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**Principles of International Commercial Contracts:
I: Promoting and Monitoring Use in Practice
II: Preparation of a Third Edition**

(Secretariat Memorandum)

1. – When approving at its 83rd session (2004) the 2004 edition of the Principles of International Commercial Contracts, the UNIDROIT Governing Council recommended that the Principles become an ongoing project on the Institute's Work Programme, and instructed the Secretariat to monitor their use by the international legal and business communities and to solicit comments and suggestions with respect to additional topics to be dealt with in a future edition (*cf.* UNIDROIT 2004, C.D. (83) 24, p. 12).

I. PROMOTING AND MONITORING THE USE OF THE UNIDROIT PRINCIPLES IN PRACTICE

2. – Following publication of the 2004 edition of the UNIDROIT Principles the Secretariat immediately took measures to promote distribution of the volume world-wide. A specific section of the UNIDROIT website was created containing a short presentation of the new edition together with the text of the black letter rules. In addition an electronic flyer advertising the new edition was sent to hundreds of potentially interested addressees whose names had been taken from specialised databases of professional associations and arbitration centres around the world. Academic foreign and international law librarians were also contacted world-wide. The results have been quite satisfactory: as of 1 March 2006, 938 copies of the English language version have been sold, as well as 91 of the French and 435 of the Italian.

3. – For a truly world-wide distribution it is obviously very important that, as was the case of the first edition, also the 2004 edition of the UNIDROIT Principles be available – and effectively distributed – in all the major international languages. So far the black letter rules exist in all the five official languages of UNIDROIT (English, French, German, Italian and Spanish) as well as in Chinese, Russian and Turkish. As to the integral version, in addition to the English, French and

Italian language versions published by UNIDROIT, a Chinese language version has been published in China, while Arabic, Farsi, Korean, Portuguese, Romanian, Russian, Slovakian and Spanish language versions are in preparation.

- The Working Group may wish to consider ways to encourage the preparation of additional language versions of the 2004 edition of the UNIDROIT Principles in their integral version or at least of the black letter rules.
- The Working Group may also wish to consider ways further to promote the distribution of the various language versions of the UNIDROIT Principles world-wide.

4. – Another important way to promote the UNIDROIT Principles among the international business and legal communities is the organization of seminars devoted to the Principles. The 2004 edition of the Principles has already been presented on several occasions in different parts of the world: in most cases the context was essentially academic, but in others the audience was composed predominantly of practicing lawyers, judges and arbitrators. This was the case in particular of the international colloquia held in Milan at the Chamber of National and International Arbitration of Milan (November 2004), in Paris at the ICC International Court of Arbitration (December 2004) and in Cairo at the Cairo Regional Center for International Commercial Arbitration (September 2005).

- The Working Group may wish to consider how to encourage the organization of other events for the presentation of the UNIDROIT Principles, especially those targeting interested professional circles.

5. – As will be recalled, the UNIDROIT Principles served as the basis for a draft Uniform Contract Law Act for the member States of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA). The draft, prepared by Professor Marcel Fontaine and transmitted in September 2004 to the competent organs of OHADA for consideration, consists of 13 chapters, 10 of which are almost identical to the corresponding chapters of the UNIDROIT Principles.

- The Working Group may wish to consider how it could support the implementation of that project (e.g., by organising, possibly as a joint venture with other interested institutions, an international seminar in one of the OHADA member States).

6. – Another significant contribution to the promotion of the UNIDROIT Principles would be their formal endorsement by the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL has already endorsed other soft law instruments that have proved particularly successful in international trade practice, such as INCOTERMS or the Uniform Customs and Practice for Documentary Credits prepared by the International Chamber of Commerce. If UNCITRAL at one of its next annual sessions were to recommend also the use of the UNIDROIT Principles by parties in international trade transactions, this would definitely enhance the prestige and popularity of the Principles worldwide.¹

¹ Contacts between the UNIDROIT Secretariat and the Secretariat of UNCITRAL on this issue are underway. A suggested draft resolution reads as follows:

"The United Nations Commission on International Trade Law

Expressing its appreciation to the International Institute for the Unification of Private Law (UNIDROIT) for having transmitted to it the 2004 edition of the Principles of International Commercial Contracts,

Congratulating the International Institute for the Unification of Private Law (UNIDROIT) on having made a further contribution to the facilitation of international trade by preparing a new enlarged edition of the UNIDROIT Principles of International Commercial Contracts which were first published in 1994 and have been favourably received world-wide,

Noting that the UNIDROIT Principles of International Commercial Contracts aim at establishing a balanced set of rules designed for use throughout the world irrespective of the legal traditions of the countries involved,

- Assuming that the text of the suggested draft Resolution is agreeable, the Working Group may wish to consider how to encourage its adoption by UNCITRAL in the near future.

7. – There can be no doubt that full acceptance of the UNIDROIT Principles as a valid alternative to domestic law in international commercial contracting and dispute resolution will ultimately depend on the publication and dissemination of the growing body of case law relating to the Principles. Only comprehensive information as to why and how domestic courts and arbitral tribunals apply the UNIDROIT Principles in the different parts of the world will effectively make it possible to monitor their use in practice and to demonstrate the advantages as well as possible shortcomings of choosing them as the legal basis in international dispute resolution.

8. - UNILEX, the Rome-based database accessible on line at <<http://www.unilex.info>> - which publishes all known court decisions and arbitral awards referring in one way or the other to the UNIDROIT Principles in the form of an abstract and (excerpts of) the original full text (where available) – represents a first step in this direction. However, since most of the decisions applying the UNIDROIT Principles are arbitral awards, which for not always compelling reasons of confidentiality remain unpublished, UNILEX can only offer a selection of all the relevant decisions actually rendered worldwide. It can only be hoped that more and more international arbitration centres will be willing to provide regular information about awards rendered under their supervision concerning the UNIDROIT Principles. So far significant contributions in this respect have been made by the ICC International Court of Arbitration, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, the Chamber of National and International Arbitration of Milan, and the Arbitration Court of the Lausanne Chamber of Commerce and Industry. Yet exhaustive and timely information on the international case law concerning the UNIDROIT Principles is still missing.

- The Working Group may wish to consider how to ensure exhaustive and timely information by international arbitration centers on arbitral awards concerning the UNIDROIT Principles.

II. NEW TOPICS TO BE DEALT WITH IN THE UNIDROIT PRINCIPLES

9. - Following up on the decisions taken by the Governing Council at its 83rd session (2004), an informal inquiry was undertaken primarily among those who had participated in the preparation of the 1994 and 2004 editions of the UNIDROIT Principles; the addressees were however invited to submit their comments and proposals after consultation with representatives of the legal and business communities of their home countries. While all replies stressed the necessity of continuing work on the UNIDROIT Principles, as to the new topics to be addressed the proposals covered a wide range of items: for a complete list of the proposed topics see APPENDIX I. At its 84th session (2005) the Governing Council instructed the Secretariat to set up a new Working Group with the task of preparing a third edition of the UNIDROIT Principles to include new topics. While no definite decision was taken as to the specific topics ultimately to be selected, the Council felt that their number should be limited to no more than four or five (*cf.* UNIDROIT 2005, C.D. (84) 22) and expressed a clear preference for the following topics:

- (a) unwinding of failed contracts

Considering that the UNIDROIT Principles of International Commercial Contracts, relating to international commercial contracts in general, represent a significant complement to other international uniform law instruments such as, but not limited to, the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the UNCITRAL Model Law on International Commercial Arbitration,

Aware that, notwithstanding their non-binding nature, the UNIDROIT Principles of International Commercial Contracts may serve in practice a number of purposes, the most important of which are set out in the Preamble thereto,

Commends the use of the UNIDROIT Principles of International Commercial Contracts world-wide."

- (b) illegality
- (c) plurality of debtors and of creditors
- (d) conditions
- (e) termination of long-term contracts for cause

10. - The Working Group may wish to consider the feasibility of actually including these topics in the third edition of the UNIDROIT Principles and, if it so decides, to determine in more detail how each of them should be approached. In order to facilitate the discussion brief presentations of each of the five topics, followed by a list of issues possibly to be dealt with, are set out below. To the extent that the topics under consideration are dealt with in other similar international instruments, such as the Principles of European Contract Law (hereinafter “European Principles”) and the United Nations Convention on Contracts for the International Sale of Goods (hereinafter “CISG”), the relevant provisions are reproduced in APPENDIX II, which also contains excerpts from the United States Restatement of the Law Second on Contracts (hereinafter “Restatement, Second, Contracts”).

(a) ***Unwinding of failed contracts***

11. - This topic is definitely the one most widely supported among the experts consulted. At present the UNIDROIT Principles deal with unwinding of failed contracts in two different places: in the case of avoidance of contracts for defects in consent (see Art. 3.17) and in the case of termination for breach (see Art. 7.3.6). In both cases the rule is that each party has the right to claim restitution of whatever it has supplied under the contract provided it makes concurrent restitution of what it has received or, if it cannot make restitution in kind, it makes an allowance for what it has received (see Arts. 3.17(2) and 7.3.6(1), respectively). However, in the case of termination for breach it is further provided that allowance in money may be made also where restitution in kind would not be “appropriate”, e.g., when the aggrieved party has received part of the performance and wants to retain that part, and only “whenever reasonable”, i.e., if and to the extent that the performance received has conferred a benefit on the party claiming restitution (see Art. 7.3.6(1) final part of second sentence). Moreover, if the performance has extended over a period of time and is divisible restitution can only be claimed for the period after termination has taken effect (see Art. 7.3.6(2)).

12. - The European Principles deal with the issue of restitution in three different contexts: in the case of avoidance (Art. 4:115), in the case of termination (Arts. 9:306 – 9:309) and in the case of illegality (Art. 15:104) – a topic not yet covered by the UNIDROIT Principles. While the rule provided in Art. 4:115 is basically the same as the rules contained in Arts. 3.17(2) and 7.3.6(1) of the UNIDROIT Principles, Arts. 9:306 – 9:309 and Art. 15:104 take a considerably different approach: thus in the case of termination restitution is in principle granted only where the counter-performance due under the contract has not been rendered, and in the case of illegality it ultimately depends on the circumstances of each given case whether restitution is granted or not.

13. - On its part CISG addresses the issue of restitution only in the context of termination for breach (“avoidance” in the terminology of the Convention), since both the questions of avoidance of the contract for defects in consent and of illegal contracts are outside the scope of the Convention. The basic rule is that a party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract, and if both parties are bound to make restitution they must do so concurrently (see Art. 81(2)). While this rule coincides with those provided in Arts. 3.17(2) and 7.3.6(1) of the UNIDROIT Principles and in Art. 4:115 of the European Principles, there is still a substantial difference between CISG and the other two instruments: under CISG a buyer is in principle entitled to terminate the contract and consequently to recover the price already paid only if it is in a position to return the goods in substantially the same condition in which it received them (see Art. 82(1)). It is fair to say, however,

that there are many exceptions to this rule (see Art. 82(2)), so that its impact in practice is rather limited.

14. – The Restatement, Second, Contracts contains a special section on restitution (Chapter 16: Remedies, Topic 4: Restitution). The section begins with three general provisions on the requirement that a benefit must have been conferred (§ 370), on the measurement of the benefit (§ 371) and on specific restitution (§ 372), followed by provisions dealing with the claims for restitution in specific cases of failed contracts, i.e., breach (§§ 373-374), unenforceability under the Statute of Frauds (§ 375), avoidance for lack of capacity, mistake, misrepresentation, duress, undue influence or abuse of a fiduciary relation (§ 376) and impracticability and frustration (§ 377). In conformity with the general principle laid down in § 370, in all these cases the basic rule is that, respectively, the injured party/the party in breach, parties to a contract within the Statute of Frauds, the party who has avoided the contract and the party whose duty of performance is discharged on grounds of supervening impracticability of performance or frustration of purpose “[are] entitled to restitution for any benefit that [they have] conferred on the other party by way of part performance or reliance”. As to the restitution regime in cases of unenforceable contracts on the grounds of public policy it is dealt with separately in Chapter 8 on “Unenforceability on Grounds of Public Policy” in general: the general rule is that contracts which are unenforceable on grounds of public policy do not give rise to claims for restitution (§ 197, first part); however, this rule is subject to a number of exceptions, i.e., if denial of restitution would cause disproportionate forfeiture (§ 197, second part); if the party claiming restitution was excusably ignorant of the facts or legislation rendering the contract unenforceable (§ 198); if the party claiming restitution did not engage in serious misconduct and withdraws from the transaction before the improper purpose has been achieved, or restitution would put an end to a continuing situation that is contrary to the public interest (§ 199).

15. - In dealing with the topic of unwinding of failed contracts the Working Group may wish to focus, among others, on the following issues:

- Is the restitution regime as provided in the UNIDROIT Principles in the case of avoidance of the contract for defects in consent and in case of termination for breach satisfactory, or are some additional provisions needed addressing, e.g., the question of which party has to bear the risk of an accidental loss of the goods to be returned or the risk of the loss of or damage to the goods on their way back?
- Should there be provisions on restitution also in other cases of failed contracts presently envisaged by the UNIDROIT Principles, such as where the parties erroneously believe to have concluded a contract but in fact have not (see, e.g., Arts. 2.1.1, 2.1.22), where a contract has been concluded with terms deliberately left open which subsequently could not be determined (see Art. 2.1.14(2)), where a contract has been concluded by a false agent and not ratified by the principal (see Arts. 2.2.6 and 2.2.9), where a contract has been terminated following denial of public authorisation (see Art. 6.1.16), where a contract has been terminated for hardship (see Art. 6.2.3(4)) and where a contract has been terminated for force majeure (see Art. 7.1.7)?
- Assuming that the new edition of the UNIDROIT Principles will contain chapters on conditions and on termination of long-term contracts for cause, should there be provisions on restitution also in the cases of contracts coming to an end upon the fulfilment of a so-called resolutive condition or terminated for cause?
- Assuming that the new edition of the UNIDROIT Principles will contain a chapter on illegality, should the traditional solution be adopted according to which with respect to illegal contracts restitution is always excluded, or should a more flexible approach be taken, e.g., by distinguishing between immoral contracts and contracts *contra legem* and/or depending on whether the illegal character of the transaction was known to both parties or only to one

and/or by making restitution dependent on several factors to be taken into account in each given case? If the latter approach were to be taken, what should these factors be?

- Should a special regime be provided in the case of long-term contracts where a substantial part of the performance has already been rendered (e.g., construction contracts declared null and void for corruption when the works have almost been completed)?
- As a drafting matter, should the provisions on restitution be grouped together in a new chapter on unwinding of failed contracts in general or should they be placed in the context of each single case of failed contracts covered by the UNIDROIT Principles?

(b) *Illegality*

16. - Illegality is one of the matters which so far has been expressly excluded from the scope of the UNIDROIT Principles (see Art. 3.1).

17. - The European Principles deal with the topic in Chapter 15 and distinguish between “contracts contrary to fundamental principles” (Art. 15:101) and “contracts infringing mandatory rules” (Art. 15:102). With respect to the former it is stated that they have no effect “[...] to the extent that [they are] contrary to principles recognised as fundamental in the laws of the Member States of the European Union”. As to the latter, their effects first of all depend on what the violated mandatory rule provides (Art. 15:102(1)); if there is no express provision in this respect, the contract may be declared to have full effect, to have some effect, to have no effect or to be subject to modification (Art. 15:102(2)), depending on a number of factors to be taken into account in each given case, such as the purpose of the violated rule, the seriousness of the infringement, whether the infringement was intentional, etc. (Art. 15:102(3)).

18. – On its part the Restatement, Second, Contracts speaks in general of contracts (*rectius*: “promises or other terms of an agreement”) that are “unenforceable on grounds of public policy” (§ 178). Whether or not a given contract is unenforceable on grounds of public policy depends, first of all, on what is provided in the relevant legislation (§ 178(1)); in the absence of an express provision in this respect in the statute, the court’s decision as to unenforceability depends on a careful balancing of a number of factors, such as the strength of the policy involved, the parties’ expectations, any forfeiture that would result if enforcement were denied, the likelihood that a refusal to enforce will further the policy, etc. (§ 178(2)(3)).

19. - In dealing with the topic of illegality in the context of the UNIDROIT Principles, the Working Group may wish to consider, among others, the following issues:

- Should the Principles distinguish between “immoral” and “illegal” contracts, i.e., between contracts contrary to basic ethical and socio-political principles and values, and contracts which violate specific statutes?
- Assuming such a distinction will be made, how should “immoral” contracts be defined (e.g., contracts contrary to “internationally recognised fundamental rights and values”)?
- Which mandatory provisions should be taken into consideration in order to determine whether or not a given contract is “illegal”? Would it be sufficient to refer generically to the “mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law” (see Art. 1.4) or should a special conflict of laws rule be adopted, e.g., along the lines of Art. 7(1) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations,² or Art. 11(2) of the 1994 Inter-American Convention on the Law Applicable Contracts?³

² “When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and insofar as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering

- Should “immoral” contracts be at any rate null and void or should their effects depend on a number of factors to be assessed in each single case? If this latter approach were to be adopted, what should these factors be?
- Should the effects of “illegal” contracts depend on the mandatory provisions they violate and, absent an express provision in this respect, on a number of factors to be assessed in each single case? What should these factors be?
- Should there be a special provision dealing with the case where only part of a contract is affected by “immorality” or “illegality”?

(c) ***Plurality of debtors and of creditors***

20. - The importance of this topic derives from the fact that international commercial contracts quite frequently involve more than one party on either side, with the consequence that there may be several obligors and/or obligees with respect to the performance(s) to be rendered. Examples of cases of several obligors are a group of contractors submitting a joint offer for construction works, or several insurance companies ensuring one and the same risk, while an example of a case of several obligees is that of several financial institutions granting a loan.

21. - Domestic laws generally distinguish between at least two different types of “plural” obligations, i.e., obligations where each obligor is bound to render only part of the performance and obligations where each obligor is bound to render the entire performance, and correspondingly two different types of “plural” claims, i.e., claims where each obligee may require from the obligor only a particular share of performance and claims where each obligee may require from the obligor full performance.

22. – At present the UNIDROIT Principles address the issue of plurality of debtors only incidentally in the context of transfer of obligations and of assignment of contracts (see Arts. 9.2.5 and 9.3.5, respectively) where a distinction is made between the situation in which, in the case of transfer of obligations, the original obligor and the new obligor, and, in the case of assignment of contracts, the assignor and the assignee, are “jointly and severally liable”, and the situation in which in the two cases, respectively, the obligee/the other party retains the original obligor/the assignor as a subsidiary obligor if the new obligor/the assignee does not perform properly.

23. – The European Principles contain a special chapter on “Plurality of Parties” (Chapter 10) composed of a section on “Plurality of Debtors” (Section 1) and one on “Plurality of Creditors” (Section 2). A distinction is made among “solidary”, “separate” and “communal” obligations (see Art. 10:101), and “solidary”, “separate” and “communal” claims (see Art. 10:201). If several debtors are bound to render the same performance to a creditor under the same contract, it is presumed that they are solidarily liable (Art. 10:102(1)), i.e., all the debtors are bound to render one and the same performance and the creditor may require it from any one of them until full performance has been received (Art. 10:101(1)). The section on plurality of debtors further contains special provisions on apportionment stating the general rule that as between themselves solidary debtors are liable in equal shares unless the contract or the law provides otherwise (Arts. 10:105(1)); on recourse between solidary debtors to the effect that a solidary debtor who has performed more than that debtor’s share may claim the excess from any of the other debtors to the extent of each debtor’s unperformed share (Art. 10:106(1)); on performance and set-off in solidary obligations stating that performance or set-off by a solidary debtor or set-off by the creditor against one solidary debtor discharges the other debtors in relation to the creditor to the extent of the performance or set-off

whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”

³ “It shall be up to the forum to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties”.

(Art.10:107(1)); on release or settlement stating that when the creditor releases, or reaches the settlement with, one solidary debtor, the other debtors are discharged of liability for the share of that debtor (Art. 10:108(1)); on effect of judgment to the effect that a decision by a court as to the liability to the creditor of one solidary debtor does not affect the liability to the creditor of the other solidary debtors or the rights of recourse between the solidary debtors (Art. 10:109); on prescription stating that prescription of the creditor's right to performance against one solidary debtor does not affect the liability to the creditor of the other solidary debtors or the rights of recourse between the solidary debtors (Art. 10:110); and on opposability of other defences stating that a solidary debtor may invoke against the creditor any defence which another solidary debtor can invoke, other than a defence personal to that other debtor (Art. 10:111(1)). Most of these provisions apply with appropriate adaptations to solidary claims (see Arts. 10:201, 10:204, 10:205).

24. – Also the Restatement, Second, Contracts contains a specific chapter on “Joint and Several Promisors and Promisees” (Chapter 13). Where two or more parties to a contract promise the same performance to the same promisee, each is bound for the whole performance thereof but their duty may be “joint”, “several” or “joint and several” (§ 289(1)). Unless a different intention is manifested, their duty is presumed to be a “joint” duty (§ 289(2), i.e., the promisee cannot sue one of the joint promisors without joining all other promisors; however, since in most states the traditional distinction at common law between “joint” duties and “joint and several” duties has been basically abolished by statute (see § 289(3)), in practice, whenever two or more parties to a contract promise the same performance to the same promisee, their duties are considered to be “joint and several”, i.e., the promisee may sue for the whole performance either all the joint promisors or only one (or some) of them (see §§ 290, 291 and 292). Special provisions deal, among others, with the effect of performance or other satisfaction of the contractual duty by one promisor vis-à-vis the other promisors (§ 293), and the effect of discharge on co-promisors (§ 294), while the general rule laid down in § 289 applies accordingly also to the case where a party to a contract promises the same performance to two or more promisees (§ 297).

25. - In dealing with the topic of plurality of debtors and of creditors in the context of the UNIDROIT Principles, the Working Group may wish to consider, among others, the following issues:

- How many types of “plural” obligations and “plural” claims should be envisaged?
- What criteria should be used, in the absence of an express provision in the contract or the law, to determine the type of “plural” obligations and “plural” claims in a given case?
- What should the criteria be for the apportionment and the recourse between solidary debtors?
- What, in the different types of “plural” obligations and “plural” claims, would be the consequences of, e.g., performance or set-off by one of the obligors, settlement between one of the obligors and the obligee (or between the obligor and one of the obligees), and the expiry of the limitation period for one of the obligee's right?
- As a matter of terminology, should in this context the concepts of “debtor/creditor” or “promisor/promisee” be used or should one continue to use the concepts of “obligor/obligee” (Art. 1.11) used elsewhere in the UNIDROIT Principles (see, e.g., Arts. 6.1.9, 9.2.1).

(d) **Conditions**

26. - Parties quite frequently make their contract or individual terms of it dependent on the occurrence of a future and uncertain event. Such an event is commonly referred to as a “condition”. A condition may either be suspensive (“condition precedent” in common law terminology), i.e., the obligation(s) arising out of the contract will not exist unless and until the event occurs, or resolutive (“condition subsequent” in common law terminology), i.e., the obligation(s) will cease to exist if the event occurs.

27. – The European Principles deal with conditions in Chapter 16, composed of three articles: Art. 16:101 which defines conditions as uncertain future events upon the occurrence of which a contractual obligation is made conditional, and distinguishes between the case where the obligation takes effect only if the event occurs (suspensive condition) and the case where the obligation comes to an end if the event occurs (resolutive condition); Art. 16:102 which deals with the cases where the fulfilment of a condition is prevented by the party to whose disadvantage the fulfilment would have operated, or where the fulfilment of a condition is brought about by the party to whose advantage the fulfilment operates, and states that in the first case the condition is deemed to be fulfilled and in the second not to be fulfilled; finally Art. 16:103 which provides that, unless otherwise agreed by the parties, fulfilment of both a suspensive and a resolutive condition does not have retroactive effects.

28. – The Restatement, Second, Contracts uses the term “condition” only for suspensive conditions (see § 224), while resolutive conditions are referred to as “events that terminate a duty” (see § 230). With respect to the effects of the fulfilment of the two kinds of conditions, as well as with respect to the effects of the interference with the conditions by the party interested in their non-fulfilment or fulfilment the solutions envisaged are basically the same as those adopted by the European Principles (see § 225(1)(2) and § 230(1)(2)). It is worth noting however that according to the Restatement, Second, Contracts an event may be made a condition not only by the agreement of the parties but also by a term supplied by the court (see § 226).

29.- In dealing with the topic of conditions in the context of the UNIDROIT Principles, the Working Group may wish to consider, among others, the following issues:

- Should the Principles deal with both so-called suspensive and resolutive conditions and, if so, should the term “condition” be used in both cases?
- Should there be a provision dealing in general with the rights and duties of the parties pending the fulfilment of the condition (e.g., in case of a suspensive condition, the obligor’s duty to abstain from any behaviour which could jeopardise the obligee’s legitimate interests and the obligee’s right to take whatever steps are necessary to protect its rights)?
- Should there be provisions on interference with a condition by the party interested in its non-fulfilment or fulfilment and, if so, what should their content be?
- Should the fulfilment of a condition have prospective/retroactive effects and, in the case of the latter, should there be an exception for resolutive conditions concerning contracts whose performance is extended over a period of time?
- Should an express distinction be made between conditions in a strict sense and future events which are a simple means of measuring the time of the performance (e.g., a sub-contractor is to be paid by the general contractor “when”/“not until” the general contractor is paid by the owner), and/or between conditions in a strict sense and future events which are the subject of a duty (e.g., A contracts to sell and B to buy goods stipulating “selection to be made by buyer before September 1”)?
- Should conditions as a term implied by the court be covered?
- Should conditions imposed by law (e.g., public permission requirements) be covered?

(e) ***Termination of long-term contracts for cause***

30. - Art. 5.1.8 of the UNIDROIT Principles states that contracts for an indefinite period may be ended by either party by giving notice a reasonable time in advance. Yet long-term contracts, particularly so-called “relational” or “symbiotic” contracts (e.g., distributorship agreements, partnerships, joint ventures, industrial cooperation agreements, management contracts, etc.), characterised by values of cooperation and mutual economic dependence and the impossibility to predict, when they are made, the contingencies that may affect the relationship’s future course, pose

additional problems. On account of supervening circumstances, whether caused by either party's fault or not, the continuation of the relationship may no longer be acceptable to one or all of the parties involved. If such a contingency arises, the party(ies) may be permitted to terminate the contract without advance notice, irrespective of whether it was concluded for an indefinite period or for a specified duration.

31. – Neither the European Principles nor the Restatement, Second, Contracts address this topic.

32. - In dealing with the topic of termination of long-term contracts for cause in the context of the UNIDROIT Principles, the Working Group may wish to consider, among others, the following issues:

- How should the scope of the proposed provision(s) be defined?
- How should "cause" (or "good cause"), i.e., the reasons for which a party may put an end to the contract without advance notice irrespective of whether it had been concluded for an indefinite period or for a specified duration, be defined (e.g., a party, in the light of the circumstances and taking into account the possible opposite interest of the other party(ies) in the contract, can no longer be reasonably expected to continue the contractual relationship until its expiry or the end of a reasonable time of notice)?
- What would be the relationship between termination for cause and the different, though sometimes overlapping, remedy of termination for breach?
- What would be the relationship between termination for cause and the different, though sometimes overlapping, remedies provided for hardship?
- As a drafting matter: should the concept of "termination" be used in this context or should a different term be found so as to avoid confusion with the other cases of termination so far addressed in the UNIDROIT Principles?

III. WORKING METHOD

33. - It is suggested that the Working Group adopt the same working method as followed in the preparation of the previous editions of the UNIDROIT Principles.

34. – For each of the new topics the Working Group may wish to appoint a Rapporteur with the task of preparing first a position paper and subsequently the preliminary draft provisions and comments.

35. – The position papers and preliminary drafts will be discussed by the Working Group at its annual sessions. It is suggested that the position papers be discussed together, and that on that occasion the Working Group decide the order in which the preliminary drafts will be discussed.

36. – While it will be the task of the Working Group to finalize and to approve the drafts, whenever appropriate the drafts may first be discussed by a smaller Drafting Committee, composed mainly of the English and French native speakers in the Working Group, also in order to ensure a sufficient degree of editorial uniformity.

37. - The UNIDROIT Governing Council, as the Institute's highest scientific body, will be constantly informed of the work in progress. It is suggested that the drafts discussed by the Working Group be submitted to the Governing Council at its annual sessions and that the Governing Council be requested to express its opinion on the policy to be followed, especially in those cases where the Working Group had found it difficult to reach a consensus.

APPENDIX I

Excerpt from UNIDROIT 2005 - C.D. (84) 19 rev. 2 : Preparation of the Work Programme for the 2006/2008 triennium (pp. 4-6)

[...]

(b) *Principles of International Commercial Contracts*

[...] The following new topics were proposed for inclusion in a future edition of the UNIDROIT Principles:

- Unwinding of failed contracts (Hartkamp, Komarov, Crépeau, Date-Bah, Fontaine, Lando, Schlechtriem, Uchida, Dessemontet, Raeschke-Kessler, Zimmermann)
- Illegality (Hartkamp, Crépeau, Date-Bah,¹ Huang, Fontaine, Furmston, Lando, Uchida, Van Houtte, Zimmermann)
- Plurality of debtors and of creditors (Hartkamp, Komarov, Crépeau, Date-Bah, Fontaine, Furmston, Lando, Schlechtriem, Uchida, Dessemontet, Zimmermann)
- Conditions (i.e. “suspensive conditions” or “conditions precedent” and “resolutive conditions” or “conditions subsequent”) (Hartkamp, Crépeau, Huang, Fontaine, Lando, Schlechtriem, Uchida, Dessemontet, Zimmermann)
- Suretyship and guarantees (Hartkamp, Komarov, Huang, Date-Bah, Lando, Schlechtriem, Uchida, Dessemontet)
- « *L'éthique du contrat au niveau transnational* » (Crépeau,² Lando)
- Specific contracts (sales, services, long term contracts) (Lando,³ Uchida, Zimmermann⁴)
- Alternative obligations (Crépeau, Fontaine)
- Capitalisation of interest (Crépeau, Zimmermann⁵)
- Control of standard terms (Crépeau,⁶ Lando,⁷ Zimmermann⁸)
- Obligations with a term (Crépeau)
- Facultative obligations (Crépeau)
- Divisible and indivisible obligations (Crépeau)

¹ With special attention to government procurement contracts in conflict with the constitution or the public law of the host country.

² Suggesting a solemn statement to be made by the Governing Council stressing the need to promote the “transnational ethic” (“*éthique transnationale*”) in the context of international commercial contracts and reminding business persons of their “moral responsibilities” (“*responsabilités morales*”). Referring to the work undertaken in this field by the Study Group for a European Civil Code.

³ Referring to the work undertaken in this field by the Study Group for a European Civil Code.

⁴ Referring to a provision on this topic contained in the Principles of European Contract Law (Art. 17:101).

⁵ With special reference to abusive clauses in relation to competition.

⁶ Referring to a provision permitting the striking out of unfair terms contained in the Principles of European Contract Law (Art. 4:110).

⁷ Referring to a provision permitting the striking out of unfair terms contained in the Principles of European Contract Law (Art. 4:110).

⁸ Referring to a provision permitting the striking out of unfair terms contained in the Principles of European Contract Law (Art. 4:110).

- Consensual transfer of real rights (Crépeau⁹)
- Transfer of intellectual property rights (Crépeau)
- Proof of contract (Crépeau)
- Simulation (Fontaine¹⁰)
- « *Confusion* » (Fontaine¹¹)
- « *Action oblique* » (Fontaine¹²)
- Arbitration and conciliation agreements (Crépeau)
- Standard clause of confidentiality (Dessemontet)
- Partial nullity and arbitration agreement (Dessemontet)
- Termination of long lasting contracts for cause (Dessemontet)
- Price reduction (Zimmermann¹³)

In general terms, two replies (Crépeau and Zimmerman) suggested that an ever closer relationship be maintained between the UNIDROIT Principles, the European Principles and the *lex mercatoria* principles. One reply (Crépeau) suggested that a close dialogue be maintained between the English and French versions of the Principles.

[...]

⁹ Restricted for the time being to movables.

¹⁰ Referring to provisions on this topic contained in the draft OHADA Uniform Act on Contracts.

¹¹ Referring to provisions on this topic contained in the draft OHADA Uniform Act on Contracts.

¹² Referring to provisions on this topic contained in the draft OHADA Uniform Act on Contracts.

¹³ Referring to a provision on this topic contained in the Principles of European Contract Law (Art. 9:401).

APPENDIX II

I. UNWINDING OF FAILED CONTRACTS

UNIDROIT Principles
<p>CHAPTER 3 – VALIDITY</p> <p>[...]</p> <p><i>Article 3.17 (Retroactive effect of avoidance)</i></p> <p>(1) Avoidance takes effect retroactively.</p> <p>(2) On avoidance either party may claim restitution of whatever it has supplied under the contract or the part of it avoided, provided that it concurrently makes restitution of whatever it has received under the contract or the part of it avoided or, if it cannot make restitution in kind, it makes an allowance for what it has received.</p>
<p>CHAPTER 7 – NON-PERFORMANCE</p> <p>SECTION 3: TERMINATION</p> <p>[...]</p> <p><i>Article 7.3.5 (Effects of termination in general)</i></p> <p>(1) Termination of the contract releases both parties from their obligation to effect and to receive future performance.</p> <p>(2) Termination does not preclude a claim for damages for non-performance.</p> <p>(3) Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination.</p> <p><i>Article 7.3.6 (Restitution)</i></p> <p>(1) On termination of the contract either party may claim restitution of whatever it has supplied, provided that such party concurrently makes restitution of whatever it has received. If restitution in kind is not possible or appropriate allowance should be made in money whenever reasonable.</p> <p>(2) However, if performance of the contract has extended over a period of time and the contract is divisible, such restitution can only be claimed for the period after termination has taken effect.</p>
Principles of European Contract Law
<p>CHAPTER 4 – VALIDITY</p> <p>[...]</p> <p><i>Article 4:115: Effect of Avoidance</i></p> <p>On avoidance either party may claim restitution of whatever it has supplied under the contract, provided it makes concurrent restitution of whatever it has received. If restitution cannot be made in kind for any reason, a reasonable sum must be paid for what has been received.</p>

CHAPTER 9 – PARTICULAR REMEDIES FOR NON-PERFORMANCE

SECTION 3: TERMINATION OF THE CONTRACT

[...]

Article 9:305: Effects of Termination in General

- (1) Termination of the contract releases both parties from their obligation to effect and to receive future performance, but, subject to Articles 9:306 to 9:308, does not affect the rights and liabilities that have accrued up to the time of termination.
- (2) Termination does not affect any provision of the contract for the settlement of disputes or any other provision which is to operate even after termination.

Article 9:306: Property Reduced in Value

A party which terminates the contract may reject property previously received from the other party if its value to the first party has been fundamentally reduced as a result of the other party's non-performance.

Article 9:307: Recovery of Money Paid

On termination of the contract a party may recover money paid for a performance which it did not receive or which it properly rejected.

Article 9:308: Recovery of Property

On termination of the contract a party which has supplied property which can be returned and for which it has not received payment or other counter-performance may recover the property.

Article 9:309: Recovery for Performance that Cannot be Returned

On termination of the contract a party which has rendered a performance which cannot be returned and for which it has not received payment or other counter-performance may recover a reasonable amount for the value of the performance to the other party.

CHAPTER 15- ILLEGALITY

[...]

Article 15:104: Restitution

- (1) When a contract is rendered ineffective under Articles 15:101 or 15:102, either party may claim restitution of whatever that party has supplied under the contract, provided that, where appropriate, concurrent restitution is made of whatever has been received.
- (2) When considering whether to grant restitution under paragraph (1), and what concurrent restitution, if any, would be appropriate, regard must be had to the factors referred to in Article 15:102(3).
- (3) An award of restitution may be refused to a party who knew or ought to have known of the reason for the ineffectiveness.
- (4) If restitution cannot be made in kind for any reason, a reasonable sum must be paid for what has been received.

CISG

CHAPTER 5 – PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

SECTION V. EFFECTS OF AVOIDANCE

Article 81

- (1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.
- (2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 82

- (1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.
- (2) The preceding paragraph does not apply:
 - (a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;
 - (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or
 - (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

Article 83

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

Article 84

- (1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.
- (2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:
 - (a) if he must make restitution of the goods or part of them; or
 - (b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

Restatement, Second, Contracts

CHAPTER 16 - REMEDIES

TOPIC 4. RESTITUTION

§ 370 (*Requirement that Benefit Be Conferred*)

A party is entitled to restitution under the rules stated in this Restatement only to the extent that he has conferred a benefit on the other party by way of part performance or reliance.

§ 371 (*Measure of Restitution Interest*)

If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by either

(a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or

(b) the extent to which the other party's property has been increased in value or his other interests advanced.

§ 372 (*Specific Restitution*)

(1) Specific restitution will be granted to a party who is entitled to restitution, except that:

(a) specific restitution based on a breach by the other party under the rule stated in § 373 may be refused in the discretion of the court if it would unduly interfere with the certainty of title to land or otherwise cause injustice, and

(b) specific restitution in favor of the party in breach under the rule stated in § 374 will not be granted.

(2) A decree of specific restitution may be made conditional on return of or compensation for anything that the party claiming restitution has received.

(3) If specific restitution, with or without a sum of money, will be substantially as effective as restitution in money in putting the party claiming restitution in the position he was in before rendering any performance, the other party can discharge his duty by tendering such restitution before suit is brought and keeping his tender good.

§ 373 (*Restitution When Other Party Is in Breach*)

(1) Subject to the rule stated in Subsection (2), on a breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.

(2) The injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance.

§ 374 (*Restitution in Favor of Party in Breach*)

(1) Subject to the rule stated in Subsection (2), if a party justifiably refuses to perform on the ground that his remaining duties of performance have been discharged by the other party's breach, the party in breach is entitled to restitution for any benefit that he has conferred by way of part performance or reliance in excess of the loss that he has caused by his own breach.

(2) To the extent that, under the manifested assent of the parties, a party's performance is to be retained in the case of breach, that party is not entitled to restitution if the value of the performance as liquidated damages is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.

§ 375 (*Restitution When Contract Is Within Statute of Frauds*)

A party who would otherwise have a claim in restitution under a contract is not barred from restitution for the reason that the contract is unenforceable by him because of the Statute of Frauds unless the Statute provides otherwise or its purpose would be frustrated by allowing restitution.

§ 376 (*Restitution When Contract Is Voidable*)

A party who has avoided a contract on the ground of lack of capacity, mistake, misrepresentation, duress, undue influence or abuse of a fiduciary relation is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.

§ 377 (*Restitution in Cases of Impracticability, Frustration, Non-Occurrence of Condition or Disclaimer by Beneficiary*)

A party whose duty of performance does not arise or is discharged as a result of impracticability of performance, frustration of purpose, non-occurrence of a condition or disclaimer by a beneficiary is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.

CHAPTER 8 - UNENFORCEABILITY ON GROUNDS OF PUBLIC POLICY

TOPIC 5. RESTITUTION

§ 197 (*Restitution Generally Unavailable*)

Except as stated in §§ 198 and 199, a party has no claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy unless denial of restitution would cause disproportionate forfeiture.

§ 198 (*Restitution in Favor of Party who Is Excusably Ignorant or Is Not Equally in the Wrong*)

A party has a claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy if

- (a) he was excusably ignorant of the facts or of legislation of a minor character, in the absence of which the promise would be enforceable, or
- (b) he was not equally in the wrong with the promisor.

§ 199 (*Restitution Where Party Withdraws or Situation Is Contrary to Public Interest*)

A party has a claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy if he did not engage in serious misconduct and

- (a) he withdraws from the transaction before the improper purpose has been achieved, or
- (b) allowance of the claim would put an end to a continuing situation that is contrary to the public interest.

II. ILLEGALITY

Principles of European Contract Law

CHAPTER 15- ILLEGALITY

Article 15:101: Contracts Contrary to Fundamental Principles

A contract is of no effect to the extent that it is contrary to principles recognised as fundamental in the laws of the Member States of the European Union.

Article 15:102: Contracts Infringing Mandatory Rules

- (1) Where a contract infringes a mandatory rule of law applicable under Article 1:103 of these Principles, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule.
- (2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the contract may be declared to have full effect, to have some effect, to have no effect, or to be subject to modification.
- (3) A decision reached under paragraph (2) must be an appropriate and proportional response to the infringement, having regard to all relevant circumstances, including:
 - (a) the purpose of the rule which has been infringed;
 - (b) the category of persons for whose protection the rule exists;
 - (c) any sanction that may be imposed under the rule infringed;
 - (d) the seriousness of the infringement;
 - (e) whether the infringement was intentional; and
 - (f) the closeness of the relationship between the infringement and the contract.

Article 15:103: Partial Ineffectiveness

- (1) If only part of a contract is rendered ineffective under Articles 15:101 or 15:102, the remaining part continues in effect unless, giving due consideration to all the circumstances of the case, it is unreasonable to uphold it.
- (2) Articles 15:104 and 15:105 apply, with appropriate adaptations, to a case of partial ineffectiveness.

Article 15:104: Restitution

[...]

Article 15:105: Damages

- (1) A party to a contract which is rendered ineffective under Articles 15:101 or 15:102 may recover from the other party damages putting the first party as nearly as possible into the same position as if the contract had not been concluded, provided that the other party knew or ought to have known of the reason for the ineffectiveness.
- (2) When considering whether to award damages under paragraph (1), regard must be had to the factors referred to in Article 15:102(3).
- (3) An award of damages may be refused where the first party knew or ought to have known of the reason for the ineffectiveness.

Restatement, Second, Contracts

CHAPTER 8 - UNENFORCEABILITY ON GROUNDS OF PUBLIC POLICY

TOPIC 1. UNENFORCEABILITY IN GENERAL

§ 178 (*When a Term Is Unenforceable on Grounds of Public Policy*)

- (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.
- (2) In weighing the interest in the enforcement of a term, account is taken of
- (a) the parties' justified expectations,
 - (b) any forfeiture that would result if enforcement were denied, and
 - (c) any special public interest in the enforcement of the particular term.
- (3) In weighing a public policy against enforcement of a term, account is taken of
- (a) the strength of that policy as manifested by legislation or judicial decisions,
 - (b) the likelihood that a refusal to enforce the term will further that policy,
 - (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
 - (d) the directness of the connection between that misconduct and the term.

[...]

§ 184 (*When Rest of Agreement Is Enforceable*)

- (1) If less than all of an agreement is unenforceable under the rule stated in § 178, a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.
- (2) A court may treat only part of a term as unenforceable under the rule stated in Subsection (1) if the party who seeks to enforce the term obtained it in good faith and in accordance with reasonable standards of fair dealing.

TOPIC 5. RESTITUTION

§ 197 (*Restitution Generally Unavailable*)

[...]

§ 198 (*Restitution in Favor of Party who Is Excusably Ignorant or Is Not Equally in the Wrong*)

[...]

§ 199 (*Restitution Where Party Withdraws or Situation Is Contrary to Public Interest*)

[...]

III. PLURALITY OF DEBTORS AND OF CREDITORS

UNIDROIT Principles
<p>CHAPTER 9 – ASSIGNMENT OF RIGHTS, TRANSFER OF OBLIGATIONS, ASSIGNMENT OF CONTRACTS</p> <p>SECTION 2: TRANSFER OF OBLIGATIONS</p> <p>[...]</p> <p><i>Article 9.2.5 (Discharge of original obligor)</i></p> <p>(1) The obligee may discharge the original obligor.</p> <p>(2) The obligee may also retain the original obligor as an obligor in case the new obligor does not perform properly.</p> <p>(3) Otherwise the original obligor and the new obligor are jointly and severally liable.</p> <p>SECTION 3: ASSIGNMENT OF CONTRACTS</p> <p>[...]</p> <p><i>Article 9.3.5 (Discharge of the assignor)</i></p> <p>(1) The other party may discharge the assignor.</p> <p>(2) The other party may also retain the assignor as an obligor in case the assignee does not perform properly.</p> <p>(3) Otherwise the assignor and the assignee are jointly and severally liable.</p>
Principles of European Contract Law
<p>CHAPTER 10 – PLURALITY OF PARTIES</p> <p>SECTION 1: PLURALITY OF DEBTORS</p> <p><i>Article 10:101: Solidary, Separate and Communal Obligations</i></p> <p>(1) Obligations are solidary when all the debtors are bound to render one and the same performance and the creditor may require it from any one of them until full performance has been received.</p> <p>(2) Obligations are separate when each debtor is bound to render only part of the performance and the creditor may require from each debtor only that debtor's part.</p> <p>(3) An obligation is communal when all the debtors are bound to render the performance together and the creditor may require it only from all of them.</p> <p><i>Article 10:102: When Solidary Obligations Arise</i></p> <p>(1) If several debtors are bound to render one and the same performance to a creditor under the same contract, they are solidarily liable, unless the contract or the law provides otherwise.</p> <p>(2) Solidary obligations also arise where several persons are liable for the same damage.</p>

- (3) The fact that the debtors are not liable on the same terms does not prevent their obligations from being solidary.

Article 10:103: Liability under Separate Obligations

Debtors bound by separate obligations are liable in equal shares unless the contract or the law provides otherwise.

Article 10:104: Communal Obligations: Special Rule when Money Claimed for Non-performance

Notwithstanding Article 10:101(3), when money is claimed for non-performance of a communal obligation, the debtors are solidarily liable for payment to the creditor.

Article 10:105: Apportionment between Solidary Debtors

- (1) As between themselves, solidary debtors are liable in equal shares unless the contract or the law provides otherwise.
- (2) If two or more debtors are liable for the same damage under Article 10:102(2), their share of liability as between themselves is determined according to the law governing the event which gave rise to the liability.

Article 10:106: Recourse Between Solidary Debtors

- (1) A solidary debtor who has performed more than that debtor's share may claim the excess from any of the other debtors to the extent of each debtor's unperformed share, together with a share of any costs reasonably incurred.
- (2) A solidary debtor to whom paragraph (1) applies may also, subject to any prior right and interest of the creditor, exercise the rights and actions of the creditor, including accessory securities, to recover the excess from any of the other debtors to the extent of each debtor's unperformed share.
- (3) If a solidary debtor who has performed more than that debtor's share is unable, despite all reasonable efforts, to recover contribution from another solidary debtor, the share of the others, including the one who has performed, is increased proportionally.

Article 10:107: Performance, Set-off and Merger in Solidary Obligations

- (1) Performance or set-off by a solidary debtor or set-off by the creditor against one solidary debtor discharges the other debtors in relation to the creditor to the extent of the performance or set-off.
- (2) Merger of debts between a solidary debtor and the creditor discharges the other debtors only for the share of the debtor concerned.

Article 10:108: Release or Settlement in Solidary Obligations

- (1) When the creditor releases, or reaches a settlement with, one solidary debtor, the other debtors are discharged of liability for the share of that debtor.
- (2) The debtors are totally discharged by the release or settlement if it so provides.
- (3) As between solidary debtors, the debtor who is discharged from that debtor's share is discharged only to the extent of the share at the time of the discharge and not from any supplementary share for which that debtor may subsequently become liable under Article 10:106(3).

Article 10:109: Effect of Judgment in Solidary Obligations

A decision by a court as to the liability to the creditor of one solidary debtor does not affect:

- (a) the liability to the creditor of the other solidary debtors; or
- (b) the rights of recourse between the solidary debtors under Article 10:106.

Article 10:110: Prescription in Solidary Obligations

Prescription of the creditor's right to performance ("claim") against one solidary debtor does not affect:

- (a) the liability to the creditor of the other solidary debtors; or
- (b) the rights of recourse between the solidary debtors under Article 10:106.

Article 10:111: Opposability of Other Defences in Solidary Obligations

- (1) A solidary debtor may invoke against the creditor any defence which another solidary debtor can invoke, other than a defence personal to that other debtor. Invoking the defence has no effect with regard to the other solidary debtors.
- (2) A debtor from whom contribution is claimed may invoke against the claimant any personal defence that that debtor could have invoked against the creditor.

SECTION 2: PLURALITY OF CREDITORS

Article 10:201: Solidary, Separate and Communal Claims

- (1) Claims are solidary when any of the creditors may require full performance from the debtor and when the debtor may render performance to any of the creditors.
- (2) Claims are separate when the debtor owes each creditor only that creditor's share of the claim and each creditor may require performance only of that creditor's share.
- (3) A claim is communal when the debtor must perform to all the creditors and any creditor may require performance only for the benefit of all.

Article 10:202: Apportionment of Separate Claims

Separate creditors are entitled to equal shares unless the contract or the law provides otherwise.

Article 10:203: Difficulties of Executing a Communal Claim

If one of the creditors in a communal claim refuses, or is unable to receive, the performance, the debtor may discharge the obligation to perform by depositing the property or money with a third party according to Articles 7:110 or 7:111 of the Principles.

Article 10:204: Apportionment of Solidary Claims

- (1) Solidary creditors are entitled to equal shares unless the contract or the law provides otherwise.
- (2) A creditor who has received more than that creditor's share must transfer the excess to the other creditors to the extent of their respective shares.

Article 10:205: Regime of Solidary Claims

- (1) A release granted to the debtor by one of the solidary creditors has no effect on the other solidary creditors
- (2) The rules of Articles 10:107, 10:109, 10:110 and 10:111(1) apply, with appropriate adaptations, to solidary claims.

Restatement, Second, Contracts

CHAPTER 13- JOINT AND SEVERAL PROMISORS AND PROMISEES

TOPIC 1: JOINT AND SEVERAL PROMISORS

§ 288 (*Promises of the Same Performance*)

(1) Where two or more parties to a contract make a promise or promises to the same promisee, the manifested intention of the parties determines whether they promise that the same performance or separate performances shall be given.

(2) Unless a contrary intention is manifested, a promise by two or more promisors is a promise that the same performance shall be given.

§ 289 (*Joint, Several, and Joint and Several Promisors of the Same Performance*)

(1) Where two or more parties to a contract promise the same performance to the same promisee, each is bound for the whole performance thereof, whether his duty is joint, several, or joint and several.

(2) Where two or more parties to a contract promise the same performance to the same promisee, they incur only a joint duty unless an intention is manifested to create several duties or joint and several duties.

(3) By statute in most states some or all promises which would otherwise create only joint duties create joint and several duties.

[...]

§ 293 (*Effect of Performance or Satisfaction on Co-promisors*)

Full or partial performance or other satisfaction of the contractual duty of a promisor discharges the duty to the obligee of each other promisor of the same performance to the extent of the amount or value applied to the discharge of the duty of the promisor who renders it.

§ 294 (*Effects of Discharge on Co-promisors*)

(1) Except as stated in § 295, where the obligee of promises of the same performance discharges one promisor by release, rescission or accord and satisfaction,

(a) co-promisors who are bound only by a joint duty are discharged unless the discharged promisor is a surety for the co-promisor;

(b) co-promisors who are bound by joint and several duties or by several duties are not discharged except to the extent required by the law of suretyship.

(2) By statute in many states a discharge of one promisor does not discharge other promisors of the same performance except to the extent required by the law of suretyship.

(3) Any consideration received by the obligee for discharge of one promisor discharges the duty of each other promisor of the same performance to the extent of the amount or value received. An agreement to the contrary is not effective unless it is made with a surety and expressly preserves the duty of his principal.

[...]

TOPIC 2. JOINT AND SEVERAL PROMISEES

§ 297 (*Obligees of the Same Promised Performance*)

(1) Where a party to a contract makes a promise to two or more promisees or for the benefit of two or more beneficiaries, the manifested intention of the parties determines whether he promises the same performance to all, a separate performance to each or some combination.

(2) Except to the extent that a different intention is manifested or that the interests of the obligees in the performance or in the remedies for breach are distinct, the rights of obligees of the same performance are joint.

[...]

IV. CONDITIONS

Principles of European Contract Law

CHAPTER 16 - CONDITIONS

Article 16:101: Types of Condition

A contractual obligation may be made conditional upon the occurrence of an uncertain future event, so that the obligation takes effect only if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition).

Article 16:102: Interference with Conditions

- (1) If fulfilment of a condition is prevented by a party, contrary to duties of good faith and fair dealing or co-operation, and if fulfilment would have operated to that party's disadvantage, the condition is deemed to be fulfilled.
- (2) If fulfilment of a condition is brought about by a party, contrary to duties of good faith and fair dealing or co-operation, and if fulfilment operates to that party's advantage, the condition is deemed not to be fulfilled.

Article 16:103: Effect of Conditions

- (1) Upon fulfilment of a suspensive condition, the relevant obligation takes effect unless the parties otherwise agree.
- (2) Upon fulfilment of a resolutive condition, the relevant obligation comes to an end unless the parties otherwise agree.

Restatement, Second, Contracts

CHAPTER 9 – THE SCOPE OF CONTRACTUAL OBLIGATIONS

TOPIC 5. CONDITIONS AND SIMILAR EVENTS

§ 224 (Condition Defined)

A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.

§ 225 (Effects of the Non-Occurrence of a Condition)

- (1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.
- (2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.
- (3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.

§ 226 (How an Event May Be Made a Condition)

An event may be made a condition either by the agreement of the parties or by a term supplied by the court.

[...]

§ 230 (*Event that Terminates a Duty*)

(1) Except as stated in Subsection (2), if under the terms of the contract the occurrence of an event is to terminate an obligor's duty of immediate performance or one to pay damages for breach, that duty is discharged if the event occurs.

(2) The obligor's duty is not discharged if occurrence of the event

(a) is the result of a breach by the obligor of his duty of good faith and fair dealing, or

(b) could not have been prevented because of impracticability and continuance of the duty does not subject the obligor to a materially increased burden.

(3) The obligor's duty is not discharged if, before the event occurs, the obligor promises to perform the duty even if the event occurs and does not revoke his promise before the obligee materially changes his position in reliance on it.