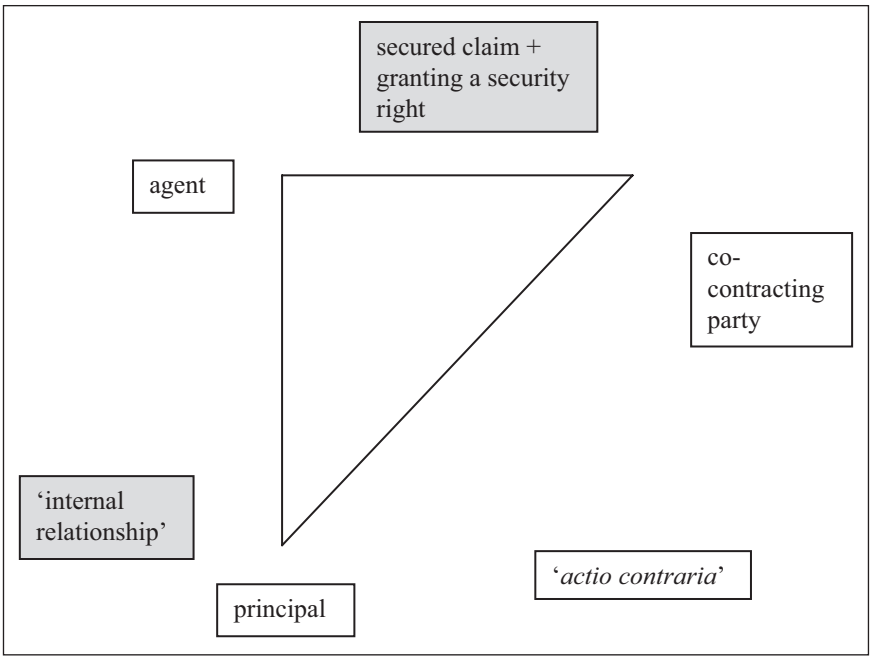
[20] Because the debtor is discharged by performing to the assignor, see *supra*.

There is one important difference: The limited character of the security right implies first of all in the system chosen by the DCFR that the security right is accessory or dependent upon the creditor's right to performance (see Article IX-5:301). For the matter of the defences, this must have the effect that the debtor can, in principle, not only invoke all defences from the relationship with its creditor (the security giver); he can also invoke all defences the main debtor (the security giver) has against its secured creditor. In other words, the exercise of the security right is 'subject to any defences which the security giver may set up against the secured creditor and those which the debtor of the encumbered right may set up against the security giver', to paraphrase Article 3:303 PECL.



The latter rule is the PECL rule on the *actio contraria* of the third party against the principal of his contractor in case of indirect representation. That rule is no longer found in the DCFR because the third party in case of indirect representation has now a stronger right than in PECL (see *supra* the counter-option of Article III-5:402). In PECL, the rule on defences shows that the nature of such an *actio contraria* is that of a security right in a claim.

This does not exclude that the security provider may grant its secured creditor a stronger right, whereby the secured creditor may in relation to the debtor of the encumbered right act as the full owner of the right. Thus, the default rules in Articles IX-7:214 and 215 concerning the realization of a security right in a right to payment provide that the secured creditor may collect the outstanding performance from the third party and repay afterwards the remaining proceeds to the security provider.



3. New Debtors

A similar analysis can be made of the rules concerning different multiparty situations that can be seen as the addition or substitution of a debtor: the complete substitution of debtor (Article III-5:204), the transfer of contractual position (Article III-5:301), the incomplete substitution of debtor (Article III-5:206), the addition of a new debtor (Article III-5:208), the dependent personal security (Book IVG, section 2), the different forms of *delegatio solvendi* (as such not regulated in the DCFR) and its specific forms such as the independent personal security (Article IVG, section 3), money transfer and the different payment instruments, and so on. In these situations, it is also very helpful to analyse the different relationships separately, taking into account each time in how far each relationship is dependent upon or independent from one or more of the other relationships.

3.1 Forms of Plurality of Debtors in General

In the DCFR, as in most legal traditions of the European Member States, the different forms of plurality of debtors can first of all be classified in the following three general categories:

(1) Co-debtors liable for the same obligation, either solidarily or jointly. A performing debtor performs an obligation, which is its 'own' obligation, but not merely its own obligation and also someone else's obligation, each of them

having a 'share' to bear. These situations are in the DCFR governed by Book III, Chapter 4.

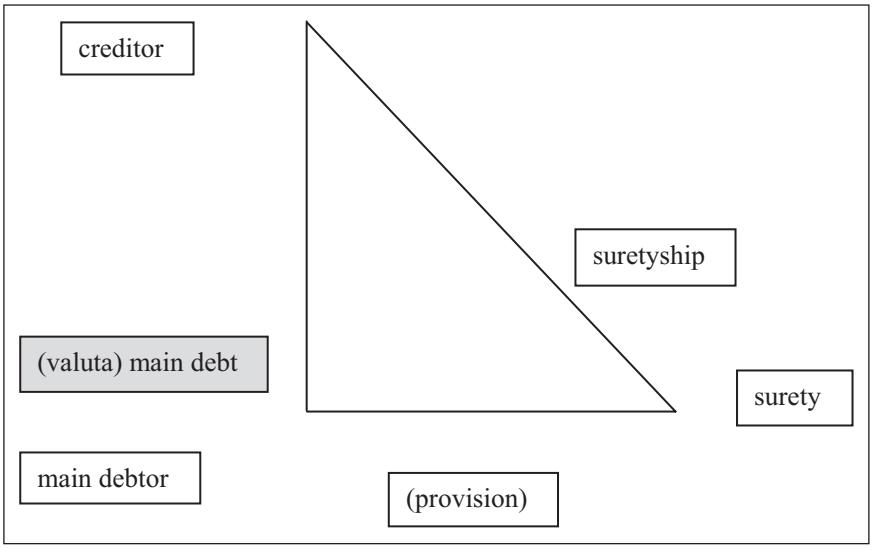
(2) A debtor liable for a debt, that is the debt of someone else, the main debtor; the first mentioned has no 'share', internally the debt is apportioned solely to the main debtor. The main figure is the dependent personal security. This category includes in my view also the cases where a third party grants a proprietary security right to secure someone else's debt.

(3) Two debtors each liable for a different obligation; their obligations are concurrent, not cumulative, and in the internal relationship, the debt is apportioned to one of them and the other has no share to bear. One of the main figures is the independent personal security, in the DCFR governed by Book IVG, Chapter 3.

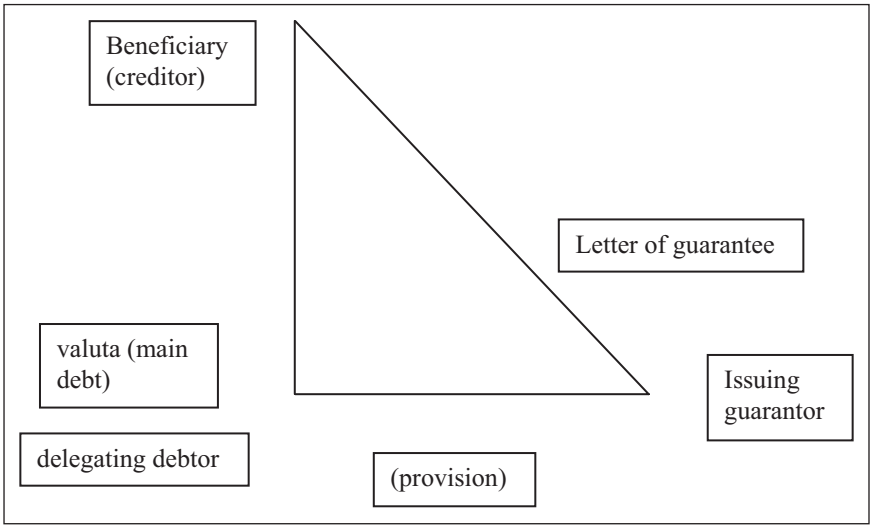
The 'odd' figure is the co-debtorship for security purposes, where the creditor stipulates that the personal security is nevertheless liable as a main debtor. The DCFR has not abolished this figure, except for B2C relationships.

The main difference between the second and third categories is evidently expressed by the words 'dependent' and 'independent'. The obligation of the personal security is either dependent on or (wholly or partially) independent from the 'valuta relationship', the relationship between the creditor and the 'main' debtor (whose debt it primarily is). The word 'independent' is to be preferred over 'abstract', because the abstraction of their obligation describes the relationship to the internal relationship between the debtors, the 'provision relationship' and both types of personal security are in principle 'abstract' in that sense.

Dependent Personal Security



Independent Personal Security



3.2 Guarantee Function and Payment Function

The different forms of plurality, or at least the second and third types, can, however, also be classified on the basis of another criterion, depending on whether the addition of a debtor has first of all a security (guarantee) function or a payment function. A third possibility is that a new debtor is fully substituting for the old debtor who is discharged (perfect or complete substitution of debtor, see Articles III-5:203 and 204 DCFR).

Leaving aside the last figure, where there is no longer a plurality of debtors, this brings us the four following categories of plurality of debtors other than simple co-debtorship.

	Dependent on Valuta Relationship	Independent from Valuta Relationship
Guarantee function (whether subsidiary or solidary)	Dependent personal security Subsidiary liability old debtor	Independent personal security –borderline cases: demand guarantees; standby l/c
Payment function	Dependent *delegatio solvendi*; for example, contract bonds. Compare substitute debtor when old debtor is not discharged	Independent *delegatio solvendi*, for example –credit card –documentary credit –money transfer –bill of exchange

The distinction between security instruments and payment instruments is not absolute and intermediate figures are in principle possible. The whole matter is in a certain sense law of obligations in its purest form: The rules express the relation between the different party relationships involved. Nevertheless, it is possible that a legislator for reasons of consumer protection or more generally transparency for the market participants introduces a certain *Typenzwang* or converts divergent figures into one of the pre-established ones. The latter policy has indeed been followed in the DCFR for personal security provided by a consumer to a business.

3.3 Classification of the Internal Relationship

One can also classify the situations according to the intended effect in the internal relationship between the different debtors: is the performing party engaging itself to pay an existing debt towards the main debtor (*solvendi causa*), to obtain a claim for reimbursement and maybe a remuneration (*credendi causa*) or gratuitously (*donandi causa*)? This distinction does, however, only have an indirect effect on the obligation of the debtors towards the creditor and is therefore not used in the given scheme.

The internal relationship is, on the other hand, interesting from the point of view of proprietary security, something that may seem curious at first sight. If the delegating debtor requests the delegated debtor to engage itself towards the creditor (especially by drawing a bill of exchange or a cheque), in many national systems and some uniform laws, this request amounts to a disposition of the right to performance that the delegating debtor has against the delegated debtor, a disposition in favour of the creditor. Where the delegated debtor is indeed becoming a debtor of the creditor, this does not matter very much, but where he does not, the creditor has a proprietary security right in the delegator's right against the delegated party.

3.4 Four Basic Types

Where do we find these four categories in the DCFR?

3.4.1 'Dependent' Obligations with a Guarantee Function

We find them mainly in the form of the dependent personal security in Book IVG, Chapters 2 and 4. The DCFR has rightly chosen functional and neutral terminology.

3.4.1.1 Dependent Personal Security

Book IVG contains as a default rule that personal security is *dependent* on the debtor's obligation (Article IVG-2:101; the valuta relationship) and subject to all defences of the debtor (Article IVG-2:103), with the exception of some personal defences (Articles IVG-2:102(2)(a) to (c)).

In case of *dependent security*, the terms of the obligation are primarily limited in a double way:

– by the extent of the obligations of the main debtor;
– and by the extent to which these obligations are 'covered' by the security (an extent that cannot be totally unlimited).

The notion of coverage combines these two cumulative limitations. Fortunately, the DCFR does not follow a certain tendency in the French and Belgian doctrines to see two different obligations on the side of the security, a so-called 'obligation de garantie' and 'obligation de payement'; there is only one obligation of the security, but the content of that single obligation is determined by the notion of a coverage, which refers to covered obligations of the main debtor.

Apart from the limitation of coverage, the obligation can also be limited by other terms, such as a time for resort to the security (Article IVG-2:108) or other modes of extinction or modalities of the obligation of the security provider (e.g., its possible subsidiary character). As it would go against public policy that the obligation of the security can indefinitely increase because the agreed coverage is 'global', the object of the obligation can by notice be limited to obligations arisen before the end of the notice period.

The security provider can, on the other hand, not invoke any defence arising out of the internal relationship between the security provider and the main debtor (provision relationship).

3.4.1.2 Incomplete Substitution of Debtor

We also find them in the case of an incomplete substitution of debtor, where the old debtor has a similar function, in Articles III-5:206 and 5:207. The remaining obligation of the old debtor has certainly a guarantee function, although it is not 'dependent' in the strict sense, as it was the original obligation. Article III-5:207 thus provides that:

> (1) The effects of an incomplete substitution on defences and set-off are the same as the effects of a complete substitution.
> (2) To the extent that the original debtor is not discharged, any personal or proprietary security provided for the performance of that debtor's obligations is unaffected by the substitution.
> (3) So far as not inconsistent with paragraphs 1 and 2, the liability of the original debtor is governed by the rules on the liability of a provider of dependent personal security with subsidiary liability.

3.4.2 'Independent' Obligations with a Guarantee Function

We find them as 'independent personal security' in Book IVG, Chapter 3. Here again, the DCFR has rightly chosen functional and neutral terminology.

As said, there is a presumption that the obligation undertaken by the security provider is not an independent one. Where the security is nevertheless an

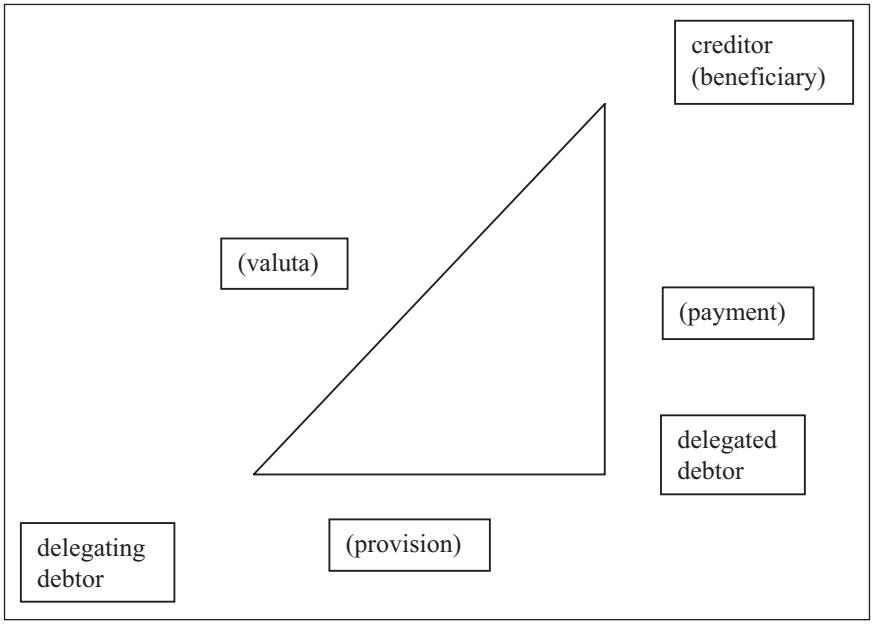
independent security, the terms of the obligation are determined in principle by the contract with the creditor in itself, without reference to one or more secured obligations. Chapter 3 contains more specific default rules:

- the content and terms of the obligation are not determined by the delimitation of a 'coverage' given to obligations of a main debtor but by requirements for a demand for performance;
- the security provider can only invoke defences out of its own relationship with the creditor, including evidently that the demand does not comply with the terms of the obligation (Articles IVG-3:103(1) and (2)); this rule is restricted in case of guarantees on first demand (Article IVG-3:104). As in dependent personal security, the security provider can first of all not invoke any defence arising out of the internal relationship between the security provider and the main debtor (provision relationship);
- the security provider can also not invoke defences from the relationship between the main debtor and the creditor (valuta relationship), except where the creditor's demand for performance is manifestly abusive or fraudulent (Article IVG-3:105).

3.4.3 'Dependent' Obligations with a Payment Function

This is found in those forms of *delegatio solvendi* where the obligation of the additional debtor is not independent in the sense of not abstracted from the original or valuta relationship (dependent delegation).

Dependent *Delegatio Solvendi*

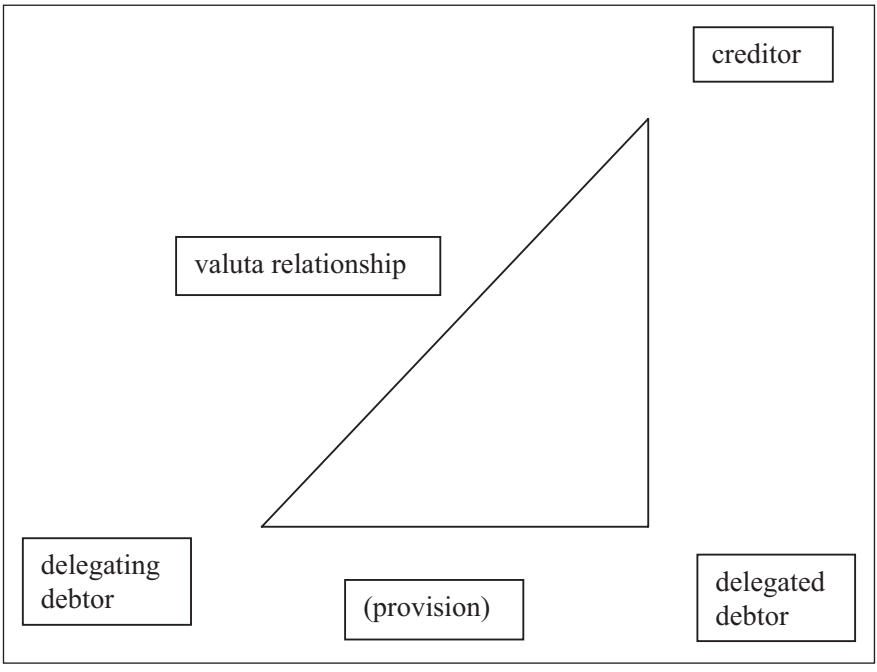


This institution is not as such regulated by the DCFR. It is in a certain sense the mirror image of the incomplete substitution of debtor of Article III-5:206. Where the creditor has accepted the delegation, it has to pursue performance from the delegated debtor in the first place and the original debtor is now merely a subsidiary debtor, although in the internal relationship between both debtors he has to bear the full obligation. The relationship between the creditor and its debtor will determine whether the creditor is obliged to accept a delegation of debt by its debtor to a delegated debtor. As long as the creditor neither accepts the delegation nor is bound to accept, the old debtor remains bound unconditionally and will only be discharged if the third party effectively pays for the account of the old debtor.

3.4.4 'Independent' Obligations with a Payment Function

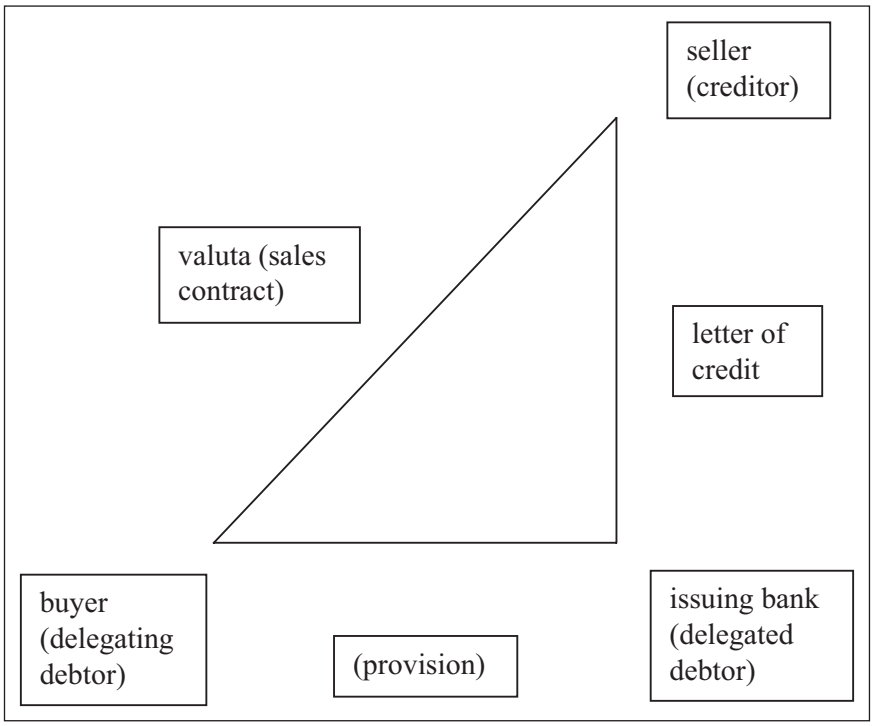
This is again a form of delegatio solvendi, but one where the delegated debtor engages in an obligation that is not dependent upon the original obligation. The conditions under which the delegated debtor is bound (i.e., the modalities of his obligation) are a question of interpretation of his promise. This figure is not regulated either by the DCFR, although some aspects can be traced, for example, in Article III-2:108(2), which provides that 'a creditor who accepts a cheque or other order to pay or a promise to pay is presumed to do so only on condition that it will be honoured. The creditor may not enforce the original obligation to pay unless the order or promise is not honoured'. Here, too, the 'main' debtor becomes a subsidiary debtor in the relationship with the creditor.

Independent *Delegatio Solvendi*



An example mentioned in the Comments to Book IVG is the letter of credit in a documentary credit.

Documentary Credit



Other examples are the different payment instruments, such as credit cards, bills of exchange, and even simple money transfer. Some elements of these figures are governed by Acquis rules, especially in the Payments Services Directive. That Directive does not elaborate on the basic infrastructure of payment instruments in the general law of obligations.

4. Conclusion

The analysis I made tries to show that there is a sufficient degree of coherence in the rules concerning different multiparty situations that have in common that in one way or another they add or substitute a creditor to a relationship. Certainly, the coherence could be made even clearer, but one cannot expect too much – the result until now is already rather innovative in this domain. In addition, not all institutions are covered by the DCFR – especially general rules on *delegatio solvendi* are missing; but what we have already brings us rather far.

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Style guide

A style guide for contributors can be found in volume 11, issue No. 1 (2003), pages 103–108, and online at http://www.kluwerlawonliine.com/europeanreviewofprivatelaw.

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