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# THE INDIRECTLY REPRESENTED PERSON'S CLAIM TO DELIVERY ILLUSTRATED BY THE EXAMPLE OF THE COMMISSION CONTRACT

*O DIREITO DE ENTREGA DA PESSOA INDIRETAMENTE REPRESENTADA  
ILUSTRADO PELO EXEMPLO DO CONTRATO DE COMISSÃO*

Ricarda Stoppelhaar<sup>1</sup>

DOI: <https://doi.org/10.34628/R705-M975>

**Abstract:** The principle of the privity of contractual obligations applies in almost all continental private law systems. Accordingly, a contractual obligation, in particular a contract, can only have legal effects inter partes, i.e. between the persons involved as parties. For third-parties not involved in the contract, this principle has both positive and negative consequences. Thus, third-parties are neither obligated (positive consequence) nor entitled (negative consequence) under the contract. The consequences of the principle of privity of contract are particularly clear in the case of indirect representation. Indirect representation is defined as when someone (the indirect representative) concludes a contract with a third-party in his own name, but at the same time is obliged on the basis of another contract with the indirectly represented person to provide the performance of the third-party to the indirectly represented person. While the legal effects of the concluded transaction occur solely for the acting indirect representative, the economic interest therein lies with the indirectly represented person. As a consequence, the indirectly represented person has a performance claim only vis-à-vis the indirect representative. There is no direct legal relationship with the third-party. If the indirect representative does not fulfill his duty to deliver the performance of the third-party to the indirectly represented person, then the principle of privity leads to a lack of protection for the indirectly represented person, as he has no possibility of directly demanding the performance from the third-party himself. In a first step, this article defines indirect representa-

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<sup>1</sup> Dr. iur. Bern, Switzerland. The author would like to thank Dominique Koevoets, attorney at law, Bern, for her critical reading of this article.

tion and distinguishes it from other legal figures such as direct representation and the agency of common law. It will subsequently explain how the indirect representative can fulfil his obligation to deliver to the indirectly represented person. Finally, it is necessary to show how the indirectly represented person can be protected in enforcing his claim for performance against the indirect representative. For this purpose, a special provision of Swiss law will be discussed. The article concludes with a summary of the results.

**Keywords:** Indirect representation; Privity of contract; Commission; Agency; Assignment by operation of law; Direct representation.

**Resumo:** O princípio da privação das obrigações contratuais aplica-se em quase todos os sistemas continentais de direito privado. Assim, uma obrigação contratual, nomeadamente um contrato, só pode ter efeitos jurídicos inter partes, ou seja, entre as pessoas envolvidas como partes. Relativamente a terceiros não envolvidos no contrato, este princípio tem consequências positivas e negativas. Assim, os terceiros não são obrigados (consequência positiva) nem têm direito (consequência negativa) no âmbito do contrato. As consequências do princípio da privação do contrato são particularmente claras no caso da representação indireta. A representação indireta é definida quando alguém (o representante indireto) celebra um contrato com um terceiro em seu próprio nome, mas, ao mesmo tempo, é obrigado, com base num outro contrato com a pessoa indiretamente representada, a fornecer a prestação do terceiro à pessoa indiretamente representada. Enquanto os efeitos jurídicos da transação concluída ocorram apenas para o representante indireto em exercício, o interesse económico é da pessoa representada indiretamente. Consequentemente, a pessoa representada indiretamente tem um direito de execução apenas em relação ao representante indireto. Não existe uma relação jurídica direta com o terceiro. Se o representante indireto não cumprir o seu dever de entregar a prestação do terceiro ao indireto, então o princípio da privacidade conduz a uma falta de proteção do indiretamente representada, uma vez que esta não tem a possibilidade de exigir diretamente a prestação diretamente ao terceiro. Numa primeira fase, este artigo define a representação indireta e distingue-a de outras figuras jurídicas como a representação direta e a agência de direito comum. Seguidamente, explicará como o representante indireto pode cumprir a sua obrigação de entrega à pessoa representada indiretamente. Por último, é necessário mostrar como a pessoa representada indiretamente pode ser protegida na execução do seu direito de execução contra o representante indireto. Para o efeito, será analisada uma disposição especial do direito suíço. O artigo termina com uma síntese dos resultados.

**Palavras-chave:** Representação indireta; Privacidade do contrato; Comissão; Agência; Cessão por força da lei; Representação direta.

**Summary:** I. Introduction. II. Definition of indirect representation. III. Distinction from other legal figures. 1. Distinction from direct representation. 2. Distinction from “agency” in common law. IV. Ways in which the indirect representative can fulfil the performance obligation. V. Art. 401 CO - as a special provision of the basic relationship. VI. Conclusion.

## I. Introduction

This article addresses the indirectly represented person's claim to performance. Once the indirect representative acquires an asset from a third-party, he is obliged to transfer the acquired asset to the indirectly represented person.<sup>2</sup> If the indirect representative does not fulfil this obligation, the indirectly represented person is entitled to contractual claims against the indirect representative only.<sup>3</sup> This problem can be illustrated by the commission contract. The commission contract obliges the commission agent to conclude a sales contract with a third-party, either in the role of the buyer or the seller (purchase commission or sales commission).<sup>4</sup> The performance of the third-party to the commission agent must then be transferred to the commission principal based on the delivery obligation resulting from the commission contract,<sup>5</sup> since only the commission principal has an economic interest in the performance of the third-party.<sup>6</sup> The commission principal, however, does not have a direct contractual relationship with the third-party.<sup>7</sup> The question now arises how to address the situation in which the commission agent does not fulfil his performance obligation towards the commission principal.

In a first step, this article defines indirect representation<sup>8</sup> and distinguishes it from other legal figures such as direct representation and the agency of common law.<sup>9</sup> It will subsequently explain how the indirect representative can fulfil

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<sup>2</sup> See Ricarda Stoppelhaar, *Die Indirekte Stellvertretung – Zugleich ein Beitrag zur Lehre von den Zustimmungsgeschäften*, thesis Bern 2023, no. 205. Cf. eg. also Jacques Droin, *LA REPRÉSENTATION INDIRECTE EN DROIT SUISSE*, THESIS GENÈVE 1956, p. 76 ET SEQQ.

<sup>3</sup> See eg. Droin (fn. 1), p. 94; Stoppelhaar (fn. 1), no. 2; Mathieu Zufferey, *La représentation indirecte, Etude d'une institution de droit suisse des obligations*, thesis Freiburg i.Ue., Zürich/Basel/Genève 2018, no. 110.

<sup>4</sup> See the legal definition in art. 425 para. 1 Swiss code of obligations (CO): «1 A buying or selling commission agent is a person who, in return for a commission, buys or sells chattels or securities in his own name but for the account of another (the principal).»

<sup>5</sup> With further references on the commission contract eg. Claire Huguenin, *Obligationenrecht, Allgemeiner und Besonderer Teil*, 3<sup>rd</sup> edn., Zürich/Basel/Genève 2019, no. 3427 et seqq.; Christian Lenz/Andreas von Planta, in: Corinne Widmer Lüchinger/David Oser (eds.), *Basler Kommentar, Obligationenrecht I*, art. 1–529 OR, 7th edn., Basel 2020, no. 1 et seqq. on art. 425 CO (quotes BSK-author).

<sup>6</sup> Stoppelhaar (fn. 1), no. 13; cf. Caroline von Graffenried, *Schadloshaltung des Dritten in zweivertraglichen Dreiparteienverhältnissen*, Ein Beitrag insbesondere zum Vertrag zugunsten Dritter (Art. 112 OR), zum Vertrag mit Schutzwirkung zugunsten Dritter und zur Drittschadensliquidation im schweizerischen Recht, thesis Bern 2019, no. 658.

<sup>7</sup> Stoppelhaar (fn. 1), no. 13 et seq.

<sup>8</sup> See below II.

<sup>9</sup> See below III.

his obligation to deliver to the indirectly represented person.<sup>10</sup> Finally, it is necessary to show how the indirectly represented person can be protected in enforcing his claim for performance against the indirect representative.<sup>11</sup> For this purpose, a special provision of Swiss law will be discussed. The article concludes with a summary of the results.<sup>12</sup>

However, before starting with the definition of indirect representation, two points need to be clarified. First it must be mentioned that this article is written from the perspective of Swiss law. Nevertheless, as the topic at hand concerns the general principles of the law of obligations, the topic is also of importance beyond the Swiss legal sphere. The second point concerns terminology. In English legal terminology, the representative and the represented person are often referred to as “agent” and “principal”.<sup>13</sup> This is not compatible with the understanding of representation in the Swiss legal system, since “representation” differs from a “mandate” which is a special type of contract.<sup>14</sup> A mandate can, but does not have to form the legal relationship between the representative and the represented person.<sup>15</sup> Therefore, to indicate representation only, in this article the persons involved are referred to as indirect representative, indirectly represented person and third-party.

## II. Definition of indirect representation

Indirect representation is not regulated by Swiss law.<sup>16</sup> In legal discourse, however, the term “indirect representation” is generally used when someone (*the indirect representative*) acts with legal effect for himself, but at the same time is obliged to another person (*the indirectly represented person*) to transfer through further legal acts the economic result of the concluded transaction to him.<sup>17</sup> While

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<sup>10</sup> See below IV.

<sup>11</sup> See below V.

<sup>12</sup> See below VI.

<sup>13</sup> Cf. eg. Clara Erika Dietl/Egon Lorenz, *Wörterbuch Recht, Wirtschaft & Politik*, Vol. II, Deutsch-Englisch, 6<sup>th</sup> edn., München 2020, p. 802 *in fine*, p. 803 *in initio*; Peter Watts/F.M.B. Reynolds, *Bowstead and Reynolds on Agency*, 21<sup>st</sup> edn., London 2018, no. 1-001. The quoted edition is a previous one. The current edition is the 23rd, 2023 London. This edition was not available in Switzerland at the time this article was written.

<sup>14</sup> Cf. Stoppelhaar (fn. 1), no. 19. In detail on the definition of the mandate eg. Huguenin (fn. 4), no. 3221 et seqq.

<sup>15</sup> Eg. Huguenin (fn. 4), no. 1024; Alfred Koller, *Schweizerisches Obligationenrecht, Allgemeiner Teil*, Vol. I: Handbuch des Allgemeinen Teils des Obligationenrechts, 5<sup>th</sup> edn., Bern 2023, no. 18.02 et seqq.

<sup>16</sup> Stoppelhaar (fn. 1), no. 6.

<sup>17</sup> Eg. Federal Supreme Court Judgements 2C\_255/2020 of 18<sup>th</sup> August 2020, cons. 4.2.2; 2C\_767/2018 of 8<sup>th</sup> May 2019, cons. 2.1.2; 4A\_496/2014 of 11<sup>th</sup> February 2015, cons. 3.2; BGE 126 III 59

the legal effects of the concluded transaction – unlike in the case of direct representation – occur solely for the acting indirect representative, the economic interest therein lies with the indirectly represented person.<sup>18</sup>

As mentioned above, indirect representation occurs when the indirect representative concludes a contract with a third-party with effect for himself while also being obliged to transfer the economic benefits from the contract to the indirectly represented person due to their legal agreement.<sup>19</sup> The characteristic feature of indirect representation is therefore that three persons are connected to each other through two autonomous legal relationships, with the indirect representative acting as a link.<sup>20</sup> While the legal relationship between the indirect representative and the indirectly represented person is called the *basic relationship*,<sup>21</sup> the legal relationship between the indirect representative and the third party is the *third-party contract*.<sup>22</sup>

The *basic relationship* is characterised by the fact that it imposes on the indirect representative the obligation to provide the indirectly represented person with the economic result of the contract concluded with the third-party in return for full reimbursement of expenses.<sup>23</sup> The interest of the indirectly represented person is namely focused on the performance of the third-party to the indirect representative.<sup>24</sup> The indirect representative, on the other hand, has no economic interest of his own in the performance of the third-party.<sup>25</sup> The performance of the third-party may be completely useless or even burdensome for him.<sup>26</sup> Rather, the indirect representative is concerned with transferring the performance of the third-party to the indirectly represented person and thus fulfilling the obligation from the basic relationship.<sup>27</sup> For this reason, the indirectly represented person must reimburse him for all expenses in connection with the concluded

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cons. 1b p. 64; BGE 100 II 200 cons. 8a p. 211 *in fine*, p. 212 *in initio*; BSK-Watter (fn. 4), no. 29 on art. 32 CO; Droin (fn. 1), p. 42 and p. 52 *et seq.*; Huguenin (fn. 4), no. 1032.

<sup>18</sup> Stoppelhaar (fn. 1), no. 1; Zufferey (fn. 2), no. 8 *et seq.* and no. 25.

<sup>19</sup> In detail on the definition of indirect representation Stoppelhaar fn. 1), no. 11 *et seqq.*

<sup>20</sup> Stoppelhaar (fn. 1), no. 15.

<sup>21</sup> See Stoppelhaar (fn. 1), no. 16 *et seq.*

<sup>22</sup> See Stoppelhaar (fn. 1), no. 18.

<sup>23</sup> Walter Fellmann, Berner Kommentar, Band VI: Obligationenrecht, 2. Abteilung: Die einzelnen Vertragsverhältnisse, 4. Teilband: Der einfache Auftrag, Art. 394–406 OR, Bern 1992, no. 53 on art. 394 CO (quotes BK-Fellmann); Stoppelhaar (fn. 1), no. 16.

<sup>24</sup> Stoppelhaar (fn. 1), no. 16.

<sup>25</sup> Stoppelhaar (fn. 1), no. 16.

<sup>26</sup> Stoppelhaar (fn. 1), no. 16.

<sup>27</sup> Stoppelhaar (fn. 1), no. 16.

third-party contract.<sup>28</sup> The basic relationship is usually a contract.<sup>29</sup> A typical contract underlying indirect representation is a simple mandate or a commission contract.<sup>30</sup>

In contrast, the contractual relationship between the indirect representative and the third-party is referred to as a “*third-party contract*”.<sup>31</sup> For the indirect representative to have a performance claim against a third-party, he concludes a contract with this third-party on his own account, thus establishing a claim against the third-party in his favour.<sup>32</sup> In reverse, the third-party contract also only has legal effects between the parties involved, i.e. between the indirect representative and the third-party.<sup>33</sup> However, the third-party’s performance to the indirect representative is economically due to the indirectly represented person.<sup>34</sup> The legal relationship with the third-party is always a contract,<sup>35</sup> often in the form of a sales contract.<sup>36</sup> This is, however, not mandatory. Rather, very different types of contract can form the third-party contract of an indirect representation.<sup>37</sup> For example, the indirect representative may be obliged to have an item belonging to the indirectly represented person repaired. For this purpose, the indirect representative will conclude a contract for work and labour with the third-party.<sup>38</sup>

It follows from the above that indirect representation is characterised by the principle of the “*privity of contract*”.<sup>39</sup> According to this principle, a contract only has effects between the persons involved as parties.<sup>40</sup> As a consequence, the indirectly represented person has a performance claim only vis-à-vis the indirect

<sup>28</sup> See Stoppelhaar (fn. 1), no. 16; cf. Droin (fn. 1), p. 78 et seqq.

<sup>29</sup> Stoppelhaar (fn. 1), no. 17 and no. 209 et seqq.

<sup>30</sup> Droin (fn. 1), p. 58 and p. 60 et seqq.; Stoppelhaar (fn. 1), no. 210 et seq.; Roger Zäch/Adrian Künzler, Berner Kommentar, Obligationenrecht, Stellvertretung, art. 32–40 OR, 2<sup>nd</sup> edn., Bern 2014, no. 175 on art. 32 CO (quotes BK-Zäch/Künzler); Zufferey (fn. 2), no. 55 et seq.

<sup>31</sup> In detail on the third-party contract Stoppelhaar (fn. 1), no. 293 et seqq.

<sup>32</sup> Stoppelhaar (fn. 1), no. 294.

<sup>33</sup> Stoppelhaar (fn. 1), no. 315; cf. BK-Zäch/Künzler (fn. 29), no. 178 on art. 32 CO; Droin (fn. 1), p. 83; Zufferey (fn. 2), no. 211.

<sup>34</sup> Stoppelhaar (fn. 1), no. 344.

<sup>35</sup> Stoppelhaar (fn. 1), no. 294 et seqq.

<sup>36</sup> Stoppelhaar (fn. 1), no. 295.

<sup>37</sup> Stoppelhaar (fn. 1), no. 295; Zufferey (fn. 2), no. 80 et seqq.

<sup>38</sup> Illustrative Stoppelhaar (fn. 1), no. 295.

<sup>39</sup> Stoppelhaar (fn. 1), no. 40. In detail on the definition of privity of contract Yannick Minnig, GRUNDFRAGEN MEHRFACHER VERPFLICHTUNGSGESCHÄFTE, DOPPELVERKAUF – DOPPELVERMIETUNG – DOPPELARBEITSVERHÄLTNIS, THESIS BERN 2018, no. 2.22; INGEBORG SCHWENZER/CHRISTIANA FOUNTOLAKIS, SCHWEIZERISCHES OBLIGATIONENRECHT, ALLGEMEINER TEIL, 8TH EDN., BERN 2020, no. 4.06; VON GRAFFENRIED (fn. 5), no. 99 et seqq.

<sup>40</sup> See eg. Minnig (fn. 38), no. 2.22 et seq.; Schwenger/Fountoulakis (fn. 38), no. 4.06; von Graffenried (fn. 5), no. 99.



representative. There is no direct legal relationship with the third-party.<sup>41</sup> Thus, due to the privity of contract principle, the indirectly represented person's entitlement to the economic outcome of the third-party contract is legally ignored.<sup>42</sup> Therefore, the economic result of the third-party contract must be transferred separately, by means of further legal acts between the indirect representative to the indirectly represented person.<sup>43</sup>

### III. Distinction from other legal figures

#### 1. Distinction from direct representation

In the case of direct representation, the authorised representative acts on behalf of the represented person.<sup>44</sup> The contract concluded by the direct representative only takes effect between the directly represented person and the third-party.<sup>45</sup> The direct representative does not become part of the concluded contract. Direct representation requires that the representative has power of representation.<sup>46</sup> He obtains this through an authorisation from the represented person.<sup>47</sup> This authorisation is based on a unilateral declaration of intent by the directly represented person.<sup>48</sup> A contract may also exist between the directly represented person and the direct representative, eg. a mandate, but this is not necessary.<sup>49</sup>

#### 2. Distinction from “agency” in common law

The dichotomy between direct and indirect representation is usually foreign to common law systems.<sup>50</sup> In common law systems, the concept of ‘agency’ refers to a fiduciary relationship where one person (the principal) gives consent for another person (the agent) to act on his behalf, influencing his legal and business

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<sup>41</sup> *Stoppelhaar* (fn. 1), no. 40.

<sup>42</sup> *Stoppelhaar* (fn. 1), no. 40.

<sup>43</sup> BGE 100 II 200 cons. 8a p. 211 et seq.; *Bernhard Berger*, Allgemeines Schuldrecht, Schweizerisches Obligationenrecht Allgemeiner Teil mit Einbezug des Deliktsrechts und Einführung in das Personen- und Sachenrecht, 3rd edn., Bern 2018, no. 837 et seq.; *Zufferey* (fn. 2), no. 115.

<sup>44</sup> *Huguenin* (fn. 4), no. 1061; *Koller* (fn. 14), no. 16.03; *Schwenzer/Fountoulakis* (fn. 38), no. 41.03.

<sup>45</sup> *Huguenin* (fn. 4), no. 1025; *Schwenzer/Fountoulakis* (fn. 38), no. 41.09.

<sup>46</sup> *Koller* (fn. 14), no. 16.06; *Huguenin* (fn. 4), no. 1051 et seq.; *Schwenzer/Fountoulakis* (fn. 38), no. 41.06 et seqq.

<sup>47</sup> *Koller* (fn. 14), no. 18.02 et seqq.; *Huguenin* (fn. 4), no. 1072 et seqq.

<sup>48</sup> BK-Zäch/Künzler (fn. 29), no. 28 on art. 33 CO; *Koller* (fn. 14), no. 18.16.

<sup>49</sup> *Koller* (fn. 14), no. 18.05; *Schwenzer/Fountoulakis* (fn. 38), no. 42.05.

<sup>50</sup> *Bowstead/Reynolds/Watts* (fn. 12), no. 1-022.



relations with third-parties.<sup>51</sup> The agent, in turn, agrees to undertake this role.<sup>52</sup> The agent has the authority to perform actions that the principal has agreed to.<sup>53</sup> This authority constitutes a power to affect the principal's legal relations with third-parties and, in contrast to the authority in the case of direct representation, is not based on a unilateral declaration of intent but on the fiduciary relationship.<sup>54</sup> The agent can act on behalf of the principal or in his own name towards the third-party. While the former is referred to as "*disclosed agency*",<sup>55</sup> the latter is referred to as "*undisclosed agency*".<sup>56</sup> It is important to keep the concept of the undisclosed agency separate from that of indirect representation.<sup>57</sup>

With the "*undisclosed agency*" the agent always concludes the contract with the third-party in his own name but for the principal's account.<sup>58</sup> Just as with indirect representation, the ultimate beneficiary is not the agent with whom the third-party has concluded the contract, but the principal.<sup>59</sup> However, in contrast to indirect representation, undisclosed agency creates a direct legal relationship between the principal and the third-party.<sup>60</sup> As soon as the third-party is notified of the principal, both parties, the agent and the principal, are alternatively obligated to the third-party.<sup>61</sup> In the reverse, the principal can directly demand performance from the third-party.<sup>62</sup> This indicates that the principle of privity of contract is circumvented in the context of agency relationships.<sup>63</sup>

#### IV. Ways in which the indirect representative can fulfil the performance obligation

As already explained, the performance provided to the indirect representative by the third-party must be transferred to the indirectly represented person

<sup>51</sup> Bowstead/Reynolds/Watts (fn. 12), no. 1-001.

<sup>52</sup> Bowstead/Reynolds/Watts (fn. 12), no. 1-001.

<sup>53</sup> Bowstead/Reynolds/Watts (fn. 12), no. 1-001.

<sup>54</sup> Cf. Bowstead/Reynolds/Watts (fn. 12), no. 1-001.

<sup>55</sup> See Bowstead/Reynolds/Watts (fn. 12), no. 8-001 et seqq.

<sup>56</sup> See Bowstead/Reynolds/Watts (fn. 12), no. 8-069.

<sup>57</sup> Bowstead/Reynolds/Watts (fn. 12), no. 8-071.

<sup>58</sup> Zufferey (fn. 2), no. 185 et seqq. The terms "*agent*" and "*principal*" are used here, as this corresponds to the common terminology in connection with undisclosed agency. See Bowstead/Reynolds/Watts (fn. 12), no. 1-001.

<sup>59</sup> Cf. Zufferey (fn. 2), no. 188.

<sup>60</sup> Cf. Bowstead/Reynolds/Watts (fn. 12), no. 8-069 et seqq.; Zufferey (fn. 2), no. 188.

<sup>61</sup> Bowstead/Reynolds/Watts (fn. 12), no. 8-069; Zufferey (fn. 2), no. 188.

<sup>62</sup> Bowstead/Reynolds/Watts (fn. 12), no. 8-069 et seq.

<sup>63</sup> Bowstead/Reynolds/Watts (fn. 12), no. 8-069; Clara Erika Dietl/ Egon Lorenz, Wörterbuch Recht, Wirtschaft & Politik, Vol. I, Englisch-Deutsch, 7<sup>th</sup> edn., München 2016, p. 667.

by means of further legal acts.<sup>64</sup> This is a consequence of the principle of *privity of contract*.<sup>65</sup> The indirect representative's obligation to transfer the performance rendered by the third-party arises from the basic relationship and is usually of contractual nature.<sup>66</sup> In the following, it will be shown how the indirect representative can fulfil this obligation. In principle, there are two options:

– First, the indirect representative can assign the claim for performance of the third-party – arising from the third-party contract – to the indirectly represented person.<sup>67</sup> The indirectly represented person thus becomes the new creditor of the third-party and can directly demand performance.<sup>68</sup> Consequently, the indirectly represented person acquires the assets directly from the third-party<sup>69</sup> and can also directly claim damages in the event of non-performance or insufficient performance by the third-party.<sup>70</sup> However, such an assignment of claim requires that the legal requirements for the assignment are fulfilled. In Swiss law, this means that the indirect representative must execute a written deed of assignment, since pursuant to art. 165 para. 1 Swiss code of obligations (CO) an assignment is valid only if done in writing.<sup>71</sup> Accordingly, the fulfilment of the indirectly represented person's claim for delivery depends on the contribution of the indirect representative.<sup>72</sup>

– The second option is to transfer the performance of the third-party to the indirectly represented person by means of further legal acts.<sup>73</sup> In this variant, the claim from the third-party contract remains with the indirect representative. Rather, the third-party renders the performance to the indirect representative, who in turn transfers it to the indirectly represented person in a second step.<sup>74</sup> If the claim was for performance in kind, in this second variant the indirect representa-

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<sup>64</sup> See above II.

<sup>65</sup> See above II *in fine*.

<sup>66</sup> With further references *Stoppelhaar* (fn. 1), no. 205 *et seqq.* Cf. *Droin* (fn. 1), p. 76 *et seqq.*; *Zufferey* (fn. 2), no. 120 *et seqq.*

<sup>67</sup> *Hans A. Pestalozzi*, DIE INDIREKTE STELLVERTRETUNG, THESIS ZÜRICH 1927, p. 44; *STOPPELHAAR* (FN. 1), NO. 205.

<sup>68</sup> *Pestalozzi* (fn. 66), p. 44; *Stoppelhaar* (fn. 1), no. 205.

<sup>69</sup> *Stoppelhaar* (fn. 1), no. 515. Cf. *Josef Hofstetter*, Schweizerisches Privatrecht, Vol. VII: Obligationen-recht, Besonderer Teil, Der Auftrag und die Geschäftsführung ohne Auftrag, Basel 2000, p. 205.

<sup>70</sup> At least if the indirectly represented person acquires the claim before a breach of contract by the third-party occurs. In detail *Stoppelhaar* (fn. 1), no. 327 *et seqq.*

<sup>71</sup> See the legal text of art. 165 CO: "1 An assignment is valid only if done in writing. 2 No particular form is required for an undertaking to enter into an assignment agreement."

<sup>72</sup> *Stoppelhaar* (fn. 1), no. 246.

<sup>73</sup> *Pestalozzi* (fn. 66), p. 44; *Stoppelhaar* (fn. 1), no. 205.

<sup>74</sup> In detail *Stoppelhaar* (fn. 1), no. 517.

tive always first acquires legal proprietorship of the assets originating from the third-party.<sup>75</sup> The following example is given to illustrate this. In the event that the basic relationship of indirect representation is a commission contract, the buying commission agent first acquires the ownership of the chattel bought from the third-party. Subsequently, the commission agent transfers the ownership of the acquired chattel to the commission principal.<sup>76</sup> As a result, there are two independent acts of transfer. This has two disadvantages for the indirectly represented person: *Firstly*, the fulfilment of the delivery obligation – here too – depends on the cooperation of the indirect representative<sup>77</sup> and *secondly*, the indirectly represented person is exposed to the risk of the indirect representative going bankrupt.<sup>78</sup> If bankruptcy proceedings are commenced against the indirect representative, the assets acquired by the third-party become part of the bankruptcy mass.<sup>79</sup>

The two variants are mutually exclusive.<sup>80</sup> As soon as the third-party renders his performance, the claim from the third-party contract is extinguished through fulfilment.<sup>81</sup> The possibility of assignment of the claim to the indirectly represented person is therefore limited in time.<sup>82</sup> Without the intervention of the indirect representative, the indirectly represented person does not have the opportunity to obtain the performance of the third-party in either of the two variants. This is a consequence of the fact that in the case of indirect representation, the legal structure and the economic interests diverge.<sup>83</sup>

## V. Art. 401 CO - as a special provision of the basic relationship

As has been demonstrated above, the fulfilment of the delivery obligation depends in both cases on the cooperation of the indirect representative.<sup>84</sup> This can lead to a lack of protection for the indirectly represented person.<sup>85</sup> Art. 401 CO

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<sup>75</sup> Stoppelhaar (fn. 1), no. 515 and no. 536 et seqq.

<sup>76</sup> BSK-Lenz/von Planta (fn. 4), no. 2 on art. 434 CO; Huguenin (fn. 4), no. 3456.

<sup>77</sup> Cf. Stoppelhaar (fn. 1), no. 517 et seqq.

<sup>78</sup> Peter Loher, Das dingliche Schicksal des Kommissionsguts, AJP (Aktuelle Juristische Praxis/Pratique Juridique Actuelle) 2016, p. 921 et seqq., p. 926; Stoppelhaar (fn. 1), no. 519.

<sup>79</sup> Cf. Stoppelhaar (fn. 1), no. 273.

<sup>80</sup> Stoppelhaar (fn. 1), no. 246.

<sup>81</sup> Stoppelhaar (fn. 1), no. 246. Art. 114 para. 1 CO concerns the extinction of the obligation through fulfilment. The wording of the law is: “Where a claim ceases to exist by virtue of being satisfied or in some other manner, all accessory rights such as guarantees and charges are likewise extinguished”.

<sup>82</sup> Stoppelhaar (fn. 1), no. 246.

<sup>83</sup> Cf above II.

<sup>84</sup> See above IV.

<sup>85</sup> Cf. BK-Fellmann (fn. 22), no. 32 et seq. on art. 401 CO; Stoppelhaar (fn. 1), no. 246; Zufferey (fn. 2), no. 591 and no. 614.

intervenes here – at least to a certain degree – as a corrective. By allowing the indirectly represented person to directly enforce the delivery obligation in certain cases, art. 401 CO takes into account the economic reality of indirect representation.<sup>86</sup> Art. 401 CO reads as follows:

*“1 Where the mandatee acting on the mandator's behalf acquires claims in his own name against third parties, such claims pass to the mandator provided he has fulfilled all his obligations towards the mandatee under the mandate relationship.*

*2 The same applies in relation to the mandatee's assets if the mandatee is bankrupt.*

*3 Similarly, where the mandatee is bankrupt, the mandator may claim chattels of which the mandatee took possession in his own name but on the mandator's behalf, subject to the mandatee's own rights of lien.”*

Art. 401 CO is located in the section governing the agency contract. Nevertheless, according to a large – and in my opinion correct – part of the doctrine, the provision is applicable to all basic relationships of indirect representation.<sup>87</sup> Consequently, art. 401 CO is a special provision of indirect representation in Swiss law.<sup>88</sup>

Art. 401 para. 1 CO stipulates that the claims from the third-party contract are automatically, by law, transferred to the indirectly represented person. As soon as the indirectly represented person has fulfilled all obligations arising from the basic relationship with the indirect representative, such as reimbursement of expenses or salary, the indirect representative's claim against the third-party is by operation of law assigned to the indirectly represented person.<sup>89</sup> In contrast to the usual assignment, here the transfer of claim happens irrespective of the creditor's consent.<sup>90</sup> No written deed of assignment is required.<sup>91</sup> This has the advantage that the indirectly represented person can obtain the claim against the third-party without the contribution of the indirect representative.

According to art. 401 para. 2 CO, the assignment by operation of law described above is also possible if bankruptcy proceedings are opened against the indirect representative. Art. 401 para. 2 CO thus privileges the indirectly repre-

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<sup>86</sup> Cf. BK-Fellmann (fn. 22), no. 32 et seq. on art. 401 CO; Stoppelhaar (fn. 1), no. 246; Zufferey (fn. 2), no. 591 and no. 614.

<sup>87</sup> BK-Zäch/Künzler (fn. 29), no. 179 on art. 32 CO; BSK-Oser/Weber (fn. 4), no. 4 on art. 401 CO; Hofstetter (fn. 68), p. 136; Koller (fn. 14), no. 21.08; Zufferey (fn. 2), no. 607 et seqq.

<sup>88</sup> So explicit Stoppelhaar (fn. 1), no. 249 et seqq., with further references.

<sup>89</sup> With further references Stoppelhaar (fn. 1), no. 255 et seqq.

<sup>90</sup> BSK-Girsberger/Hermann (fn. 4), no. 1 on art. 166 CO; Stoppelhaar (fn. 1), no. 255.

<sup>91</sup> Cf. above IV.

sented person in the event of bankruptcy of the indirect representative.<sup>92</sup>

Paragraph 3 of art. 401 CO refers to the second variant, where the indirect representative transfers the performance of the third-party to the indirectly represented person by means of further legal acts.<sup>93</sup> The indirect representative always first acquires the ownership of the chattels that he received from the third-party.<sup>94</sup> To protect the indirectly represented person, art. 401 para. 3 CO stipulates a claim for separation with regard to chattels in the event of the indirect representative's bankruptcy. This claim for separation is limited to chattels. However, immovable property cannot be separated by the indirectly represented person.<sup>95</sup>

## VI. Conclusion

Indirect representation means that the indirect representative concludes a contract with a third-party with effect for himself, but at the same time creates an obligation from the former to the indirectly represented person to transfer the economic result of the third-party contract by means of further legal acts. Understood in this way, with indirect representation, three persons are linked to each other via two autonomous legal relationships. While the *basic relationship* represents the relationship that connects the indirect representative with the indirectly represented person, the contractual relationship between the indirect representative and the third-party is the *third-party contract*.

The indirect representative can fulfil the indirectly represented person's claim to delivery in two ways: Either he can transfer the claim arising from the third-party contract to the indirectly represented person or the third-party renders its performance to the indirect representative, who in turn transfers it to the indirectly represented person in a second step. In both variants the fulfilment of the indirectly represented person's claim to delivery depends on the contribution of the indirect representative. In Swiss law, art. 401 CO protects the indirectly represented person in enforcing his claim to delivery, at least to a certain extent, since art. 401 para. 1 CO provides an assignment by operation of law of the claims arising from the third-party contract to the indirectly represented person. In the event that the third-party has already rendered performance, paragraph 3 of art. 401 CO stipulates a claim for separation with regard to chattels in the event of the indirect representative's bankruptcy.

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<sup>92</sup> See Stoppelhaar (fn. 1), no. 267.

<sup>93</sup> See above IV.

<sup>94</sup> See Stoppelhaar (fn. 1), no. 517 et seqq. and no. 536 et seqq.

<sup>95</sup> See Stoppelhaar (fn. 1), no. 273 et seqq.