



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

**Working Group for the preparation of
Principles of International Commercial Contracts (3rd)
Second session
Rome, 4 – 8 June 2007**

UNIDROIT 2007
Study L – Doc. 102
English only
April 2007

**Position Paper
on
Plurality of Obligors and/or Obligees**

by

Professor Marcel Fontaine, Emeritus at the Catholic University of Louvain Law School

CONTENTS

Introduction

I. Plurality of Obligors

- A. Situations to be Covered
 - 1) Separate vs. Joint and several obligations
 - 2) Communal obligations ?
- B. Applicable Rules
 - 1) Separate obligations
 - 2) Sources
 - 3) Rules to govern Joint and several obligations
 - a) Obligee's rights
 - b) Recourse between obligors

II. Plurality of Obligees

- A. Another Approach ?
- B. Situations to be Covered
 - 1) Separate vs. Joint and several claims
 - 2) Communal claims ?
- C. Applicable Rules
 - 1) Separate claims
 - 2) Sources
 - 3) Rules to govern Joint and several claims
 - a) Obligees' rights
 - b) Allocation between obligees

§

§

§

Introduction

The subject of "*plurality of obligors and/or obligees*" was one of the topics retained by the Governing Council of UNIDROIT for possible inclusion in an enlarged 3rd edition of the UNIDROIT Principles of International Contracts (UNIDROIT 2006. Study L- Doc. 99, par. 9, 20-25). At its meeting held in Rome on May 29-June 1, 2006, the Working Group decided to deal with this topic (UNIDROIT 2006. Study L-Misc. 16, par. 154-191, hereafter "SR", for "Summary Records").

An already substantial discussion took place. Three main issues were raised.

1. Some participants suggested the use of the terms "*creditor*"/"*debtor*", as in PECL, instead of the terms "*obligee*"/"*obligor*", but it was recalled that the latter expressions were already used in the existing chapters of the Principles, on the basis of a decision by the Working Group taken after lengthy discussions (SR par. 154, 156, 158-162). This Position Paper will not deal with this debate, which in any case is not specific to the topic of plurality. In line with the terminology in the existing chapters of the Principles, the terms "*obligee*"/"*obligor*" will be used.

2. Plurality of obligors can include several situations. PECL, for instance, distinguishes between "*solidary*", "*separate*" and "*communal*" obligations (art. 10:101).

Some discussion took place in Rome concerning terminology, at least in the English language.

The term "*solidary*", retained by PECL, raised objections from some members of the Group. On the other hand, the expression "*jointly and severally liable*", often taken by civil lawyers as synonymous of "*solidaire*", "*solidale*", etc..., deserves close attention, as common law distinctions between "*joint*", "*several*" and "*joint and several*" have to be fully understood before deciding upon the terminology to be retained in the Principles (SR par. 154, 155, 157, 159, 161, 163-167, 170, 176, 178, 182).

There was also some debate concerning the meaning and practical importance of the so-called "*communal*" obligations (SR par. 155, 158, 161, 169, 170, 173, 174, 177, 181, 182).

The discussion below will start with the approach suggested by two members of the Group : first concretely identify the different situations we want to cover, and then consider how to name them (SR par. 168, 183).

3. Plurality of obligees is often treated as some kind of a mirror image of the subject of plurality of obligors. It was argued that the two situations actually present few analogies, if any, and should be approached separately (SR par. 155, 160, 186-189).

Leaving aside point 1 above, this Position Paper will deal successively with **I. Plurality of obligors** and **II. Plurality of obligees**. The important preliminary issues raised in points 2 and 3 above will be considered in their respective contexts, before proceeding each time to a first inventory of the different rules which could be included in each section, for the Group to decide.

I. Plurality of Obligors

Which situations should be covered (A) ? Which rules should be provided (B) ?

A. Situations to be covered

The basic assumption is that several obligors undertake the same obligation towards the same obligee. For instance, A and B borrow USD 10,000 together from Bank W; affiliated companies A and B rent the same office space from owner W; several construction firms have joined forces to submit an offer together and the contract is awarded to them; several insurers offer co-insurance for a large risk.

In such cases, two basic possibilities are to be considered as to the extent of each obligor's obligations towards the obligee (and consequently the extent of the obligee's rights against each obligor). PECL invites to consider a third situation.

The two basic situations can be described as follows :

1. Each obligor is bound only for its share, and the obligee may claim only that share from any of the obligors.
2. Each obligor is bound for the whole obligation, and the obligee may claim performance of the whole obligation from any of its obligors.

The third situation, as envisaged by PECL art. 10:101,3°, can be described as follows :

3. The obligors are bound to render performance together, and the obligee may claim performance only from all of them.

1) *Separate obligations vs. Joint and several obligations*

There seems to be no doubt that Situations One and Two have to be covered by the new rules on plurality of obligors. They appear to be the most frequent situations in practice. Situation Two is especially interesting as such an arrangement puts the obligee in a very favourable position (availability of choice, protection against insolvency of one or several obligors).

The first question will be to decide on terminology. Opinions were divided in Rome, at least concerning the designation of Situation Two in the English language.

Situation One corresponds to what PECL calls "*separate obligations*" (art. 10:101, 2°). This was not really discussed in Rome, but some seemed to agree on this expression in English (SR par. 155, 170). In French, some discussion may take place, as the situation is called "*disjointe*" in the French version of PECL, but "*conjointe*" in the Civil Code of Quebec (art. 1518), as well as in French and Belgian legal terminology ("*separate*" obligors are called "*Teilschuldner*" in German).

The main discussions in Rome concerned the terminology the Principles should use to qualify Situation Two. PECL uses the term "*solidary*" (art. 10:101, 1°), clearly inspired the terms used in Latin languages ("*solidaire*", "*in solido*", "*solidario*", etc...); this is also the choice of the English version of the Civil Code of Quebec (art. 1523). There was some support for the choice of "*solidary*" in Rome (SR par. 155, 157, 164), but also some strong disagreement (SR par. 159, 161, 165). Several members, on the other hand,

expressed preference for the English expression "*joint and several*" (SR par. 161, 163, 170, 176). A remarkable point is that the respective preferences did not always correspond to the respective legal backgrounds.

It will be remembered that the Principles already use the expression "*jointly and severally liable*" in two provisions related to transfer of obligations (art. 9.2.5) and assignment of contract (art. 9.3.5). No definition is given, but the comments make it clear that Situation Two is envisaged (see illustration 4 in both instances).

"*Joint and several*" is certainly a more familiar expression for English-speaking lawyers. Internationally, it seems to be widely understood as the equivalent of "*solidaire*" by non-English speakers, and it is very commonly used in international contracts drafted in English. If common lawyers in the Group can accept the use of this expression to qualify Situation Two (there will in any case be a provision in the Principles to define what it means), there would be some good reason to retain it in the English version - without prejudice to the corresponding term to be used in other languages, such as "*solidaire*" in French, "*in solido*" in Italian, "*gesamtschuldnerisch*" in German or "*hoofdelijk*" in Dutch. In the present Position Paper, we shall tentatively use the expression "*joint and several*", subject to what the Group will eventually decide.

2) "*Communal*" obligations ?

- Relevance of the concept

Situation Three drew much discussion in Rome.

PECL refers here to "*communal obligations*" (art. 10:101, 3°). The expression was also criticised (SR par. 161), in favour of the alternative term "*joint*" (SR par. 161, 170, 172) (but it was also said that "*communal*" in PECL was not the same as "*joint*" in common law : SR par. 181 - also see below). Here too, if the concept is retained for the Principles, a choice should be made for the English version, under the control of English-speaking members. The French version of PECL says "*commune*", which does not correspond to a recognised category under French law.

However, the main point here was whether Situation Three deserved to be dealt with in the Principles. It was described by a member as "*of no great practical importance and virtually unknown*" (SR par. 156, 181), and some others agreed it should not be covered (SR par. 158, 169, 174). On the contrary, a member explained that Situation Three is "*well known in a number of domestic laws and used in commercial practice ...*" (SR par. 170), and there was also support for this (SR par. 172, 173, 177).

PECL itself states that "*communal obligations are more rare in practice*" (p. 61), and that the notion is "*unknown in most national laws*" (Note 4, p. 63). PECL can only give one reference to German doctrine and case law, an allusion to Italian legal literature (with no reference), and another single reference to a French doctoral thesis advocating recognition of the notion.

There are two aspects to the issue. First, which are the concrete situations envisaged by PECL ? Second, if such situations can be considered as specific, are they recognised as such by certain legal systems ?

- Concrete applications

As to the first question, PECL gives two examples :

- Several musicians have agreed to play a symphony for a recording company ; *"In the event of non-performance, the recording company will have to take action against all the musicians"* (PECL, ill. 5 to art. 10:101; also see SR par. 170, where the example of a football team is also given).

- Contractors of different trades promise the owners of a piece of ground that they will build a house ; *"if the co-contractors agree to work together to achieve that result, the obligation will be a communal one"* (PECL, ill. 6 to art. 10:101).

- Recognition by legal systems

As to the second question, it seems that PECL's *"communal"* obligations drew much of their inspiration from the German concept of *"gemeinschaftliche Schuld"*, and that some of the situations envisaged could also be covered by the concept of *"indivisibility"* under certain civil law systems such as French law. Whether there could also be some common points with the notion of *"joint"* liability in the common law should also be verified.

- In German law¹, the concept of *"gemeinschaftliche Schuld"* is not to be found in the Civil code, apparently due to a deliberate choice of the legislator. It has been *"reinvented by academics and court"* for situations where performance by one obligor alone is not possible. The classical example is that of the string quartet. But the rules to be applied are partly controversial. According to Dr. Meier, *"A majority holds that the creditor has to sue all debtors together. There is unanimity that claims for damages are not split among the debtors. According to one opinion, a main difference to solidarity is that the debtors are liable for the fault of their co-debtors. This is, however, disputed"*.

In Swiss law, Prof. Tercier also refers to *"débiteurs collectifs"*, who must perform together or through a common agent, next to *"débiteurs partiels"* (*"separate"*) and *"débiteurs pour le tout"* (*"solidary"*), but this situation is described as rare : the law does not provide for it and parties seldom resort to this figure (*Le droit des obligations*, 3rd ed., 2004, p. 291).

- *"Indivisible"* obligations are considered by several legal systems, alongside joint and several obligations. Distinctions are made between *"natural"* (e.g. a horse is sold by its co-owners) and *"conventional"* (e.g. several shareholders *"indivisibly"* undertake to sell their shares) indivisibility. PECL recognises that the effects of *"communal"* obligations *"... partly overlap those of the obligation which is indivisible by nature"* (Note 4 under art. 10:101). Indeed, the example of the musicians having to perform together is sometimes given as a case of indivisibility (see for instance J. Ghestin, M. Billiau et G. Loiseau, *Traité de droit civil, Le régime des créances et des dettes*, 2005, p. 222) - but the notion is much wider.

Where they exist, the rules on indivisibility can be very complex, but they turn out to be very similar to those governing joint and several obligations, and some duplication can be avoided by unifying the rules. It seems to be obvious about *"conventional"* indivisibility. As to *"natural"* indivisibility, it may suffice to make it another source of joint and several liability - the simple and elegant German solution (BGB, § 431), which has inspired the OHADA provision.

In legal systems where indivisibility and joint and several liability are subject to generally analogous rules, there is still, however, a frequent and important difference. Upon the death of an obligor, a joint and several obligation is divided between heirs, but not an

¹ We thank Dr. Sonja Meier, researcher at the Max-Plank Institute in Hamburg, for the information and critical comments provided on the concept of *"gemeinschaftliche Schuld"* in German law, as well as on the notion of *"communal obligation"* in comparative law (also see below, her views concerning plurality of obligees).

indivisible one. This leads, in some countries, to the frequent situation where an obligation is qualified as both *"joint and several"* and *"indivisible"*, only to attach this indivisibility in case of death to the otherwise common effects of both types of obligations. If it is decided to do without special provisions on *"indivisibility"* in the Principles (this will be our suggestion), a rule could still determine the consequences on a joint and several obligation of an obligor's death (see below).

- The *"joint"* obligations of the common law have also been mentioned in the Group's earlier discussion on *"communal"* obligations (SR par. 161, 170, 172 and 181). A resemblance is that in case of joint obligations, all the joint obligors should be made parties to the action. However it seems that the distinctive traits are more in this procedural effect and in some other rules (such as the effect of judgment against, or of settlement with one joint obligor) than in the nature of the promised performance. Many of these rules were considered as unattractive and to a large extent, they have been set aside, often by statute, to the benefit of the more adequate rules of *"joint and several"* liability (see M. Furmston, *The Law of Contract*, 1999, pp. 1129-1130; also see *Restatement Second on Contracts*, Introductory Note to Chapter 13, p 401).

Subject to our common law members' expert opinion, it seems that the inclusion of *"communal"* obligations in the Principles would not really match the common law concept of *"joint"* obligations. It is symptomatic that the PECL Notes on *"communal"* obligations do not make any reference to *"joint"* obligations.

- Possible arguments against inclusion

There may be several reasons to decide not to provide for *"communal"* obligations in the Principles, next to *"separate"* and *"joint and several"* obligations. The examples given are not utterly convincing; they could be covered by the two other notions. There could be risks of misunderstandings with similar concepts used in different legal systems. It is not very clear which rules should be applied to *"communal"* obligations.

> The classical example of the members of the symphony orchestra or of the string quartet may not be as obvious as it may seem at first sight.

It is true that performance is in some way indivisible ; all instruments have to play together to make it a symphony. But are the different musicians bound by so-called *"communal"* obligations ? First it has to be supposed that the recording company has made arrangements with all musicians personally, not with the legal person that may have hired them (e.g. the Orchestra); in the latter case, only the Orchestra would be liable towards the recording company, without prejudice to the Orchestra's recourse against the musicians in breach. In the former case, the main question is whether each musician is liable for breaches by other members of the orchestra, and this is not evident. It could well be that each musician only undertakes that it will play its part, and that only the one(s) in breach would be liable for the consequences. But it could also be that the recording company would demand that all musicians undertake joint and several obligations, making each of them liable for any one's breach. This would not oblige the flutist to play the cello part too, but each musician would be liable for the full damages the recording company could claim if the symphony cannot be recorded.

In the above analysis, the musicians do not undertake a special kind of *"communal"* obligations, but either normal *"separate"* obligations, or, by agreement, *"joint and several"* liability. No distinct concept is necessary.

As to the question whether all musicians have to be sued together, it is a procedural matter, and here again, there is not a single possible answer. In case only one or some

of the musicians fail(s) to perform, unless all have accepted joint and several liability, only those in breach could be sued - and held liable for the whole loss.

In the other example given of contractors of different trades having promised to build a house, a similar analysis could be submitted. In the frequent situation where contractors submit a joint offer, *"joint and several"* liability seems to be the usual and satisfactory method to make each of them liable for each other's breaches, with no need for a different concept.

> Introducing the generally unfamiliar notion of *"communal obligations"* in the Principles could also entail risks of misunderstandings. Practitioners familiar with German law may be tempted to identify the concept with that of *"gemeinschaftliche Schuld"*, which they may have heard of. Users from some civil law systems may think this is some sort of indivisibility. Common lawyers may wonder where *"communal obligations"* stand in relation to their categories of joint, several and joint and several liability. These respective concepts correspond to different approaches and have different effects. Consequently, it would be advisable to provide a great deal of explanations and comparisons in order to avoid misconceptions, but it is not the UNIDROIT tradition to include comparative law developments in the Comments.

As Dr. Meier wrote, *"Seen against this background (of comparative law), it is not at all clear what is meant by the "communal obligation" in the PECL. It is uncertain whether it can be applied to all kinds of performances, only to indivisible performances or only when performance by one debtor is not possible. It is not clear whether the rule that the creditor may require performance only from all of the debtors is meant to be a procedural rule. Art. 10:104 PECL explicitly states that a claim for damages is not split up, but it is not stated whether a debtor can be made liable for a breach of contract by his co-debtor if he himself is willing to perform. Probably an English, a French or a German lawyer will construe the communal obligation like a joint liability, indivisibilité or gemeinschaftliche Schuld"*.

> A third argument against providing for *"communal obligation"* in the Principles is that the rules to be applied are problematic. The uncertainties of the effects of a *"gemeinschaftliche Schuld"* in German law have been mentioned. The civil law rules on indivisibility have been described as complex, but at the same time close to those on joint and several liability. There are substantial and procedural aspects to be considered.

Due to the novelty of the concept in an international instrument, rather elaborate rules should be expected.

However, it may come as a surprise that PECL has one single provision (art. 10:104) concerning communal obligations, which provides that :

" 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 ",

i.e. the only rule on communal obligations is there to assimilate them to *"solidarity"* in a frequent situation ...

It is true that the PECL Comment also explains that *"The non-performance of one of the debtors in a communal obligation necessarily has an effect on the contract as a whole. It follows that the creditor can terminate the contract for fundamental non-performance ... even if the non-performance is imputable to only one of the debtors. Similarly, the creditor can withhold performance totally ..., even if the failure to give or tender the debtor's performance emanates from only one of the debtors"* (p. 62). These are

important rules, which perhaps do not go without saying; in our opinion, such rules should be included in the black letters - along with many others.

However, we believe that the effort of drafting a whole set of specific rules is not worthwhile if one agrees that the circumstances for which the concept of "*communal obligations*" was designed are relatively rare. Mainly, such circumstances can adequately be governed by the rules on either separate or joint and several obligations.

Three "Situations" were initially described above. As a conclusion, it is suggested to cover only "Situation One" and "Situation Two" in the black letters, and not to deal with "Situation Three". The Comments could however have something to say about some of the cases that have been discussed.

B. Applicable rules

If the Group decides to deal only with the two basic situations, the provision(s) applicable to "*separate*" obligations could be very short (1), while the rules governing "*joint and several*" obligations will certainly be more elaborate (3). An important provision should determine in which situations plural obligations are either "*separate*" or "*joint and several*" (2).

In this part of the Position Paper, the main concern will be to help the Group decide which issues should be covered, without prejudice to the respective solutions to be discussed at a later stage. However, examples of possible rules will regularly be given, mainly taken from PECL and from the very recent OHADA draft provisions on "*solidarity*".

1. Separate obligations

Most of what there is to say about "*separate obligations*" seems to have already been stated in their definition :

PECL, art. 10:101 (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*".

However, there could be a default rule on the respective liabilities of separate obligors, such as this PECL provision :

PECL, art. 10:103 : "*Debtors bound by separate obligations are liable in equal shares unless the contract or the law provides otherwise*".

2. "Sources" of joint and several obligations

a) The first important point to be decided raises a major policy issue. When several obligors bind themselves to the same performance towards an obligee, is the basic rule that they are bound separately, or jointly and severally ? In other words, as PECL phrases it, "*when (do) solidary obligations arise*" ? In civilian language, what are the "*sources*" of joint and several obligations ?

Is joint and several liability a situation that has to be expressly stipulated, or is it presumed ?

In Principles governing commercial contracts, we would suggest to presume joint and several liability between obligors bound to the same performance under the same contract.

This solution has been retained in both PECL and the OHADA draft, which could serve as models (even though PECL is not limited to commercial contracts and the same could eventually be decided for the OHADA draft) :

PECL, art. 10:102, 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. "*

OHADA, art. 10/8, 1° : *" Where several obligors are bound to the obligee for the same thing by the same contract, they are deemed to be solidarily liable, unless the contract or the law indicate otherwise ".*

Should the opposite solution be retained, it should then be provided that joint and several obligations arise from a contractual clause or from the law, or possibly also from usages.

b) Two other possible sources of joint and several obligations could be considered.

- According to PECL (art. 10:202, 2°),

"Solidary obligations also arise where several persons are liable for the same damage ".

The PECL Comment on this provision explains : *" ... in order to protect the victim of a single harm caused by several people, ... obligations of reparation arising out of such harms are solidary. The victim can therefore claim reparation for the harm from any one of those responsible for it. This solidarity applies whatever the nature of the responsibility in question. One of those responsible could be bound contractually, the other non-contractually ".* An illustration is given. Another PECL provision concerns this situation : art. 10:105 (2) dealing with *" Apportionment Between Solidary Debtors "*.

Such joint and several liability between those responsible for the same harm is recognised in many legal systems, sometimes with specific traits (cf. *"in solidum"* liability in French and Belgian law).

The Group will have to decide whether such a provision should be included in the Principles.

- The OHADA draft (art. 10/8, 2° a) provides that :

"Solidarity also derives from ... the indivisible nature of the promised performance".

The concept of *"indivisible"* obligations, known in some systems, has been mentioned before, in the discussion concerning the so-called *"communal"* obligations. It was said that the rules of *"indivisible"* obligations are very similar to those governing joint and several obligations, and some duplication can be avoided by unification. It is obvious about *"conventional"* indivisibility. As to the so-called *"natural"* indivisibility, it may suffice to make it another source of joint and several liability, as in the OHADA provision, itself inspired by German law (BGB, § 431). This is the Rapporteur's suggestion.

3) Rules to govern joint and several obligations

Provisions to regulate joint and several obligations should deal with two main different aspects : the obligee's rights against the obligors, and the recourse between joint and several obligors.

a) Obligee's rights against joint and several obligors

- Main effect

Possibly, the definition of joint and several obligations has already stated their main effect from the perspective of the obligee's rights. See, for instance :

PECL, art. 10:101, 1°, : *"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 "*.

OHADA, art. 10/7 : *" Several obligors are solidarily liable where they are bound to the obligee for the same thing in such a way that each of them may be compelled separately to perform the whole obligation and where performance by a single obligor releases the others towards the obligee "*.

The obligee's option could be made more explicit by a distinct provision, as in the OHADA draft, inspired by the Quebec Civil code (art. 1528-1529) :

OHADA, art. 10/8 : *" 1) The obligee of a solidary obligation may apply for payment of the whole obligation to any one of the co-obligors at its option.*

2) Proceedings instituted against one of the solidary obligors do not deprive the obligee of its claim against the others ".

- Defences

An important issue to be regulated concerns the defences each obligor may assert against the obligee.

On this matter, both PECL and the OHADA draft have a general provision (PECL, art. 10:111, OHADA, art. 10/10, 1°), and several rules concerning specific defences : performance or set-off (PECL, art. 10:107, 1°, OHADA, art. 10/10, 4°), *"merger of debts"* between an obligor and the obligee (PECL, art. 10:107, 2°, OHADA, art. 10/10, 5°), release of one of the obligors by the obligee or settlement between the obligee and one of the obligors (PECL, art. 10:108, OHADA, art. 10/10, 3°).

The OHADA draft also has a rule on the waiver of solidarity defence (art. 10/10, 2°). PECL also considers the effect of *"prescription"* (limitation) on *"solidary"* obligations (art. 10:110).

As an introduction to the discussion, the respective provisions of those two possible models on the different defences are quoted below. Other models will be mentioned below. The OHADA texts on these issues are themselves partly inspired by PECL, partly by the Quebec Code.

- General provision

PECL, art. 10:111 : *" (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. "

OHADA, art. 10/10, 1° : *" A solidary obligor who is sued by the obligee may set up all the defences that are personal to it or that are common to all the co-co-obligors, but this solidary obligor may not set up defences that are purely personal to one or several of the other co-obligors "*.

- Performance or set-off

PECL, art. 10:107, 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. "*

OHADA, art. 10/10, 4° , practically identical.

- *"Merger of debts"* between an obligor and the obligee

PECL, art. 10:107, 1° : *" Merger of debts between a solidary debtor and the creditor discharges the other debtors only for the share of the debtor concerned. "*

OHADA, art. 10/10, 2° , practically identical.

- Release of one of the obligors by the obligee or settlement between the obligee and one of the obligors

PECL, art. 10:108 : *" (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). "

OHADA, art. 10/10, 3° : *"When an obligee, by agreement, releases its rights against one of the solidary obligors, the other obligors are discharged of liability for the share of that obligor. "*

- Waiver of solidarity

OHADA, art. 10/10, 2° : *"An obligee who renounces solidarity in favor of one of the obligors retains its solidary claim against the other obligors for the whole debt "*.

- Effect of expiration of limitation period

PECL, art. 10:110 : *" 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. "*

> A first comparative investigation² reveals that practically all codifications contain rules on defences, but the respective lists of defences considered are not absolutely the same. A general provision appears almost everywhere. The more specific defences mentioned above are sometimes regulated, sometimes not. Some other defences may be included (like "*novation*" in the Lithuanian code). The Group will have to decide which defences should be covered by the Principles.

- Impact of certain events

Some rules may also be needed to define the possible impact of some events concerning one of the obligors on the other joint and several obligors.

PECL, for instance, has a rule on the effect of judgment :

PECL, art. 10:109 : "*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. "*

A similar provision appears in certain other codifications.

Other similar issues are covered in certain systems, and they could also be considered, such as the impact of suspension of limitation periods or the impact of notice given to one of the obligors (e.g. notice of termination).

- Death of an obligor

Another possible issue to be met is that of the consequences of a joint and several obligor's death. If there are several heirs, is the joint and several obligation divided between them, or are they all jointly and severally liable for the whole obligation ? This question has already been raised above, when dealing with "*indivisible*" obligations.

While PECL does not deal with the subject, OHADA does in the following provision, inspired from the Quebec Code (art. 1540) :

OHADA, art. 10/12 : "*The obligation of a solidary obligor is divided by operation of law between its heirs, except where the obligation is indivisible. "*

The Group may decide that this is not the kind of issue to be dealt with in the UNIDROIT Principles of International Commercial Contracts.

b) Recourse between joint and several obligors

A joint and several obligor who has performed upon the obligee's request has a contributory recourse against the other obligors.

Several issues have to be met. How are the respective shares to be determined ? How much can an obligor who has been called to perform in favour of the obligee claim from the other obligors ? Can an obligor claiming recovery from the other obligors exercise the

² At this stage, we have briefly considered the Civil codes of Estonia, France (as well as the "Catala" draft), Germany, Italy, Lithuania, the Netherlands, Quebec, Russia, the Swiss Code of obligations and the Restatement Second on Contracts. It seems that the Chinese law on contracts does not have specific rules on joint and several obligations, but it uses the concept in certain provisions, such as art. 90, 267, 272 and 313.

rights and actions of the obligee ? Which defences can an obligor assert when faced with a contributory recourse ? What are the consequences of the insolvency of one or several of the other obligors ?

Here again, the respective provisions of PECL and OHADA are listed below as possible starting points for discussion. Other models will of course also be considered.

- Respective shares

PECL, art. 10:105 : *" (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. "

OHADA, art. 10/11, 1° : *" As between themselves, solidary obligors are liable in equal shares unless the contract or the law provides otherwise. "*

- Extent of contributory claim

PECL, art. 10:106, 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. "*

OHADA, art. 10/11, 2°, practically identical.

A special rule could deal with the situation where a person has agreed to bind itself jointly and severally with an obligor as a form of suretyship. In this case, if that person had been called to perform, it would have a claim for the full amount against the main obligor (see for instance French Civil Code, art. 1216; Quebec Code, art. 1537 par. 2)

- Rights and actions of the obligee

PECL, art. 10:106, 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. "*

OHADA, art. 10/11, 3° : *" A solidary obligor to whom paragraph (2) applies may also exercise the rights and actions of the obligee, including accessory securities, to recover the excess from any of the other obligors to the extent of each obligor's unperformed share. "*

- Defences

OHADA, art. 10/11, 4° : *" A solidary obligor sued for reimbursement by the co-obligor who has performed the obligation may raise any common defences that have not been set up by the co-obligor against the obligee ; it may also set up defences which are personal to itself, but not those which are purely personal to one or several of the other co-obligors. "*

PECL has no equivalent to this provision, inspired from the Quebec Code (art. 1539).

- Insolvency of one or several obligors

PECL, art. 10:106, 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. "*

OHADA, art. 10/11, 5° : *" A loss arising from the insolvency of a solidary obligor is divided between the other co-obligors, in proportion to their respective shares. "*

II. Plurality of Obligees

After considering the suggestion to adopt another approach, on which the Group will have to decide (A), this Position Paper will at this stage proceed with the traditional approach. It will examine the situations to be covered (B) and the rules to be drafted to govern separate or joint and several claims (C).

A. Another approach ?

- Mirror image ?

The subject of plurality of obligees is traditionally handled as a subject somewhat symmetrical to that of plurality of obligors. "*Active solidarity*" as opposed to "*passive solidarity*" in certain civil law systems, "*Joint and Several Promisors and Promisees*" handled together in the same chapter of the Restatement Second.

It does not mean that this section should be a perfect mirror image of the section on plurality of obligors. There are obvious differences due to the fact that the legal status of an obligee is not that of an obligor. However similar problems have to be dealt with (see SR par. 154). When there are several obligees, should the default rule be that the claims are separate or "*joint and several*" ? In case of "*solidarity*" between the single obligees, what are the rights of each of them vis-à-vis the obligor ? What defences could the obligor raise against the single obligees ? How is performance received by one obligee to be apportioned among the others ?

- Alternative approach

However, another approach was suggested at the Rome meeting. One member of the Group explained that according to recent research work on the subject done by, among others, one of his colleagues at the Max Planck Institute in Hamburg, the two situations of plurality of respectively obligors and obligees presented very little if any analogies and should therefore be approached separately and certainly deserved the same attention (SR par. 155 and 186). This drew some support (SR par. 160). However, it was also said that while the new Dutch Civil code had already taken this new approach, it "*did not prove to be successful in practice*" (SR par. 187).

The alternative approach³ starts by pointing out a basic difference between the obligations of plural obligors and the claims of plural obligees. Plural claims can be perceived as assets belonging to several persons. Consequently there can be as many claims as obligees, each obligee "owning" its "own" claim, or there can be co-ownership of the whole claim. In the latter case, the mechanisms of agency and authority (possibly also assignment) can determine who can do what concerning the claim(s), e.g. whether a single obligee can exercise the rights of all vis-à-vis the obligor, grant a discharge or assign the whole claim to a third party. It would be for historical reasons that the notion of "*solidarity*" between obligees developed alongside "*solidarity*" between obligors, because agency and assignment were not adequately available in Roman law. Nowadays, the rules of co-ownership can more effectively be applied.

³ Thanks to Professor Zimmermann's kind intervention, the Rapporteur has had the privilege to receive a note from Dr. Sonja Meier, who is conducting this research and gave some explanations on the new approach. The Rapporteur is responsible for the summary given in this Position Paper.

When there is plurality of obligees, it is suggested to distinguish between “*separate*” claims and “*common*” claims, and, in the latter situation, to determine which are the rights of each obligee : demand performance to all obligees, demand performance to itself, possibly also demand performance to itself and be entitled to discharge the obligor and/or assign the claim. The rules of co-ownership could be applied for the relationship between the obligees and the questions of allocation of the claim. There would be no more question of “*solidarity*” between obligees.

It is argued that the “*main detriment of solidarity*” is that it enables an obligee of a solidary obligee A to seize the full claim (e.g. 100) and demand full performance from the obligor - with the risk of being deprived of all possibility to seize if the obligor had already paid those 100 to B, the other solidary obligee. In the other approach, the claim of 100 is shared; even if A can, by authority, demand 100 from the obligor, A’s obligee can only seize the claim in the amount 50.

- The Dutch experience

It may be interesting to see what was made of this approach by the Dutch Civil code. While articles 6.6 to 6.14 deal with “*Plurality of debtors and solidarity among debtors*”, the following section on “*Plurality of creditors*” does not refer to “*solidarity*” any more, but contains the following two provisions :

Art. 6.15 : “*1. Where a prestation is owed to two or more creditors, each of them has the right to claim an equal share, unless, as a result of the law, usage or a juridical act, they are entitled to unequal shares of the prestation or they have jointly a single claim.*

2. Where the prestation is indivisible or the right to it is held in community, they have jointly a single claim.

3. The fact that the right to claim is held in community cannot be invoked against the debtor where this right results from a contract he has entered into with the partners, provided that he did not know nor right to have known that the right would be held in community”.

Art. 6.16 : “*Where it has been agreed with the debtor that two or more persons who, among themselves, are not all jointly entitled to the prestation, can each as creditor claim the whole prestation from him, and that payment to one releases him with respect to the others, the rules pertaining to community apply mutatis mutandis to their juridical relationship with the debtor”.*⁴

- For the Group to decide

The Group will have to decide whether this new approach should be adopted instead of the traditional one. The Dutch experience will be important to hear.

It is probably true that the different issues related to plurality of obligees could be handled through the implementation of the mechanisms of agency, authority and perhaps also assignment, instead of relying on a specific set of rules based on “*solidarity*”. However one may wonder whether practitioners would welcome such departure from a well-known traditional approach. Parallel rules on plurality on obligors and plurality of obligees in the same chapter seem to make sense. Adequate provisions can cope with the different issues. The situation may be compared to the subject of assignment : assignment of rights and transfer of obligations are dealt with together with

⁴ English translation by the Quebec Centre of Private and Comparative Law (Kluwer, 1990).

their respective specific rules in Chapter 9 of the Principles - though it could also be argued that assignment of rights should be handled differently since rights are assets.

For this Position Paper, the Rapporteur has chosen to make a presentation of the different issues still inspired by the traditional approach. Another presentation will certainly have to be submitted should the Group decide to adopt the other approach.

B. Situations to be covered

The basic assumption is here that several obligees have a claim related to the same obligation towards an obligor. For instance, Banks A and B have joined forces to lend EUR 1,000,000 together to Firm W.

In such a case, two basic possibilities are also to be considered, this time as to the extent of each obligee's rights against the obligor (and consequently the extent of the obligor's obligations towards each obligee). PECL again invites to consider a third situation.

The two basic situations can be described as follows :

1. Each obligee is entitled to claim its share only, and the obligor is bound only for that share towards each obligee.
2. Each obligee is entitled to claim the whole performance, and the obligor is bound to perform the whole obligation towards any obligee requiring performance.

The third situation, as envisaged in PECL art. 10:201, 3°, can be described as follows :

3. Each obligee is entitled to require performance only for the benefit of all, and the obligor must perform to all the obligees.

1) Separate claims vs. Joint and several claims

Situations One and Two certainly have to be covered by the new rules on plurality of obligees, as they appear to be the most frequent in practice. Situation One may be considered as the normal one, but Situation Two offers obvious practical advantages to plural obligees.

But here again, terminology has to be discussed, at least for the English language. This has not been examined at the preceding meeting, where vocabulary issues were met only about plurality of obligors (see above).

PECL calls Situation One "*separate claims*" (art. 10:201,2°), and we suggest that this could be satisfactory, at least if the term "*separate*" is also retained for the analogous situation with plurality of obligors (see above). The French translation of PECL uses the expression "*créances disjointes*". Here again, legal terminology in France and Belgium more often uses the term "*conjointes*".

Choice of terminology could be more difficult with Situation Two, where PECL has chosen to use the expression "*solidary claims*" (art. 10:201,1°). In the discussions in Rome concerning plurality of obligors, the term "*solidary*" has been criticised and the expression "*joint and several*" seemed to draw more support (SR par. 159, 161, 165, 170, 176 - see above). It can be expected that the term "*solidary*" will also raise criticism, in the English language, when applied to plurality of obligees (while an equivalent term is commonly used in some civil law systems). If the Group decides to retain the expression "*joint and several obligors*", can the opposite situation be labelled

"joint and several obligees" ? The Restatement Second does use the expression *"joint and several promisees"* (see the titles of Chapter 13 and of Topic 2).

2) *"Communal" claims* ?

In perfect symmetry with its categories concerning to plurality of obligors, PECL also mentions *"communal claims"* next to separate and solidary claims.

The definition appears in art. 10:201,3° :

" 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 ".

The PECL Comment explains that such *"communal claims"* depend of the intention of the parties, and can also result from the very nature of the obligation. The first example given is that of members of a partnership with no legal personality opening a joint bank account : *"they are communal creditors of the bank"*. The two other examples do not really concern international commercial contracts : a married couple engaged by A as caretakers and given the right to occupy an apartment; a group of friends hiring a car with a driver for a communal excursion (PECL Comment, pp. 78-79).

PECL has one specific rule on *"communal claims"*. Article 10:203 provides :

" 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 ".

Note 4 to art. 10:201,3° of PECL states : *"The category of communal claims, as distinct from indivisible claims, is not directly known except in German law. It is sometimes referred to by analogy (Austrian BGB § 890, second sentence and § 892). In other laws, reference may be made to the rules on indivisibility. The reference to such rules is sometimes made expressly : the Netherlands BW art. 6:16"*. Also see Note 1.

The Group has already devoted some discussions on *"communal obligations"*, the practical importance of which was challenged by some. This Position Paper has suggested not to retain the concept (see above). Obviously, the discussion will have to be extended to the advisability of having rules on these so-called *"communal claims"* in the Principles. The use of the concept of indivisibility in relation to the *"sources"* of joint and several claims could perhaps take care of the apparently rare instances where such situations occur. It will also be kept in mind that contractual stipulations are always possible to handle special situations.

C. Applicable Rules

If the Group decides to deal only with the two basic situations, the provision(s) applicable to *"separate"* claims could be very short (1), while the rules governing *"joint and several"* claims could - to some extent (see below) - be more elaborate (3). An important provision should determine in which situations plural claims are either *"separate"* or *"joint and several"* (2).

In this part of the Position Paper, as above concerning plurality of obligors, the main concern will be to help the Group decide which issues should be covered, without prejudice to the respective solutions to be discussed at a later stage. Examples of

possible rules will also regularly be given, mainly taken from PECL and from the OHADA draft.

1. Separate claims

The definition to be given of separate claims will already state the main effects. For instance :

PECL, art. 10:201 (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 "*.

A distinct provision could give a rule on apportionment of separate claims :

PECL, art. 10:202: *" Apportionment of Separate Claims : Separate creditors are entitled to equal shares unless the contract or the law provides otherwise. "*

2. " Sources " of joint and several claims

- When there is a plurality of obligees, when are their claims *" separate "*, when are they *" joint and several "* ?

The basic option should probably be that such claims are normally separate. *" Joint and several "* claims have to result from an express stipulation.

This is, among others, the OHADA approach :

Art. 10/14 : *" Solidarity between obligees exists only where it has been expressly stipulated. "*

Such solution, which seems to reflect practice, would differ from the corresponding one suggested above concerning plurality of obligors.

- The Group could consider adding a rule according to which joint and several claims also derive from the indivisible nature of the claimed performance, analogous to the provision suggested above concerning the sources of joint and several obligations. This could cover some of the situations for which the concept of *"communal"* claims has been advocated (see above).

3. Rules to govern joint and several claims

Provisions to regulate joint and several claims should deal with two main different aspects : the rights of each joint and several obligee against the obligor, and the allocation of performance received (what PECL calls the *"apportionment"*) between joint and several obligees.

A comparative survey of existing codifications reveals that the rules on joint and several claims are usually less detailed than the rules on joint and several obligations. This is perhaps due to the fact that the former situation is less frequent in practice.

a) Joint and several obligee's rights against the obligor

- Main effects

Here too, the definition will possibly already have stated the main effects.

PECL, art. 10:201, 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 "*.

Some further provision may be advisable, as in the OHADA draft, inspired by the Quebec Code :

OHADA, art. 10/15 : *" 1) Performance of an obligation in favour of one of the solidary obligees releases the obligor towards the other obligees.*

2) The obligor has the option of performing the obligation in favour of any of the solidary obligees, provided the obligor has not been sued by any of them ".

- Defences

Defences which the obligor may assert against each obligee are also an important issue. Here are two possible models :

PECL, art.10:205: " (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 [performance, set-off, merger], 10:109 [effect of judgment], 10:110 [" prescription "] and 10:111(1) [other defences] apply, with appropriate adaptations, to solidary claims ".

OHADA, art. 10/15, 3° : " ... a release from the obligation granted by one of the solidary obligees releases the obligor only for the portion of that obligee. The same rule applies to all cases in which the obligation is extinguished towards one of the obligees otherwise than by performance ".

It will be noted that the OHADA rule, here again inspired by the Quebec Civil code, is less specific than PECL.

b) Allocation between joint and several obligees

Once a joint and several obligee has received the whole performance from the obligor, this benefit must be allocated between the different obligees. Here, the main issue is to determine the respective shares, as in the two possible models below :

PECL, art. 10:204: " (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 ".

OHADA, art. 10/16 : " 1) As between themselves, solidary obligees are entitled to equal shares unless the contract or the law provides otherwise.

2) An obligee who has received more than its share is bound to reimburse the excess to the other obligees in proportion to their respective shares ".