

Merger in Separate, Indivisible and Solidary Obligations

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1. Confusion or merger *per se* has an *inter partes* effect in obligations with several creditors and/or debtors. In other words, it only affects two persons, whereas none of the other debtors are discharged from the performance and no rights of the other creditors are extinguished. This is a default rule, which might be established as a legal presumption for all cases of multi-party obligations. Consequently, exceptions thereto should be justified with proper reasons.

2. The *inter partes* effect of the confusion is an objective consequence of the structure of multi-party obligations that are consisted of plurality of legal bonds (*liens obligatoires*) [1, p. 827]. The merger affects only one of the links in the bundle and therefore does not cause extinguishment of the whole obligation. Thus, the position of the other participants remains untouched.

3. For cases of separate and solidary obligations with a divisible prestation, the default rule should be applied, except for the instances where the application thereof leads to ineffective economic results (see theses 5 and 7).

4. If there is only one creditor or debtor in a multi-party obligation, the application of the default rule has different practical consequences for separate and solidary obligations:

- (a) separate claims and debts are extinguished in part;
- (b) solidary obligations are not extinguished at all.

5. The default rule is not optimal for cases of active and passive solidary obligations with a divisible prestation: when the debt is paid by one of the solidary debtors not affected by merger, he or she immediately receives an action against the creditor (who is also a debtor) to return the part of the performance. This increases transaction costs, so that is why another solution should be preferred under such circumstances. The optimal regulation is expected to be based on the *erga omnes* effect of confusion limited to the internal share of the creditor (for solidary claims) or debtor (for solidary debts).

The application of this rule can have three different practical consequences:

- (a) total extinction of the obligation if the internal share equals 100%;
- (b) partial extinction of the obligation if the internal share is in the range from 0% to 100%;
- (c) no extinction of the obligation if the internal share equals 0%.

6. The default rule is well suited for indivisible obligations. The amount of an indivisible obligation remains the same but the circle of the eventual *solventēs* or *accipientēs* decreases by 1 unless there is a mixed plurality of persons.

This is also the case for separate and solidary obligations with a mixed plurality of persons, since a succession should not be detrimental to the third parties.

7. There may be exceptions to the previous thesis for instances wherein, by virtue of the merger, the creditor or creditors lose interest in maintaining the obligation. This might occur when a creditor becomes the successor of the debtor who has already made preparations for the performance (e.g., has bought a promised piece of property). In this situation, it is senseless to keep the obligation, so the merger should have the *erga omnes* effect.

References

- 1) Obligaciones / N.O. Silvestre. et al. 2a. ed. Buenos Aires: La Ley, 2016. 897 ps.