



## Third person-accessory: with regard to the New Bulgarian Code of Civil Procedure and the European Law

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**Abstract:** The paper deals with a particular form of joinder of parties in Bulgarian Civil Procedure.

**Keywords:** Civil Procedure. Bulgaria. Third-party intervention. Subsidiary party. Joinder.

I. The co-party, also called ‘third person-accessory’ in Bulgarian law, is a subsidiary party to the proceedings. Prior to constitution as a co-party to the adversary proceedings, this person is a third party. Once he/she is constituted as a co-party, he/she acquires the quality of a party, although a subsidiary party. Where the constitution as a party to the proceedings takes place on the initiative of the third person-accessory, an intervention is present, and where this constitution takes place on the initiative of a principal party, joinder is present of the third person-accessory as a subsidiary co-party to the adversary proceedings.<sup>1</sup> Both the intervention and the joinder can be on the part of the claimant or on the part of the defendant.

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<sup>1</sup> While the intervention takes place on the initiative of the third person and depends on his/her will, the joinder takes place on the initiative of one of the principal parties to the proceedings, and the third person becomes a subsidiary party regardless of his/her own will and even against it. This difference does not affect the powers of the third person-accessory in his/her quality of a subsidiary co-party to the proceedings (for these powers, see Art. 221(1) of the CCP).



## II. Prerequisites for the third person-accessory's intervention and joining the proceedings

According to Art. 218 of the CCP, prior to the closure of the court trial at first instance, a third person is entitled to intervene in the proceedings in order to support one of the parties, provided that he/she is interested in having the judgment rendered in favour of that party.

According to Art. 219(1) of the CCP, each party is entitled to have a third person join the proceedings provided that he/she has the right to join them in order to help the party. The joinder can be sought by the claimant no later than the first session in the case, while the defendant can do so by the reply to the statement of claim.

The text of Art. 175(2) of the CCP, repealed, specifying that it depends on the third person whether to intervene or not into the case, which was understood in theory and practice as a physical participation in the proceedings has not been reproduced. Item 3 of ID No. 109–85–GMCC of the SCC is still applied in the practice which was adopted in connection with 175(2) of the CCP, repealed. It provided that when the third person had not declared his/her participation in the case to support the party that had joined him/her, the court had not obligations to subpoena him/her, to serve him/her with copies of the papers, presented to the case, to serve him/her with communications, communications that the decision with the motives had been prepared, inclusive. The obligation of the court will be not valid yet at the first instance since the moment when the ruling of the court on constituting of the said joining third person, but he/she has not declared his/her participation in the case. A decisive moment in the mentioned stand of GMCC was the provision of Art. 175(2) of the CCP, repealed, that it was up to the third person to decide whether to intervene in the proceedings or not. If the person joining the proceedings is in the same position as the rest parties to the case, the specification was not necessary. Both the claimant and the defendant may not be present physically in the proceedings. Having brought in the claim the claimant may not appear in the court session although he/she has been duly subpoenaed. The same concerns the defendant. Though being served with the duplicate of the statement of claim, he/she is not obliged to be physically present when the case is heard. Obviously, the provision of the law on the participation of the joining third person in the proceedings is to distinguish his/her position in



the proceedings from those of the principle parties to the case. Consequently, the phrase settles not the physical participation of the joining third person in the proceedings, but his/her procedural position.

I do not share the above opinion. I did not use to share it under the CCP, repealed, either. The joining person becomes a party to the case, and being such he/she should be treated with subpoenaing in the same way as the principle parties to the case. The legislator has taken into account the fact that like the defendant the third person becomes a subsidiary party to the proceedings regardless of his/her own will. According to indicative provision of Art. 47(7) of the CCP, the rules in Art. 47(1)-(5) of the CCP about subpoenaing and serving with communications the defendant are applied when serving the third person-accessory with communications. In my opinion Item 3 of the mentioned ID of the GMCC should be considered as lost its effect. The fact that 175(2) of the CCP has not been reproduced is not accidental. The intention of the legislator has been to demonstrate that the physical participation or absence from the proceedings of the third person is irrelevant to his/her position as a party to the case.

In principle, the prerequisites for intervention and those for joinder of a co-party are the same. However, there are certain differences between them.

III. In order for the intervention or joinder to be admissible, adversary proceedings should be pending between other persons, which are the principal parties to the proceedings. The difference is present at the time of carrying out the respective action specified above.

A. According to Art. 218 of the CCP, the intervention is admissible until the closure of court trial. The quoted provision specifies the legislator's explicit will that intervention can take place only at the first instance and not at the intermediate appellate instance.<sup>2</sup> This term is preclusive.

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<sup>2</sup> The legislator established the explicit legal norm under the CCP, repealed, of the assumed in item 9 of the ID No. 1-2000-GMCC of the SCC on the grounds of the following considerations: 'The intervention of a co-party is a third party's participation in other people's adversary proceedings for the purpose of obtaining a judgment favourable to one of the principal parties, the party supported by the intervening person in defending his/her own interests - Art. 174 of the CCP, corresponding to Art. 218 of the CCP. The intervention is a means of defense against the unfavourable consequences the improper judgment can have for the third person. The right to participation is conditioned by the presence of interest in having a judgment rendered in favour of that party. The intervening



B. According to Art. 219(1) of the CCP, the joinder can be sought by the claimant in the first session in the case at the latest, while by the defendant with the reply to the statement of claim. Both in theory and practice, it is certain that the session concerned is the first session in the first instance, and the term specified in Art. 219 of the CCP, is preclusive. The reason for the set short preclusive term is the fact that the joining person becomes a party to the case regardless of his/her own will and even against it, and should be given the opportunity for defense throughout the proceedings.<sup>3</sup> The preclusive term set in Art. 219(1) of the CCP guarantees the rights of the third person providing him/her with the possibility to participate the proceedings since their very beginning, so that he/she could not be bounded to the motives of the decision without being able to affect the proceedings course. Joining a third person as a subsidiary party is not on his/her initiative but by the initiative of one of the principal parties. It is a right of the joining party to bind the motives effect upon the third person viewing the future lawsuit (Art. 223(2) of the CCP) which he/she could be in against the third person, if the outcome of the case he/she has been a party to is unfavourable for him/her.

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party is bound by *res judicata* in his/her relations with the opposing party, and by the obligatory effect of the motives in his/her internal relations with the supported party. According to Art. 174 of the CCP (corresponding to Art. 218 of the CCP, current), the third person is entitled to intervene in the proceedings prior to the closure of oral pleadings, but it is not specified whether this concerns the oral pleadings before the first or the second instance. Intermediate appellate proceedings provide for oral pleadings.<sup>7</sup> Therefore, it should be assumed that there are no impediments to the person to intervene in the intermediate appellate proceedings, because his/her participation is dependent on his/her own will. The new concept of the legislator deserves support since the third person, though intervening in the procedure of somebody else to defend his/her rights, his/her intervention concerns the defence of the principal parties – those of the opposite party against him/her and the supported party, as well as of the very supported party against the third person when there is a dispute between them (see the contrary in L. Kornezov, *Grazhdansko proizvodstvo, t. I, Iskov protses (Civil Proceedings, volume I, Adversary Proceedings)*, Sofia: Publishing House Sofi-R, 2000, 2009, p. 479; R. Ivanova, B. Punev, S.Chernev, *Komentari kam novija GPK. (Comments to the New CCP)*, Sofia: Labour and Law Publishing House, 2008 (the matters are worked by R. Ivanova), pp. 314-315).

<sup>3</sup>The legislator's concept on the joining unlike the intervening should be admissible at the earliest stage of the proceedings is a continuation of his concept under the CCP, repealed, consequently see J. Stalev, A. Mingova, V. Popova, R. Ivanova, *Balgarsko grajdansko protsessualno pravo, VIII izd. (Bulgarian Civil Procedure Law, 8<sup>th</sup> edition)*, Sofia: Ciela, 2004, p. 408 (the matters regarding the third person-accessory are worked out under the co-authorship of J. Stalev and V. Popova) and item 9 of the ID No. 1–2000–GMCC of the SCC. Under the CCP, repealed, it was admissible both for the claimant and defendant to sought joining of a third person-accessory in the first session latest, i.e. the established preclusive term was the same. (Art. 175 of the CCP, repealed).



Therefore it is established in Art. 219(2) of the CCP that joininding is inadmissible, if the third person has not a permanent address in the Republic of Bulgaria or lives abroad.<sup>4</sup> The text has been criticized in the literature stating its contradiction with the European Law since the rules for serving are obligatory in their whole and are applied in the member-states. It is also stated that the Republic of Bulgaria is a party to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (SG No. 65 of 8 August 2009).<sup>5</sup> I think, in the case the matters of subpoenaing and constituting are contaminated. The limitations of Art. 219(2) of the CCP are not due to the impossibility to subpoena the third party. This possibility has not occurred only after the Bulgaria's succession to EC. The limitation is not to embarrass the defence of the third person who being constituted will become a party to the process, though a supplementary one.<sup>6</sup> Being a party to the case under Art. 223(1) of the CCP he/she will be bound to the *res judicata* in his/her relationship with the opposite party, in his/her relationship with the supported party it would be bound to the motives (Art. 223(1) of the CCP). Moreover, the joinder of a third party is often in connection with bringing a cross claim, to which the third person is doubtlessly a defendant. On the other hand, the participation of such a third person by all means will slow the proceedings between the principal parties, no matter that the modern communications, those of subpoenaing, inclusive, are much faster than the ones in 1950s. The verge of economizing in the proceedings cannot be the only aim, as it cannot be in life. Economizing in the proceedings is not laid down as a principle of the procedure. On the contrary, Art. 13 of the CCP establishes explicitly the requirement for considering the case in a reasonable period of time as a principle of the procedure. I also find that Art. 219(2) of the CCP does not contradict the European Law. In my opinion its relations to the European Law should be regarded with the compliance to the regulations on the competence and not to those on subpoenaing. According to Art. 3, item 1 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the

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<sup>4</sup> Regarded strictly, the limitation concerns only the natural persons (*see also* K. Tsoleva, *The Supportive Party in the Adversary Procedure*, S. 2009, Cibi, p. 129).

<sup>5</sup> R. Ivanova, Bl. Punev, S. Chernev, *op. cit.*, pp. 314-315.

<sup>6</sup> *See* J. Stalev, A. Mingova, V. Popova, R. Ivanova, *op. cit.*, p. 414 (the matters regarding the third person-accessory are worked out under the co-authorship of J. Stalev and V. Popova).



recognition and enforcement of judgments in civil and commercial matters, specifying that persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of Chapter I of the Regulation. According to Art. 6(2) of the Council Regulation, a person domiciled in a member state may also be sued as a third party in an action on a warranty or guarantee or in any other third party proceedings; in the court seised of the original proceedings, unless these were instituted solely with the object of removing him/her from the jurisdiction of the court which would be competent in his/her case. The matter deals with 'any kind of proceedings concerning a third party', i.e. any procedural mechanism expanding the initial proceedings in order to include the third person as well. According to Art. 6(2) of the Council Regulation, a third person can be intervened voluntary into proceedings as well as joined involuntary.<sup>7</sup> In the case *GIE Groupe europeen v. Zurich Espana* the EC Court considered that Art. 6(2) of the Council Regulation is applicable when a defendant insurer intervenes a third insurer who had ensured coverage of the same risk to which the claim for indemnity is related. Although it is has not been specified explicitly in Art. 6(2) of the Council Regulation, the EC Court formulates the requirement for close relation between the original proceedings and those concerning the third party.<sup>8</sup> In this aspect I find that such a connection exists in the Bulgarian institution of intervening and joining of a third person-accessory due to the imperatively established requirement for intervention (Art 218 of the CCP) and for joining, respectively (Art 219 of the CCP). Art. 65 of the Council Regulation excludes the application of Art. 6(2) of the Council Regulation in the German Law *Streitverkundung* (informing the third person) because *Streitverkundung* is not constituting of the said person as a full party to the case but gives him/her the especial right to participate the proceedings. The latter fact reduces the right to defence because it does not allow rendering a decision which binds the third person. Meanwhile there is such a possibility in other Member States.<sup>9</sup> Unlike the German Law in Bulgarian Law:

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<sup>7</sup> See Horatia Muir Watt/Peter Mankowski, *European Commentaries on Private International Law: Brussels I Regulation*, Sellier, 2007, p.255-256.

<sup>8</sup> See the Decision on the case *GIE Groupe europeen v. Zurich Espana*; Horatia Muir Watt/Peter Mankowski, *Op.cit.*, p. 259.

<sup>9</sup> See Horatia Muir Watt/Peter Mankowski, *Op. cit.*, pp.720-722.



a) According to Art. 221(1) of the CCP, the third person being a subsidiary co-party has the right to perform all procedural actions except the actions which are disposition with the subject matter of the dispute. Moreover, in the event of a conflict between the actions and the explanations of the party and of the third person, the court evaluates those actions and explanations in connection with all circumstances of the case (Art. 221(1) of the CCP).

b) The rendered decision to the case has a *res judicata* effect in the relationships between the third person-accessory and the opposing party (Art. 221(1) of the CCP). In the relationships between the third person-accessory and the supported party the rendered decision finds manifestation in the binding effect of the motives (Art. 223(2) of the CCP). Hence, it is not by chance that no exception for our solution concerning the third person-accessory is foreseen in Art. 65 of the Council Regulation as it is for the German and Austrian Law. For that reason the matters in connection with Art. 219(2) of the CCP should be distinguished. In the hypothesis of Art. 6(2) of the Council Regulation No 44/2001, a third person domiciled in a Member State according to Arts. 59, 60 of the Council Regulation No 44/2001, he/she may be joined as a third person-accessory in the Bulgarian procedure. However, one should keep in mind the proviso in Art. 6(2) of the Council Regulation No 44/2001, namely that the case is instituted solely with the aim of removing the said person from the jurisdiction of the court which would be competent to his/her case. If the third person is not a domicile of a Member State, than his/her joining as a third person-accessory will be according to Art. 219(2) of the CCP, unless an international convention or bilateral agreement does not specify otherwise.

The difference in the deadlines by which the claimant and the defendant can seek joining of a third person-accessory is not rational. It contradicts the principal of equality of the parties in the procedure, moreover, because the legal possibility to for joining of a third person-accessory is not determined by the procedural position of the party seeking the joining.<sup>10</sup>

Moreover, here the moment of the first court session until which the claimant can seek joining is not specified as well. The first court session could end either by postponing the proceedings to a next court session, oral pleadings or announcing the ruling the case for a

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<sup>10</sup> See Kr. Tsołova, *op. cit.*, p. 117.



decision. That means if the proceedings are postponed to a next court session, bringing in an incidental ascertainment claim will be possible by the moment of terminating the court session by postponing the proceedings to a next court session. According the second hypothesis, that should be possible by the moment of oral pleadings closure. The admission of joining of a third person-accessory so late will doubtlessly bear the necessity of reversing the ruling for closure of the trial and opening the oral pleadings, i.e. the necessity of resuming the court trial. That used to be one of the reasons for providing the oral pleadings as a preclusive term in the repealed CCP. In the CCP, current, the legislator has replaced that term with the closure of the court trial.

However, by the ruling for admission of joinder, the third person becomes a party to the proceedings regardless to whether he/she actually participated in the proceedings or not and is bound by the judgment (Art. 223(1) and (2) of the CCP).

#### IV. Legal interest in the intervention and joining:

A. Art. 218 of the CCP provides explicitly that, the third person is entitled to intervene in the proceedings in support of one of the parties when he/she is interested in having the judgment rendered in favour of that party. In other words, a pragmatic criterion is used. However, it should be kept in mind that what is concerned here is a legal interest.

A person has a legal interest in intervention, if:

(a)As an exception, the judgment has res judicata-effect or enforcement effect regarding that person, although he/she did not participated in the proceedings (for the transfer of a disputed right, see Art. 226(3) of the CCP, Art. 523 of the CCP, Art. 429 of the CCP)<sup>11</sup>.

(b)The judgment unfavourable to the supported party would provide grounds for that party to bring in a recourse claim. Consequently, the following persons are entitled to intervene: the principal debtor under the case against the surety (argument under Art. 143 of the OCA), the delinquent under the case against the assignor of responsibility under Art. 49 of the OCA (argument under Art. 54 of the OCA), the joint co-debtor under a case against the other joint

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<sup>11</sup> See Ruling No 14 of 19 January 2009 on c.c. No 2286/2008, I C.Ch. of the SCC; Ruling No 218 of 22 April 2010 on c.c. No 208/2010, III C.Ch. of the SC.





co-debtor (argument under Art. 127 of the OCA), and the seller (because of his/her responsibility for eviction) under a revindication claim brought by or against the buyer, if he/she happens to be removed by the court (argument under Art. 188, 189 of the OCA), etc.

(c) Art. 74(3) of the C. Code provides explicitly that, according to the provisions of the CCP, each partner or shareholder is entitled to intervene in adversary proceedings under Art. 74(1) of the C. Code<sup>12</sup> for reversal of a decision of the General Meeting of the commercial company's shareholders or partners. He/she only has to legitimize himself/herself as a partner or a shareholder, because this capacity states his/her legal interest in the intervention, provided for in Art. 74(3) of the C. Code.<sup>13</sup> In recent court practice, the intervening shareholder or partner has the capacity of a principal party, not of a co-party. Moreover, he/she has the capacity of an indispensable joint party because he/she is bound by the obligatory effect of the decision of the General Meeting and by *res judicata* of the court decision.<sup>14</sup> This opinion is also maintained in item 5 of the ID No. 1–2002–GMCC of the SCC, which is obligatory for the courts (valid under the CCP, current, also) on the grounds of Art. 86(2) of the CSA. Art. 74(3), sentence II of the C. Code supports it as well, by laying down explicitly that, the joining partner or shareholder is entitled to maintain the claim even where the claimant waives it or withdraws it.<sup>15</sup>

The legal interest in the intervention is present, if the disputed legal relationship between the principal parties has a direct legal connection with the legal relationship between one of the principal parties and the third person willing to intervene in the proceedings.

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<sup>12</sup> According to Art. 74(1) of the C. Code, each partner or shareholder is entitled to bring in a claim before the district court by the company's registration for the reversal of a decision of the General Meeting if the decision contravenes the imperative norms of the law or the Deed of Incorporation or the Statutes of the company. The claim is brought against the company.

<sup>13</sup> See J. Stalev, A. Mingova, V. Popova, R. Ivanova, *op. cit.*, p. 408 (the matters regarding the third person-accessory are worked out under the co-authorship of J. Stalev and V. Popova); Ruling No. 245–97–V C. Ch. of the SCC, Bulletin of the SCC, 1998, Volume 1–2, No. 38; Ruling No. 1225–2002–V C. Ch. of the SCC, Bulletin of the SCC, 2002, Volume 4, No. 20.

<sup>14</sup> See Ruling No. 453–2002–V C. Ch. of the SCC, Bulletin of the SCC, 2002, Volume 10, No. 15; ID No. 1–2002–GMCC of the SCC, item 5, Bulletin of the SCC, 2002, Volume 9, No. 12 quoted in J. Stalev, A. Mingova, V. Popova, R. Ivanova, *op. cit.*, p. 409 (the matters regarding the third person-accessory are worked out under the co-authorship of J. Stalev and V. Popova); Ruling No 38 of 27 January 2009 on com.c. No 16/2009, Burgas Court of Appellation.

<sup>15</sup> The co-party is a subsidiary party. It has his/her own legal relationship with the court, but the legal relationship is accessory, if there is a pending case between the principal parties. If the claim is withdrawn or waived, the proceedings are terminated, without the consent of the co-party.



By intervening in the other persons' proceedings, the third person-accessory defends not only another person's right, but also his/her own legal sphere. There might even be an inconsistency between the interests of the third person-accessory and the supported party (see Art. 221(2) of the CCP, para. 322). For instance, in the case of a claim against the assignor of the job under Art. 49 of the OCA, he/she is entitled to prove that the delict was not committed in the course of performing the assigned job or in connection with its performance. In the case of a claim for damages caused by a chattel, the manufacturer of the chattel is entitled to prove that the damages are due to an improper use of the chattel on the part of the owner, and not to a defect of the chattel.

B. Art. 219(1) of the CCP states that, any party is entitled to have a third person join the proceedings, provided that that person is entitled to intervene in the proceedings in order to support the party. However, it is pointed out that, while in the case of intervention the third person should be interested in the intervention, in the case of joinder, it is the party willing to have the third person join the proceedings that should be interested in the joinder. In practice, the legal relationships that give rise to the legal interest in intervention and joinder are the same (see above).<sup>16</sup>

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<sup>16</sup> See J. Stalev, A. Mingova, V. Popova, R. Ivanova, *op. cit.*, p. 414 (the matters regarding the third person-accessory are worked out under the co-authorship of J. Stalev and V. Popova); Ruling No 40 of 30 January 2009 on com.c. No 20/2009, Burgas Court of Appellation. For instance, if the claim is brought against the surety, he/she is interested in having the debtor join the proceedings so that he/she is bound by *res judicata* of the judgment. Moreover, this would facilitate the surety's defense in future proceedings that can be conducted against the principal debtor on the grounds of a recourse claim under Art. 143 of the OCA. If the claim is brought against the assignor of a job, concerning the responsibility under Art. 49 of the OCA, the assignor has a legal interest in having the delinquent join the proceedings so that he/she is bound by *res judicata*. Also, in this way, the assignor is able to facilitate his/her defense in the proceedings conducted against the delinquent on the grounds of a recourse claim under Art. 54 of the OCA or a joint co-debtor against whom a claim is brought in has a legal interest in having the other joint co-debtor join the proceedings so that the latter be bound by *res judicata* of the judgment rendered on the case. Furthermore, in this way, the first joint co-debtor is able to facilitate his/her defense in the proceedings conducted against the second joint co-debtor on the grounds of a claim for his/her receivable under Art. 127 of the OCA or a buyer against whom a revindication claim is brought has a legal interest in having the seller join the proceedings, so that he/she is bound by *res judicata* of the judgment rendered on the revindication claim, due to the seller's responsibility for eviction (argument under Arts 188, 189 of the OCA). In this way, the buyer is able to facilitate his/her defense in the proceedings conducted if he/she happens to be removed by the court. Moreover, according to Art. 175(2) of the CCP, no later than the first session, the party that has a cross claim against the third person is entitled to bring it for consideration together with the pending case.



V. The form of the request for an intervention or joinder

A. The joinder should be sought by a written request, and a copy is to be delivered to the third person whose joinder is requested as well as one for the opposing party. Art. 2919(1) of the CCP does not provide explicitly on the form.

Concerning the defendant's request it comes from the fact that, he/she could make it in his/her reply to the statement of claim according to Art. 131(2) of the CCP, which should be in writing with a duplicate for the claimant and for the third party whose joinder is requested. In the case this form is also imposed by the requirement of Art. 100, sentence II, of the CCP and Art. 102 of the CCP, since the matter is a procedural action taking place out of court. Moreover, the request is for constituting a third person as a party to the case, though a subsidiary one, on the grounds of Art. 8 of the CCP in connection with Art. 100, sentence II, of the CCP and Art. 102 of the CCP, so the third person has the right to get familiar with the request and it is possible only when the latter is in writing and he/she is provided with its copy. The claimant's request for a joinder of a third person-accessory could be made in the first court session. It seems initially that according to the request Art. 100, sentence I, of the CCP and Art. 150(1) of the CCP the request could be oral and entered in the minutes of the court session. I share the opinion that, due to the specifics of the request for a joinder the rule of Art. 100, sentence I, of the CCP is not applicable. The matter concerns constituting a third person-accessory as a party to the case. The decision rendered on the grounds of Art. 223(1) of the CCP has a *res judicata* effect in the relationships between the third person-accessory and the opposing party, while in the relationships between the third person-accessory and the principle party requesting his/her joinder it bounds on the grounds of Art. 223(2) of the CCP the third person-accessory to the motives of the decision. Consequently, acquiring upon the joining the position of a party, though a subsidiary one, he/she has the right according to Art. 8(2) of the CCP to get familiar with the said procedural action made in writing. To avoid controversial court practice *de lege ferenda* the legislator should foresee the written form with a duplicate for the opposing party



and for the third person as a prerequisite for valid performance of the request for joining a third person, regardless whether it takes place in or out of a court session.<sup>17</sup>

B. The request for intervention should be made in writing with duplicates for the opposing and supported party. This form is not foreseen explicitly in the CCP. However, it arises from Art. 100, sentence II, of the CCP. Sometimes it is assumed in the literature that if it is made in a court session, then Art. 100, sentence II, of the CCP should be applied. This hypothesis is not practically and juridically possible. The first action performed by the third person-accessory is bringing the statement for intervention. The third person becomes a supporting party to the case since the day of the ruling for his/her joining and preserves his position of a supporting party.

Until the ruling for admitting the joinder of the third person is rendered, the third person continues to be a third person and not a subject in the proceedings and is not entitled to perform procedural actions in a court session. It is not practically and juridically possible the third person to appear in a court session and stating he/she is willing to intervene in the proceedings, stating all the circumstances giving rise to his/her intervention, and having these circumstances entered in the Minutes of the session. Therefore the request for intervention is always a procedural action performed out of a court session. For that reason, on the grounds of Art. 100, sentence II, of the CCP and Art. 102 of the CCP it should be made in writing with duplicates for both the opposing and supported party. To avoid controversial court practice *de lege ferenda* the legislator should foresee the written form with a duplicate for the opposing party and for the third person as a prerequisite for valid performance of the request for joining a third person, regardless whether it takes place in or out of a court session.<sup>18</sup>

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<sup>17</sup> See also K. Tsoleva, *op. cit.*, pp. 140-141.

<sup>18</sup> Art. 174 of the CCP, repealed did not use to mention anything about the form in which the request for intervention should be made. Some authors used to assume that it should be made by a written request to the court with duplicates for both parties, unless the request is made in a court session which both parties attend. (See J. Stalev, A. Mingova, V. Popova, R. Ivanova, *op. cit.*, p. 409 (the matters regarding the third person-accessory are worked out under the co-authorship of J. Stalev and V. Popova). Even then I shared the statement that in the latter case the request for intervention should be made in writing with duplicates for the opposing and supported party.



VI. According to Art. 220, sentence I of the CCP, the court renders a ruling on whether the third person is admitted or not. According to Art. 220(1), sentence II of the CCP, the ruling that does not admit the third person is subject to appeal by a private appeal (for the appeal against rulings). The specific feature of that ruling is that it does not bar the defence in the proceedings between the principal parties but bars the defence against the third person (in the case of joining), against the third person as a subsidiary party to the pending case between the principal parties (in the case of intervention), respectively. That is why the legislator has foreseen a possibility for its appeal. The solution of Art. 220, sentence II of the CCP is the same as Art. 176(1), sentence II of the CCP, repealed. It was assumed in item 6 of ID of 17 July 2001 of the GMCC of the SCC that the rulings for which the legislator has foreseen explicitly an appeal (Art. 213, item 'b' of the CCP, repealed)<sup>19</sup> are a subject to appeal only before the second instance (the respective immediate appellate court), but not before the SSC following the procedure for cassation appeal of the rulings. Art. 274(1) of the CCP, current, is identical to Art. 213, item 'b' of the CCP, repealed. It is specified in Art. 274(3) of the CCP that, when the prerequisites of Art. 280(1) of the CCP exist the rulings subject to appeal by a private appeal before the SCC are: the rulings of the intermediate appellate courts which disallow the private appeals against rulings, barring the progress of the proceedings; rulings which decide on the merits other procedures or bar their progress. The rulings which do not bar the progress of the proceedings and for which the legislator has explicitly foreseen in Art. 274(1), item 2 of the CCP the possibility for appeal, do not belong to the category of rulings subject to appeal before the SCC.<sup>20</sup> This solution is also valid for the ruling by which the request for constituting a third person as a subsidiary party is disallowed because it is a ruling for which the legislator has explicitly foreseen the possibility for appeal in Art. 220, sentence II of the CCP.

The ruling admitting the third person is not subject to appeal. It does not belong to the category of rulings under Art. 274(1), item 1 of the CCP that bar the further conduct of the

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<sup>19</sup> The ruling for disallowing the request for constituting a third person as a supportive party to the case belongs to the same category.

<sup>20</sup> In the regulations of Art. 274(3) of the CCP in connection with Art. 274(2), item 2 of the CCP the legislator has adopted the statement of the above cited ID of the GMCC of the SCC.



proceedings, nor does it belong to the category of rulings under Art. 274(1), item 1 of the CCP. That appeal is explicitly provided in the law.

#### VII. Powers of the third person-accessory

According to Art. 221(1) of the CCP, the third person is entitled to carry out any procedural actions<sup>21</sup> except those that constitute disposal of the subject matter of the dispute.

The scope of procedural powers of the third person-accessory is one and the same, regardless of whether he/she acquired his/her capacity by intervention or joinder. The rule states that he/she is entitled to perform any procedural actions. That is so because, in spite of taking part in other people's proceedings, the third person defends his/her own legal sphere and, on the grounds of Art. 223(1) of the CCP, in his/her relationships with the opposing party, he/she is bound by *res judicata* of the judgment. Moreover, on the grounds of Art. 223(2) of the CCP, in his/her relationships with the party supported by him/her, he/she is bound by the motives. His/her right to perform any procedural actions does not depend on the actions or omissions of the party supported by him/her. Furthermore, according to Art. 221(2) of the CCP, in case of inconsistency of the party's actions and explanations with those of the third person, the court assesses the actions and explanations in relation to all the circumstances in the case.

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<sup>21</sup> As for the specified scope of procedural actions and those consequences of the decision provided in Art. 179 of the CCP, repealed, which is identical to Art. 223(1) of the CCP, current, in the theory under the CCP, repealed, it was debatable whether the third person-accessory has his/her own right to claim and a right to court defense perceived as a right to seek the consideration and determination of the dispute by *res judicata*. According to Prof. Stalev, that person is not entitled to a claim because this right is enjoyed only by the principal parties (see J. Stalev, A. Mingova, V. Popova, R. Ivanova, *op. cit.*, pp. 160–167 (the matters regarding procedural legitimation, defined as the ownership of the right to claim, are worked out under the co-authorship of J. Stalev and R. Ivanova), p. 407 (the matters regarding the third person-accessory are worked out under the co-authorship of J. Stalev and V. Popova), although on page 407 it is explicitly pointed out that the intervention of the third person is a means of defense of his/her legal sphere). According to Prof. B. Yanovski (see B. Yanovski, 'Podpomagashtata strana i pravoto na isk', *Sp. Pravna missal* ('The Co-Party and the Right to Claim', *Judicial Thought Journal*), No. 6, 1976, 58–63), the third person has the right to claim, because this right is perceived as his/her right to seek the determination of the dispute by *res judicata*. The specificity of this right consists of being exercised in other persons' proceedings and, consequently, if they are terminated, the third person cannot impose the continuation. However, in the case of the principal party's omission, the third person carries out the procedural actions on his/her own. What is concerned here is a specific form of the right to legal defense by participation in other people's proceedings (see also V. Popova, "Vazrajnieto za Prihvashtane i Mejdunarodnata Podvedomstvenost", *Sbornik Pravni Izsledvania v Pamet na Prof. Ivan Apostolov* ("Defence against Withholding and International Subservience", *Collection of Legal Research Works in Memory of Prof. Ivan Apostolov*), Sofia: 2001, p. 385).



Art. 222(1) of the CCP mentions a limitation. The legislator used the phrase ‘with the exception of those actions that constitute disposal of the subject matter of the case’.<sup>22</sup> Actually, the third person-accessory is not entitled to waive or withdraw the claim. In principle, he/she is not entitled to conclude an agreement.<sup>23</sup> In other words, the third person-accessory is not entitled to perform actions that bring about the termination of proceedings.

VIII. According to Art. 219(3) of the CCP, no later than the first session, the party that has a cross claim against the third person is entitled to bring it for consideration together with the pending case simultaneously with the request for joinder. That is why in connection with Art. 219(1) of the CCP the claimant can do that in the first court session latest, but always simultaneously with the request for joinder. According to Art. 219(3) of the CCP in connection with Art. 219(1) of the CCP and Art. 133 of the CCP, the defendant is entitled to bring in a cross claim against the third party simultaneously with the reply to the statement of claim. As seen from the wording of Art. 219(3) of the CCP, the legislator admits strictly bringing a cross claim only by the supported party against the supporting one.<sup>24</sup> In Art. 213(3) of the CCP the legislator has also taken into account explicitly the procedural prerequisite of Art. 219(1) of the CCP consisting of the legal interest in the joinder. Regarded strictly, Art. 219(3) of the CCP admits bringing a cross claim only when upon the joining of a supporting party but not upon it intervening.<sup>25</sup> Unlike Art. 175(2) of the CCP, repealed, it could be brought in the first court

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<sup>22</sup> The legislator is not quite precise. The subject matter of the dispute is the alleged legal relationship. The third person-accessory is not entitled to waive or withdraw the claim, and if the third person is on the side of the defendant and the claim is withdrawn after the closure of the first court session, that third person’s consent is not required for the termination of the case.

<sup>23</sup> Depending on the relationships between the parties, there are no impediments to settling the relationships with the third person by the agreement. In my opinion, the third person-accessory can also participate in the agreement provided that he/she is a subject of the disputed legal relationship, *e.g.* if the creditor’s claim is brought against one of the joint co-debtors, while the other intervened or joined as a third person-accessory on the first joint co-debtor’s side. A similar situation occurs where the creditor brought his/her claim against the surety, while the principal debtor intervened or joined as a third person-accessory on the side of the surety. However, if the court agreement is only valid between the principal parties and the third person-accessory does not participate, although the court agreement is unenforceable against the third person-accessory.

<sup>24</sup> See Ruling No 317 of 26 June 2010 on c.c. 251/2010, III C. Ch. of the SCC; Ruling of 6 February 2009 of the City Court of Sofia on c.c. 611/2009, IV IAP; Ruling No 574 of 12 November 2009 of Veliko Turnaovo Distric Court on c.c. No1112/2009.

<sup>25</sup> See also L. Kornezov, *op. cit.*, p. 401.



session latest. It is theoretically possible someone to intervene the proceedings before the defendant's receiving a copy of the statement of claim. It is pointless to hamper the possibility to bring in a cross claim only because the third person hastened to intervene the proceedings. In my opinion, by the wording of Art. 219(3) of the CCP the legislator has determined the term for bringing a cross claim by the term for joining. Bringing in a cross claim against an intervened person is admissible unless it has been done within the term for intervening. Otherwise the intervening of the third person will hinder bringing in a cross claim against him/her. Here, the objective and subjective joinder of claims for consideration in common proceedings is present. The third person-accessory is a defendant under the cross claim, i.e. a principal party, while the principal party under the initial claim is a claimant.

IX. The person that intervened or joined is entitled to replace and release the party he/she supports provided that both parties give their consent (Art. 222 of the CCP).

X. The consequences of the judgment provided by Art. 223(1) and (2) of the CCP apply to the third person-accessory regardless to whether he/she actually takes part in the proceedings or not. Once the third person is constituted as a third person-accessory, he/she can participated in the proceedings and is not entitled to invoke his/her own negligent attitude to the proceedings.

According to Art. 223(1) of the CCP, the judgment rendered by the court has an ascertainment effect regarding the relationships between the third person and the opposing party. In other words, the judgment has a *res judicata* effect upon the third person-accessory and the opposing party.

If the judgment is a sentencing judgment, it is not enforceable against the third person-accessory. This is due to the fact that, if the person is not a party to the disputed legal relationship (for instance, if the revandication claim against the buyer is upheld, but he/she had the seller join as a third person-accessory), the judgment is not enforceable against the seller. The enforceability is not necessary in this case, as the seller is not in possession of the chattel. However, it is the same if the third person-accessory is a subject of the disputed legal





relationship. For instance, if the claim is brought against a joint debtor, while the other intervened or joined as a third party-accessory, the judgment is enforceable only against the joint debtor who is sentenced by the judgment, and is unenforceable against the other joint debtor. If the claimant was willing to have this second joint debtor sentenced as well, he/she should have joined the claims against the two debtors and should have requested that they are sentenced to perform their joint obligation. A similar situation is the one in which the claim is brought against the surety, and it had the principal debtor join as a third party-accessory and the principal debtor joined the proceedings as such.

The binding effect of the motives applies to the internal relationships between the supported party and the third person-accessory. According to Art. 223(2) of the CCP, what the court established in the motives for its decision is obligatory for the third person in his/her relationships with the party he/she supports as well as for the party that made him/her join the proceedings, and the third person-accessory is not entitled to challenge it under the pretext that the party conducted the proceedings badly, with the exception of those cases where, either willfully or because of gross negligence, he/she failed to submit evidence or facts which are unknown to the third person.