



## INTRODUCTION TO THE DRAFT

This is a first draft of the future chapter of the Unidroit Principles on Plurality of obligors and/or obligees.

The proposals attempt to take into account the discussions which took place at the Rome meetings in 2006 and 2007. They have considered the solutions given by some significant earlier models, giving special attention to the corresponding provisions of PECL and the OHADA draft on contracts. References have been added to the provisions on plurality in Book III of the recently published *Draft Common Frame of Reference*, largely similar and often identical to PECL on the subject.

Earlier discussions are briefly summarized, with references to the Summary Records of the two Rome meetings (respectively « SR 2006 » and « SR 2007 »), and sometimes also to the Rapporteur's Position Paper for the 2007 meeting (Unidroit 2007 – Study L – Doc. 102, quoted as « Posit. paper »).

Commentaries on the proposals are not meant to be the future comments to be included in the final version of the chapter. Their mere purpose is to introduce further discussions on the draft provisions within the group.

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April 2008

## Section 1 : Plurality of obligors

### Article 1.1 (*Definitions*)

**When several obligors undertake the same obligation towards an obligee :**

- 1) the obligations are joint and several when each obligor is bound for the whole obligation;**
- 2) the obligations are separate when each obligor is bound only for its share.**

#### *Earlier discussions :*

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

2. The meaning and practical importance of the so-called “*communal*” obligations has been originally discussed (SR 2006, par. 155, 158, 161, 169, 170, 173, 174, 177, 181, 182). It was suggested not to deal with this concept in the black letters, considering that the circumstances for which it was designed are relatively rare. The Comments, however, could have something to say about such cases (Posit. Paper, pp. 6-10). Apart from a brief reference in the Rapporteur’s introductory presentation (SR 2007, par. 6), “*communal*” obligations were not discussed any more at the 2007 meeting.

3. Terminology was debated concerning the two other types of situations which the Principles will cover : each obligor bound only for its share (Situation One), or bound for the whole obligation (Situation Two) (SR 2006, par. 154, 155, 157, 159, 161, 163-167, 170, 176, 178, 182; SR 2007, par. 7-28). For the latter Situation, the term “*solidary*”, retained by PECL, raised objections from some members of the Group. On the other hand, while civil lawyers often take the expression “*jointly and severally liable*” as synonymous of “*solidaire*”, “*solidale*”, etc..., common lawyers make distinctions between “*joint*”, “*several*” and “*joint and several*” obligations. For Situation One, the term “*separate*” was also subject of discussions. (More recently, the DCFR, art. 4:102, has opted for the terms “*solidary*” and “*divided*”).

The Chairman of the Group recalled that “*as a general policy the use in the Principles of term of art peculiar to particular domestic laws did not mean that these terms should necessarily have the same meaning within the system of the Principles ... irrespective of the terms chosen it was up to the Principles to define the meanings of these terms autonomously*” (SR 2007, par. 9). On this assumption, it was decided to speak of “*separate*” obligations with respect to Situation One and of “*joint and several*” obligations with respect to Situation Two (SR 2007, par. 26-28). The respective meanings will be determined by the corresponding black letter provisions.

4. Some discussion also took place on whether joint and several obligations necessarily arose from a single contract. This was the opinion of several, but one member gave an example to the contrary (SR 2007, par. 17-19, 23-25).

5. Should there be an additional provision on separate obligations, next to the rules on joint and several obligations ? The definition of separate obligations already expresses the essential rule (each obligor is bound only for its share), but another provision could provide a default rule on how to determine the shares, such as in PECL, art. 10:103 (in principle, equal shares). After discussion, it was decided that there was not sufficient support for such a rule (SR 2007, par. 126-133).

*Commentary on the proposal :*

6. Article 1.1. defines the two basic situations of plurality of obligors the Principles are going to govern (so-called « communal » obligations will only be mentioned in the Comments), using the terminology adopted by the Group.

7. The provision refers to “the same obligation”, without specifying that this obligation should come from a single contract. Actually such additional requirement is never formulated in the different codifications which have been consulted (Civil codes of France and Belgium, art 1200; German BGB, § 421; Swiss Code of obligations, art. 143; Italian Civil code, art. 1292, Quebec Civil code, art. 1523; Dutch NBW, Book 6, art. 6; PECL, art. 10:101; OHADA draft, art. 10/7). It is suggested to state in the Comments that the obligation usually arises from a single contract, and to indicate examples of possible exceptions.

8. As decided at Rome 2007, no default rule has been included concerning the respective shares in separate obligations. (Apart from PECL, art. 10:103, such a rule also appears in some domestic codifications, such as the German BGB, § 420, the Dutch NBW, Book 6, art. 6, 1° and the Russian Civil code, art. 321).

On the contrary, after their definition in this article 1.1, joint and several obligations will be more extensively dealt with in the following provisions.

**Article 1.2** (*Presumption of joint and several liability*)

**When several obligors undertake the same obligation towards the same obligee, they are deemed to be jointly and severally liable, unless the circumstances indicate otherwise.**

*Earlier discussions :*

9. If Article 1.1 defines two different situations when several obligors are either jointly and severally or separately bound, there has to be a default rule indicating which situation is applicable in case of doubt. It was agreed that in the commercial settings to which the Principles applies, the default rule should be in favour of joint and several liability (SR 2007, par. 29-30).

10. PECL, art. 10.102 (2) provides that “*Solidary obligations also arise when several persons are liable for the same damage*” (A similar rule appears in DCFR art. 4:103 (2)) The Group discussed whether such a rule should also be included in the Principles. It was objected that such a provision referred to tort liability. Some possible applications were examined. The question was finally left open for the time being (SR 2007, par. 31-40).

11. A provision on indivisible performance had been suggested before (Posit. paper, p. 11), but it has not been discussed by the Group.

*Commentary on the proposal :*

12. According to the decision taken at Rome 2007, joint and several liability is the default rule for several obligors under the same obligation. PECL has adopted the same solution (art. 10:102 (1)) (So does DCFR, art. 4:103 (2)).

There can naturally be exceptions to the default rule. While PECL resorts to the formula “*unless the contract or the law provides otherwise*”, it is suggested to use the expression “*unless the circumstances indicate otherwise*”, which already appears frequently in the Principles and which the Group adopted again at another occasion when discussing this chapter (see below, under art. 1.12). The Comments will of course indicate that the most frequent contrary “circumstance” will be a contractual provision excluding joint and several liability. Perhaps an example can also be given of a legal provision having the same effect.

13. It is proposed not to include a provision similar to PECL, art. 10:102 (2). The envisaged situation mainly corresponds to the case of multiple tortfeasors, and the Principles do not deal with tort claims. Admittedly there can also be cases of an identical damage caused by breaches of contract, but then there are two possibilities. Either it is the same contract with liable co-obligors – in that case they are already deemed to be jointly and severally liable. Or their liability derives from different contracts (cf. an architect and a building contractor) and this probably should not be covered by rules on joint and several liability.

14. Upon reflection, we do not include a provision considering indivisible performance as a source of joint and several obligations.

Such a provision exists in the OHADA draft, art. 10/8, itself inspired by the German BGB, § 431, the Dutch NBW, Book 6, art. 6, 2° and the Russian Civil code, art. 322, 1°. Other codifications have separate provisions on indivisible obligations (e.g. the French and Belgian Civil code, art. 1217-1225, the Italian Civil code, art. 1314-1320 and the Quebec Civil code art. 1520-1522). At least as seen from a Belgian point of view, those Civil code provisions on indivisibility are archaic and excessively detailed, especially since the effects of indivisibility are very similar to those of joint and several liability. Other legal systems have merged the two sets of rules by making indivisibility of performance a source of joint and several liability. Some of the situations examined when dealing with the concept of so-called “communal” obligations (see above, under art. 1.1) are cases of indivisibility, which could then be covered by such a provision.

However, while such an explicit provision on indivisibility can have much importance when separate liability is the default rule for plural obligors, it is probably less necessary in the system retained by the Group, where joint and several liability is the default rule. Indivisible obligations undertaken by several obligors would then *a priori* be joint and several, and the circumstances would most probably not indicate otherwise. This is the reason why we suggest not to have such a provision, but cases of indivisibility could still be mentioned in the Comments.

**Article 1.3** (*Obligee's rights against joint and several obligors*)

**When several obligors are jointly and severally liable, the obligee may require the whole performance from any one of them, until full performance has been received.**

*Earlier discussions :*

15. It was agreed that there would be a provision stating the main effect of joint and several obligations between obligee and obligors, i.e. that each of the obligors is liable for the whole performance towards the obligee and that the obligee has an option to ask performance from any of the obligors up to the point where performance is total (SR 2007, par. 41-42).

*Commentary on the proposal :*

16. This provision is inspired by the language of PECL, art. 10:101 (1) (cf. also DCFR, art. 4:102 (1)). Similar provisions are found in all codifications (see for instance French and Belgian Civil code, art. 1200; German B.G.B, § 421; Swiss Code of obligations, art. 144; Italian Civil code, art. 1292; Quebec Civil code, art. 1523; Dutch NBW, Book 6, art. 7; Russian Civil code, art. 323; OHADA draft, art. 10/9).

**Article 1.4** (*Defences in general*)

**A joint and several obligor who is sued by the obligee may assert all the defences and rights of set-off that are personal to it or that are common to all the co-obligors, but may not assert defences and rights of set-off that are purely personal to one or several of the other co-obligors.**

*Earlier discussions :*

17. It was agreed that the rules on the defences which can be asserted by joint and several obligors against the obligee would start with a provision stating the general principles, as in PECL and the OHADA draft (SR 2007, par. 43-48). (In PECL, however, the general rule of art. 10:111 is located not before, but after the provisions dealing with some particular defences – id. in DCFR, art. 4:112).

*Commentary on the proposal :*

18. As suggested by some in Rome 2007, this draft provision is more inspired by the language of the OHADA draft. In line with article 9.1.13 of the Principles, rights of set-off have been explicitly mentioned next to defences

The Comments will obviously give examples of the different types of defences envisaged.

**Article 1.5** (*Performance and set-off*)

**Performance or set-off by a joint and several obligor or set-off by the obligee against one joint and several obligor discharges the other obligors in relation to the obligee to the extent of the performance or set-off.**

*Earlier discussions :*

19. It was agreed to include specific provisions on the defences related to performance, set-off and merger of debts, along the lines of the very similar PECL and OHADA texts (SR 2007, par. 49).

*Commentary on the proposal :*

20. Article 1.6 is inspired by the PECL and OHADA models, subject to terminological adaptations (DCFR art. 4:108, is identical to PECL, art. 10:107).

21. However, it is suggested not to include a rule on merger of obligations in the black letters (which could have been “*Merger of obligations between a joint and several obligor and the obligee discharges the other obligors only for the share of the obligor concerned*”), since the Principles have no provisions of this mechanism. The Comments, however, could mention the situation; in international commercial contracts, applications related to the law of inheritance are probably rare, but merger of companies can provide more relevant examples.

**Article 1.6** (*Release*)

*Variant 1 :*

**(1) Release of one joint and several obligor discharges all the other obligors, unless the obligee has reserved its rights against them.**

**(2) In the latter case, the other obligors’ obligations are reduced by the amount of the release.**

*Variant 2 :*

**(1) Release of one joint and several obligor discharges all the other obligors for the share of the released obligor, unless the obligee intends to release them totally.**

**(2) When the other obligors are discharged for the share of the released obligor, they have no more contributory claim for that share against the released obligor under article 1.12.**

*Variant 3 :*

**(1) Release of one joint and several obligor does not release the other obligors, unless the obligee intends to release them totally or partially.**

**(2) The other obligors retain their contributory claim against the released obligor.**

*Earlier discussions :*

22. There was a lengthy discussion in Rome 2007 concerning the defences of release and settlement. Both PECL and OHADA texts, initially submitted as possible models, provide that when the obligee releases one of the joint and several obligors, or reaches a settlement with it, the other obligors are discharged only for the share of that obligor (unless the release or settlement extends to them). As between joint and several obligors, the released obligor is also released from its share. Some members of the Group felt on the contrary that release of one obligor should not affect this obligor's "internal" liability vis-à-vis the other obligors, unless the obligee has released the other obligors for that internal part. Various opinions were expressed, and several examples discussed, including cases of settlement reached between the obligee and one of the obligors : should then the others be released by the full amount of the first obligor's part, or only by the amount of the settlement ? It appeared to some that settlement and release needed to be treated separately, and that in any case one should distinguish between the external effects (relationship between the released or settling obligor and the obligee) and the internal effects (relationship between the released or settling obligor and the other obligors). Care should also be taken not to create disincentives to settle, though opinions differed as to whether certain proposed rules were incentives or disincentives.

This brief summary cannot fully account for all points made during this rich discussion : see SR 2007, par. 50-84. As a conclusion, the Rapporteur was asked to submit alternative approaches in the preliminary draft.

*Commentary on the proposals :*

## a) Release

23. The hypothesis should be clearly defined. If the obligee releases all joint and several obligors, the obligation is fully extinguished. The problems to be solved here concern situations where the obligor releases only one (or several but not all) co-obligor(s) : what are then the consequences for (i) the non-released obligors' obligations towards the obligee and (ii) the non-released obligors' contributory claims towards the released obligor(s).

24. It has been pointed out that this introduces the notion of shares in the co-obligors' relationship with the obligee, a notion normally relevant only for the so-called "internal" relationship between obligors (SR 2007, par. 70). This is correct, but the obligee is often aware of the respective shares (even though joint and several liability gives it the right to ignore them), and it happens, under various circumstances, that an obligee wants to release one of the obligors without waiving its rights against the others; the notion of shares then intervenes in the "external" relationship.

25. The solutions provided by Article 10:108 of PECL (which mainly inspired the OHADA text, both provisions having initiated discussions at Rome 2007) do not represent "generally accepted" solutions, in spite of the opening statement made in Note 1 following Article 10:108. Actually, in codifications which deal with the effect of release of one obligor on joint and several obligations (not all of them have provisions on the issue), several very different solutions are present :

- Sometimes, release of one obligor discharges all the others, unless the obligee has reserved its rights against the others (French and Belgian codes, art. 1285, Catala draft, art. 1238,

Italian code, art. 1301); in the latter case, the others' obligations will be reduced by the amount of the release.

- The same principle solution (discharge of all) appears in the German code, but phrased in different language : *“A release agreed between the obligee and one of the obligors also applies to the other obligors, when the parties wanted to extinguish the whole debt”* (§ 423).
- The Swiss Code of obligations is even less firm on the issue : *“When one of the joint and several obligors is released without payment of the obligation, its release benefits the others only insofar as circumstances or the nature of the obligation indicate”* (art. 147, 2°).
- The PECL and OHADA solution can be recalled here : release of one obligor releases the others only for the part of the released obligor. DCFR, art. 4:109 retains the same basic solution as PECL.
- Then the Dutch solution is quite different : *“Renunciation by a creditor of his right to claim a debt from a solidary debtor does not release the latter from his obligation to make contributions. Nevertheless, the creditor can release him from his obligation to make contributions to a co-debtor by obliging himself towards the latter to reduce his claim by the amount which could have been claimed in contribution”* (Book 6, art. 14).

This implies that release of one obligor, in principle, does not affect the others' obligations towards the obligee.

In such a context, it would indeed be strange to exempt the released obligor from its contributory obligations in the internal relationship. But the situation is totally different if release of one obligor affects the others' obligations towards the obligee (total or partial release, as in most other systems described above).

26. It seems to us, upon reflection, that some of the doubts or objections raised in Rome 2007 were linked to different individual perceptions of what the basic rule was. Of course there should be coherence between the rules for external and internal effects (see SR 2007, par. 59).

27. Now coming to the proposals made above, our concern was to have a clear default rule – thus avoiding language immediately calling for interpretation (such as, in our view, the BGB and CO solutions). There appeared to be three basic possibilities : release of one obligor fully releases the others; release of one obligor releases the others for the part of the released obligor; release of one obligor has no effect on the others' obligations – each time with the logical consequences as regards internal effects.

The third solution may at first sight appear strange : what could be the interest of a release if its effects can be annihilated by the subsistence of a contributory obligation ? A possible answer is that the released obligor does not carry any more the risk of insolvency of all its co-obligors, since it does not have to pay the full amount to the obligee and can only be bound to pay its contribution.

28. Consequently, three Variants are submitted :

Variant 1 provides that release of one obligor releases all others, unless the obligee has reserved its rights against them (first solution).

*Illustration:*

Obligee X has three obligors A, B and C, jointly and severally liable for 300. The respective shares are 3 x 100.

X releases A.  
B and C are also released.

Variant 2 provides that release of one obligor releases the others for the part of the released obligor, unless the obligee intends to release all obligors (second solution).

*Illustration :*

Obligee X has three obligors A, B and C, jointly and severally liable for 300. The respective shares are 3 x 100.

X releases A.

B and C are released for A's share of 100. B and C are jointly and severally liable for 200 (100 each).

They have no contributory claim against A.

Variant 3 provides that release of one obligor does not release the others, unless the obligee intends to release them totally or partially (third solution).

*Illustration :*

Obligee X has three obligors A, B and C, jointly and severally liable for 300. The respective shares are 3 x 100.

X releases A.

B and C are still jointly and severally liable for 300.

Since their respective shares are 100, they still have a contributory claim of 100 against A.

29. Whichever variant would be chosen would be a default rule. The respective logical consequences are attached as regards internal effects.

b) Settlement

30. See below, article 1.7.

**Article 1.7 (Settlement)**

**If the obligee grants a settlement reducing the share of one obligor,**

**a) the other obligors' joint and several obligations are reduced by the full initial amount of the settling obligor's share ;**

**b) the other obligors have no more contributory claim against the settling obligor.**

*Earlier discussions :*

31. It has just been said, under draft Article 1.6 above, that there was a lengthy discussion at Rome 2007 concerning the defences of release and settlement. Some of the opinions and examples discussed concerned cases of settlement reached between the obligee and one of the obligors. Should then the others be released by the full amount of the first obligor's part, or only by the amount of the settlement ? Though PECL (explicitly) and the OHADA draft (through the use of broad language) cover both release and settlement in a single provision, it appeared to some members of the Group that settlement and release could need to be treated

separately. Care should also be taken not to create disincentives to settle, though opinions differed as to whether certain proposed rules were incentives or disincentives (SR 2007, par. 56, 57, 62-64, 68-70, 77, 79-82).

*Commentary on the proposal :*

32. If PECL explicitly refers to settlement to submit it to the same provision as release (art. 10:108) (so does DCFR, art. 4:109), some other codifications seem to imply the same association through the use of broad language : see for instance the OHADA draft : “*when an obligee, by agreement, releases its rights against one of the solidary obligors ...*” (art. 10/10, 3°) or the Swiss Code of Obligations : “*if one of the joint and several obligors is released without the obligation being performed ...*” (art. 147, 2°).

The Italian Civil code stands out with a distinct provision on settlement (*transazione*) : “*Settlement made between the obligee and one of the joint and several obligors does not produce effects towards the other obligors, unless these declare their intent to benefit from it*” (art. 1304 par. 1). Remarkably, this solution is opposite to that which the same code provides for release, where release of one obligor in principle also releases the others (art. 1301).

33. In this context of joint and several obligations, can one assimilate settlement and release, or should one consider them differently ?

At first sight, a settlement that leads to a reduction of the amount due seems to be similar to a partial release, which could justify a common legal treatment. However, there is an important difference. A settlement is an agreement ending a dispute, where both parties usually make concessions. The reduction of the obligation granted by the obligee normally has counterparts; the obligor has also accepted to abandon or reduce some of its own claims. This means that reduction of the obligation through settlement cannot be treated as simply as a pure partial release.

Such distinction may not be so obvious to common lawyers, where release has to be agreed on in the form of a settlement because of the need for consideration. However, there is no requirement of consideration in the Principles (art. 3.2), and article 5.1.9 has explicitly accepted the concept of gratuitous release.

34. As with release, a distinction should be made depending on whether the settlement concerns the whole obligation, or only the part of one (or several but not all) obligor(s). In the former case, since there are reciprocal obligations, the settlement can only be effective towards the obligors who have agreed to it. This obvious solution probably does not call for a special provision (comp. art. 1304 par. 1 of the Italian Civil code, quoted above).

35. The draft provision concerns the case when the obligee wants to settle only with one obligor, this can only concern the latter’s share of the obligation. That share will be reduced while the other obligors’ shares will remain unchanged. However, the global, joint and several obligation is necessarily affected by that settlement with one of the obligors. It has to be reduced, but by which amount ? By the initial amount of the first obligor’s share, or only by the amount of the reduction the first obligor obtained through settlement ?

Supposing that the settling obligor has paid the agreed amount, we feel that the others’ joint and several obligation should be reduced by the full initial amount of the settling obligor’s

share. With the settlement with one obligor, the obligee has accepted to waive its claim to that full amount. It would be unfair that the other obligors would remain bound to pay that amount as part of the joint and several obligation. It also means that having paid the obligee, another obligor has no more contributory claim against the settling obligor; the opposite solution would deprive the latter from the benefit of the settlement, for which it has itself granted counterparts to the obligee. This would clearly be a disincentive to settle.

*Illustration :*

Obligee X has three obligors A, B and C, jointly and severally liable for 300. The respective shares are 3 x 100.

X reaches a settlement with A, in which X accepts to reduce A's share from 100 to 60. A pays 60 to X.

B and C's joint and several obligation is reduced to 200.

If B pays 200 to X, B can claim a contribution of 100 from C, but nothing from A.

A, of course, has no claim against B and C for the 60 paid to X.

36. This proposed rule is the adaptation to settlement of Variant 2 of Article 1.6 above concerning release. It seems to us that this is the most adequate solution for settlement, even if Variant 1 or Variant 3 were to be retained for release :

- In Variant 1, release of one obligor releases the co-obligors. A similar solution could not be adopted for settlement. An obligee having settled with concerning the share on one obligor cannot be deprived of its rights against the others.

*Illustration :*

Obligee X has three obligors A, B and C, jointly and severally liable for 300. The respective shares are 3 x 100.

X reaches a settlement with A, in which X accepts to reduce A's share from 100 to 60. A pays 60 to X.

In a solution corresponding to Variant 1 on release, B and C would be fully released.

This would be unfair to obligee X, who after waiving 40 from A would also lose the 200 still owed by B and C, with whom X did not settle.

- In Variant 3, release of one obligor does not release the others, who keep their contributory claim against the former. In the case of settlement with one obligor, who has paid part of its share, a similar rule does not seem to be appropriate. The other obligors cannot still be liable for the full amount. On the other hand, even if their obligation is reduced by the amount already paid by the settling obligor, granting them a contributory claim against the settling obligor for the difference would deprive the latter of the benefit of the settlement for which it has granted some counter-performance to the obligee.

*Illustration :*

Obligee X has three obligors A, B and C, jointly and severally liable for 300. The respective shares are 3 x 100.

X reaches a settlement with A, in which X accepts to reduce A's share from 100 to 60. A pays 60 to X.

In a solution corresponding to Variant 3 on release, B and C would still be jointly and severally liable for 300, which would enable the obligee to receive 360 (60 + 300) instead of 300, an unacceptable solution.

B and C's liability should at least be reduced by the amount of A's payment, making them jointly and severally liable for 240. Their contributory claim against A could only be 40, since A has already paid 60 to X. But obliging A to contribute those 40 would leave A with the loss of the counterparts granted to X in the settlement agreement.

At the present stage we believe that the proposed text of article 1.7 is the most appropriate for the hypothesis of settlement with one of the co-obligors, whichever Variant is retained for the different case of release.

37. Due to the real complexity of the subject and the difficulty, under some systems, to distinguish between release and settlement, another possibility would be not to have a special provision on settlement (but then we think it should not be assimilated to release in the black letters, in spite of the PECL and DCFR precedents. The Comments could have some explanations on the issues at stake.

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### ***Waiver of joint and several liability***

38. Several codifications provide that an obligee who renounces "solidarity" in favour of one of the obligors retains its "solidary" remedy against the other obligors for the whole debt (Italian Civil Code, art. 1311; Quebec Civil Code, art. 1532; OHADA draft, art 10/10, 2°). France and Belgium (art. 1210-1212) also have provisions on waiver of solidarity, but with a difference : the other obligors remain jointly and severally bound, but with the deduction of the first obligor's part.

39. Opinions were divided in Rome 2007 concerning the utility of such a provision, in the light of what could be decided as to the effects of release of one co-obligor. It was considered premature to take a final stand on whether a special provision on waiver of solidarity was needed until a decision was taken on release (SR 2007, par. 85-92).

40. Upon reflection, we believe the respective rules on release and waiver of joint and several liability are not interfering with each other. The two situations are very different.

*When an obligee releases one of the obligors, either the other obligees are also released (Article 1.7, Variant 1), or they are discharged for the share of the released obligor (Variant 2), or they are not discharged and they retain their contributory claim against the released obligor (Variant 3). In Variants 1 and 2, the released obligor has no more obligation, and waiver of joint and several liability in its favour would make no sense. Even in Variant 3, where the released obligor is still bound to contribute, this concerns the relationship between the released obligor and the other obligors; the obligee has no more claim against the obligor it has released, so here again, waiver of joint and several liability would make no sense.*

*On the contrary, when an obligor benefits from a waiver of joint and several liability, it is still bound to pay its share to the obligee. But it means that the obligee will no longer be entitled to claim the whole obligation from this obligor. The question is thus relevant to decide whether this waiver granted in favour of one obligor also benefits the others or not.*

41. However we propose not to have such a provision on waiver of solidarity. It only appears in a few codifications. Even though we believe the distinction with partial release is clear, some may consider that it might sometimes be difficult to draw in practice. Also this would be a rule on a special case of waiver, a difficult topic on which the Principles have no general rules.

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#### **Article 1.8** (*Expiration of limitation period*)

**Expiration of the limitation period of the obligee's rights against one joint and several obligor does not affect:**

- (a) **the obligations to the obligee of the other joint and several obligors; or**
- (b) **the rights of recourse between the joint and several obligors under article 1.11.**

*Earlier discussions :*

42. There was little discussion of this issue. When the PECL model (art. 10:110) was submitted, a member of the Group found the rule “*self-evident and therefore superfluous*”, but could nevertheless accept (SR 2007, par. 93-94).

*Commentary on the proposal :*

43. The general issue of the effect of the expiration of the limitation period benefiting one joint and several obligor on the other obligors' rights and obligations is also touched by the German B.G.B. (§ 425 : in principle, effects only for the obligor concerned). The Dutch N.B.W. has a provision concerning contributory claims (Book 6, art. 11 : an obligor asked to pay its contributory share can invoke limitation of the obligee's claim only if at the moment the obligation to contribute arose, both itself and the claiming co-obligor could have invoked such limitation).

Since the PECL provision had met no opposition, though it had not really been discussed at Rome 2007, a draft article inspired by it is submitted to the Group (DCFR art. 4:111 is identical to PECL art. 10:110).

#### **Article 1.9** (*Effect of judgment*)

**A decision by a court as to the liability to the obligee of one joint and several obligor does not affect:**

- (a) **the obligations to the obligee of the other joint and several obligors; or**
- (b) **the rights of recourse between the joint and several obligors under article 1.11.**

*Earlier discussions :*

44. The PECL model (art. 10:109) raised no objection at Rome 2007 (SR 2007, par. 95).

*Commentary on the proposal :*

45. A draft article inspired by the corresponding PECL provision is submitted to the Group. (DCFR art. 4:110 is identical to PECL art. 10:109).

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### ***Death of an obligor – Winding up or splitting of a company***

*Earlier discussions and commentary*

46. Some codifications consider the effect of the death of an obligor on its joint and several obligation, generally to provide that the obligation is in principle divided between the heirs. Two examples were submitted to the Group at Rome 2007 (Quebec Civil code, art. 1540; OHADA draft, art. 10/12; also see Italian civil code, art. 1295; French and Belgian Civil code, art. 1213). It was felt that such a provision would not be advisable in Principles governing international commercial contracts (SR 2007, par. 95) ; consequently it has not been included in the present draft.

The suggestion was made instead to contemplate cases of winding up and of splitting of companies. It was however objected that dealing with such matters would inevitably bring company law into play, which was for a number of reasons inadvisable (SR 2007, par. 95).

47. Upon reflection, this is also the Rapporteur's feeling, and no draft provision has been prepared at this stage.

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### **Article 1.10 (Apportionment between joint and several obligors)**

**As between themselves, joint and several obligors are liable in equal shares unless the circumstances indicate otherwise.**

*Earlier discussions :*

48. The corresponding PECL (art. 10:105) and OHADA (art. 10/11, 1) provisions were examined at Rome 2007 and inspired only one suggestion, to delete any reference to “the law” and to use the formula “under the circumstances indicate otherwise” (SR 2007, par. 98-103). (DCFR art. 4:106 (1) simply states the presumption of equal shares, omitting any reference to the contract or the law providing otherwise).

*Commentary on the proposal :*

49. The provision proposed in the first paragraph follows Rome 2007. This solution, that as between themselves, joint and several obligors are in principle liable in equal shares, is also adopted by several other codifications, such as the German B.G.B. (§ 426), the Swiss Code of obligations (art. 148), the Italian Civil code (art. 1299), the Quebec Civil code (art. 1537) and the Russian Civil code (art. 325). Other codifications just refer to the respective shares,

without presuming them to be equal (cf. French and Belgian Civil code, art. 1213, Dutch NBW, Book 6, art. 10, 1°).

A presumption that the respective shares are equal appears to be useful in case of doubt; indications to the contrary can always be taken into consideration.

50. A specific situation should be mentioned where precisely, circumstances would indicate another apportionment between obligors. It frequently happens that a person accepted to become jointly and severally bound with another, not because it had itself an interest in the obligation, but in order to provide security for the “main” obligor’s obligation. This situation is covered by some codifications, such as the French and Belgian Civil code (art. 1216), the Italian Civil code (art. 1298) or the Quebec Civil code (art. 1537 par. 2). In such circumstances, if the “intervening” obligor has paid the obligee, it can claim reimbursement of the whole amount from the “main” obligor.

One could envisage to include a distinct provision on this situation. One could also consider that it is adequately covered by the formula “*unless the circumstances indicate otherwise*”, but give it as a typical illustration in the Comments.

51. No rule corresponding to PECL 10:105 (2) is proposed, since it has been suggested not to retain joint and several liability for persons liable for the same damage (cf. above, art. 1.2).

#### **Article 1.11** (*Extent of contributory claim*)

**A joint and several obligor who has performed more than its share may claim the excess from any of the other obligors to the extent of each obligor's unperformed share.**

#### *Earlier discussions :*

52. The corresponding PECL provision (art. 10:106 (1)) was examined at Rome 2007. Some felt that it was self-evident or at least implicit in the equal shares principles just adopted (see above art. 1.11), but others disagreed and considered that such a rule was necessary. One member suggested to delete the last part concerning costs, fearing it could give rise to litigation (SR 2007, par. 104-108). (DCFR art. 4:107 (1) is identical to PECL art. 10:106 (1)).

#### *Commentary on the proposal :*

53. A similar basic rule on contributory recourse appears in many codifications, such as the French and Belgian Civil code (art. 1214), the Swiss Code of obligations (art. 148, 2°), the Italian Civil code (art. 1299), the Dutch NBW (Book 6, art. 10, 2°) or the Quebec Civil code (art. 1536). We suggest to have one in the Principles. The provision on the respective shares may be interpreted as implying the possibility of contributory recourse, but we feel this is such an important feature of the system of joint and several obligations that it should be explicitly stated.

54. We have followed the suggestion made in Rome 2007 not to take over the PECL rule concerning recovery of costs.

**Article 1.12** (*Rights and actions of the obligee*)

**A joint and several obligor to whom article 1.11 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.**

*Earlier discussions :*

55. The discussion was very brief when the corresponding provisions of PECL (art. 10:106, 2°) and OHADA (art. 10/11, 3°) were submitted at Rome 2007. One member favoured having such a rule. (DCFR art. 4:107 (2) is almost identical to PECL).

*Commentary on the proposal :*

56. Such a rule also frequently appears in other codifications, such as the French and Belgian Civil code (art. 1251, 3°), the German BGB (§ 426, 2°), the Swiss Code of obligations (art. 149, 1°), the Italian Civil code (art. 1303, 3°), the Dutch NBW (Book 6, art. 12) or the Quebec Civil code (art. 1656, 3°).

Subject to further discussion, we have included the rule in the draft.

**Article 1.13** (*Defences*)

**A joint and several obligor sued for reimbursement by the co-obligor who has performed the obligation may raise any common defences and rights of set-off that have not been asserted by the co-obligor against the obligee ; it may also assert defences and rights of set-off which are personal to itself, but not those which are purely personal to one or several of the other co-obligors.**

*Earlier discussions :*

57. Article 10/11, 4° of the OHADA draft, which served as a model for the proposed Article 1.14, was discussed at Rome 2007. Several clarifications were given. The text deals with defences against the obligee, not any defences that may exist between co-obligors. One member felt uneasy to think that the proposed rule would enable the obligee not only to choose the co-obligor who had no defence against it but also to transfer to the co-obligor who has paid in full the liability which the party having the defence would have had. It was answered that there was nothing wrong with that : it was inherent in joint and several liability, and similar to the consequences when one of the co-obligors becomes insolvent (see below, art. 1.15). It was suggested to make it clear that the defences at stake are those which already existed at the time joint and several liability arose (SR 2007, par. 111-121).

*Commentary on the proposal :*

58. The model of the proposed provision is the OHADA draft (art. 10/11, 4°), itself inspired by the Quebec Code (art. 1539). The corresponding provision in PECL allows the contributing obligor to assert only personal defences (art. 10:111, (2)). (DCFR art. 4:112 (2) is

identical). Subject to further research, other codifications seem to be silent on the matter. This provision has been retained since the issue is quite important between co-obligors. The solutions are coherent with those provided by article 1.4 (defences asserted against the obligee). Defences that may arise between obligors are another matter, which this provision does not cover.

As suggested at Rome 2007 (SR par. 121), the Comments will give examples of the different kinds of defences (coordinated with the Comments to article 1.4).

59. Attention should be given to the relationship between this article 1.13 and the provisions of articles 1.9 (b) and 1.10 (b) above, which state that neither the expiration of the limitation period of the obligee's rights against one joint and several obligor, nor a decision by a court as to the liability to the obligee of one joint and several obligor affect the rights of recourse between the joint and several obligors under article 1.11. This means that for the application of article 1.11, these two defences are not to be considered as personal defences. If a limitation period has expired in favour of co-obligor A and if B has paid the obligee, B still has a recourse against A – this can be justified as being a consequence of the risk accepted by A when it accepted to become a joint and several obligor.

Another possibility would be to reconsider articles 1.9 (b) and 1.10 (b). They could be deleted and the solutions entirely governed by article 1.13 (with the subsequent changes that A could assert against B the expiration of the limitation period – or a favourable court decision - in its favour, as personal defences).

#### **Article 1.14** (*Insolvency of a co-obligor*)

**If a joint and several obligor who has performed more than that obligor's share is unable, despite all reasonable efforts, to recover contribution from another joint and several obligor, the share of the others, including the one who has performed, is increased proportionally.**

#### *Earlier discussions :*

60. Two possible models were discussed in Rome on the issue of insolvency of one of the co-obligors (PECL, art. 10:106 (3)) and the OHADA draft (art. 10/11, 5°). Preference was expressed for the PECL model, with its requirement that the obligor exercising the recourse must first exert reasonable efforts to recover the insolvent co-obligor's share before all other shares are increased proportionally (SR 2007, par. 122-125).

#### *Commentary on the proposal :*

61. Proportional allocation between the other co-obligors of the loss resulting from insolvency of one of the co-obligor is the general solution in codifications that have a provision on the issue : French and Belgian Civil code, art. 1214 ; German BGB, § 426 ; Swiss Code of obligations, art. 148, 3°; Italian Civil code, art. 1299 ; Dutch NBW, Book 6, art. 13 ; Quebec Civil code, art. 1538 ; Russian Civil code, art. 325, 2°. As suggested at Rome 2007, PECL art. 10:106 (3), with its reference to reasonable efforts, has served as a model to the proposed provision. (DCFR art. 4:107 (3) is identical to PECL).

## Section 2 : Plurality of obligees

62. Plurality of obligees is traditionally treated as the “mirror image” of the chapter on plurality of obligors (which does not mean that all the rules are perfectly symmetrical). However, at Rome 2006, one member pointed out that recent research work tended to demonstrate that the two situations were actually very different and should be approached separately. It was also said that this other approach had been taken by the new Dutch code, but that it did not prove to be very successful (SR 2006, par. 155, 186-189).

63. Between the two sessions, the Rapporteur engaged into a discussion by correspondence with the collaborator of the Max-Planck Institute who had especially studied the alternative approach <sup>1</sup>. The Rapporteur was not totally convinced of the merits of this alternative approach, if only because practitioners could be disoriented by such departure from a well-know traditional approach <sup>2</sup>. At Rome 2007, the difficulties the new approach had created in Dutch law were explained. It was finally decided that the Rapporteur should follow the traditional approach (SR 2007, par. 134-137). This is done in the following draft provisions.

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### Article 2.1 (*Definitions*)

**When several obligees can claim performance of the same obligation from an obligor :**

- 1) the claims are separate when each obligee can only claim its share;**
- 2) the claims are joint and several when each obligee can claim the whole performance.**
- 3) the claims are joint when the obligor must perform to all obligees.**

### *Earlier discussions :*

64. Concerning terminology, it was suggested to use the same expressions “separate” and “joint and several” in the context of plurality of obligees as decided before concerning plurality of obligors (see above, under article 1.1) (SR 2007, par. 138).

A default rule on the respective shares when claims are separate was suggested on the model of article 10:202 of PECL (presumption of equal shares), but it was preferred not to include such a rule, in line with what had been decided concerning separate obligations (see above, under article 1.1) (SR 2007, par. 138-139).

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<sup>1</sup> According to this alternative approach, plural claims could be perceived as assets belonging to several persons. Consequently there could be as many claims as obligees, each obligee “owning” its “own” claim, or there could be co-ownership of the whole claim. In the latter case, the mechanisms of agency and authority (possibly also assignment) could 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. Cf. Posit. paper, pp. 17-18.

<sup>2</sup> Cf. Posit. paper, pp. 18-19.

*Commentary on the proposal :*

65. Though the language is different, the respective definitions of separate and joint and several claims can be compared to PECL, art. 10:201 and to DCFR, art. 4:202.

Similar definitions of joint and several claims appear for instance in the French and Belgian Civil code (art. 1197), the Swiss Code of obligations (art. 150, 1<sup>o</sup>), the Italian Civil code (art. 1292), the Quebec Civil code (art. 1541) and the Russian Civil code (art. 326, 1<sup>o</sup>).

66. Paragraph 3 retains the notion of “joint” claims, to be compared to PECL’s “communal” claims and to DCFR’s “joint” claims. It will be remembered that concerning plurality of obligors, it had been decided not to deal with the concept of communal obligations in the black letters, considering that the circumstances for which this concept was designed are relatively rare (see above, under art. 1.1). When the Group came to discuss plurality of obligees, it did not come back to the corresponding issue of communal claims (SR 2007, par. 138-164).

On the basis of some further information received, it is nevertheless suggested that in the context of plurality of obligees, it would be advisable to introduce such a concept. The main reason is that in this case (active plurality), the notion seems to have much practical interest. When there are several co-obligees, it is frequent that the obligor is bound to perform to all of them together, usually by having to pay to a joint account.

**Article 2.2** (*Presumption of joint claims*)

**When several obligees can claim performance of the same obligation from the same obligor, they are deemed to be joint obligees, unless the circumstances indicate otherwise.**

*Earlier discussions :*

67. It was initially suggested to state as the default rule that plural claims are deemed to be separate, unless the circumstances indicate otherwise. This is the solution in the OHADA draft (art. 10/14). The discussions at Rome 2007 lead to a different solution, presuming the claims to be joint and several. One of the reasons was the advantage of having similar default rules with respect to plurality of obligors (see above, art. 1.2, 1<sup>o</sup>) and of obligees (SR 2007, par. 143-157).

*Commentary on the proposal :*

68. Presumption of separate claims is retained as a default rule not only OHADA, as already indicated, but also by the Swiss Code of obligations (art. 150), the Dutch NBW (Book 6, art. 15, 1<sup>o</sup>), the Quebec Civil code (art. 1541) and the DCFR (art. 4:203 (2)). Subject to further research, other codifications contain no default provision on the issue. PECL, for instance, does not have such a default rule.

69. The proposal made at Rome 2007 to retain joint and several claims as the default rule would have led to an original solution. In the light of what has been said to justify the inclusion of joint claims as a third category of plurality of obliges, we suggest another original solution, to choose such joint claims as the default rule, considering that this is the most frequent situation in practice.

The exception is phrased in the same language as the corresponding one in art. 1.2,1°. The contract between the obligor and the different obligees may for instance provide that the claims will be separate, each obligee for its share, or joint and several, each obligee being allowed to claim the whole performance.

### **Article 2.3** (*Effects of joint and several claims*)

- (1) Any of the joint and several obligees can claim full performance from the obligor.**
- (2) Performance of an obligation in favour of one of the joint and several obligees releases the obligor towards the other obligees.**
- (3) When the obligor has been sued by a joint and several obligee, it can no longer perform to the other obligees.**

#### *Earlier discussions :*

70. Article 10:201, 1° of PECL (DCFR art. 4:202 (1) is almost identical) and the more explicit article 10/15 of the OHADA draft, inspired by articles 1542 and 1543 of the Quebec Civil code, were submitted as possible models at Rome 2007. One member thought the additional language contained in the OHADA draft was already implied by the concept of joint and several claims. Otherwise there were no further comments on the proposed texts (SR 2007, par. 158-161).

#### *Commentary on the proposal :*

71. The proposed provision is inspired by the models already indicated. Similar explicit provisions on the effects of joint and several claims on performance by the obligor appear in several codifications, such as the French and Belgian Civil code (art. 1197 and 1198), the Swiss Code of obligations (art. 150, 2° and 3°), the Italian Civil code (art. 1292) and the Russian Civil code (art. 326, 1° and 3°).

### **Article 2.4** (*Defences against joint and several claims*)

- (1) The obligor may assert against any of the joint and several obligees all the defences and rights of set-off that are personal to its relationship to that obligee or that it can assert against all the co-obligees, but may not assert defences and rights of set-off that are personal to its relationship to one or several of the other co-obligees.**
- (2) A release granted to the obligor by one of the joint and several obligees has no effect on the other obligees.**
- (3) The rules of articles 1.5, 1.7, 1.8 and 1.9 apply, with appropriate adaptations, to joint and several claims.**

*Earlier discussions :*

72. The corresponding provision of PECL (art. 10:205) was submitted at Rome 2007, and met with the Group's approval (SR 2007, par. 162-163). (DCFR art. 4:207 is identical to PECL).

*Commentary on the proposal :*

73. Even more so than concerning defences in joint and several obligations (see above, art. 1.4 to 1.10), domestic codifications can be far from comprehensive in their treatment of defences in joint and several claims. Sometimes, only some of them are covered (see for instance the French and Belgian civil code, art. 1198 and 1199). The Swiss Code of obligations does not even touch the matter. More general principles appear in other codifications (see for instance the Quebec Civil code, art. 1543 par. 2 and the Russian Civil code, art. 326, 2°). The Italian Civil code is the most extensive on the issue, perhaps due to the fact that joint and several claims and obligations are treated simultaneously (cf. art. 1297-1310). The German BGB deals with the specific defence of merger of obligation, before ruling by reference to the provisions on defences in joint and several obligations (§ 429, 2° and 3°).

This technique of ruling by reference has been adopted by article 10:205, 2° of PECL, and consequently by the proposed draft provision. Release deserves a special treatment. The general rule was also felt to be sufficiently important to be stated in an explicit form, in the first paragraph.

74. It is prudent to verify the different situations envisaged, through the following different illustrations submitted to discussion.

In each case, X, Y and Z are joint and several obligees. X claims performance from obligor A.

- General principle (art. 2.4, 1°)

*Illustration 1 :*

Obligor A may assert against co-obligee X the illegality of the obligation (a defence which could be asserted against all co-obligees) or the fraud through which X induced A to enter the contract (a defence personal to A's relationship with X), but not a similar fraud committed only by co-obligee Y (a defence personal to A's relationship with another obligee).

- Release (art. 2.4, 2°)

*Illustration 2:*

Co-obligee X grants a release to obligor A. This has no effect on co-obligees Y and Z, who are still entitled to claim full performance from A.

Obviously, other obligees Y and Z may also give their consent to the release.

On the other hand, one could also consider a variant according to which a release granted by one of the joint and several obligees would be effective towards the other obligees for the share of the releasing obligee. This is the solution of the French and Belgian (art. 1198), Italian (art. 1301) and Quebec (art. 1543) Civil codes.

*Illustration 3:*

Co-obligee X grants a release to obligor A. A is released from A's share of 100. Co-obligees Y and Z are still entitled to claim 200 (300 – 100) from A.

This is to be compared to Variants 1 and 2 proposed for the situation of joint and several obligors (article 1.6), but there is probably no necessity of parallelism.

- Settlement (art. 2.4, 3° referring to art. 1.7)

*Illustration 4:*

Co-obligee X pretends to settle for the whole obligation with obligor A, accepting to reduce the global amount. Co-obligees Y and Z not bound by this settlement, unless they have given their consent (comp. art. 1.7, 1°).

*Illustration 5:*

Co-obligee X settles with obligor A, accepting to reduce the amount of its share. Co-obligees Y and Z's joint and several claim against A is reduced by the full amount of X's share. Settling obligee X has no more recourse under article 2.5 against Y or Z (comp. art. 1.7, 2°).

This reference to art. 1.7 would be deleted if it were decided not to have a special rule of settlement in the section on plurality of obligors (see above under art. 1.7).

- Performance, set-off (art. 2.4, 3° referring to art. 1.5)

*Illustration 6:*

Co-obligee X receives full performance of the obligation from obligor A. This discharges A also against co-obligees Y or Z.

*Illustration 7:*

Obligor A exercises a right of set-off towards co-obligee X. Up to the discharged amount, A is also discharged against co-obligees Y or Z.

- Limitation (art. 2.4, 3° referring to art. 1.8)

*Illustration 8:*

Co-obligee X's claim against obligor A is time-barred. This does not affect co-obligees Y and Z's claims against A. If Y or Z receives performance from A, X can claim its share from Y or Z.

- Effect of judgment (art. 2.4, 3° referring to art. 1.9)

*Illustration 9:*

A judgment affects the rights or obligations of co-obligee X towards obligor A. Neither the rights of co-obligees Y or Z against A nor their recourses between themselves under article 2.5 are affected.

**Article 2.5** (*Effects of joint claims*)

**Joint obligees have to sue together, unless the circumstances indicate otherwise.**

*Earlier discussions :*

75. Joint claims have not been discussed before (see above, under art. 2.1).

*Commentary on the proposal :*

76. This provision states as a default rule that joint obligees have to sue together. This is different from PECL art. 10:201 (3) and DCFR art. 4:202 (3), which allow any creditor to require performance for the benefit of all. As already mentioned (cf. above, under art. 2.1), this does not necessarily correspond to practice. Co-obligees may grant one of them (or each other) authority to sue the obligor for the benefit of all, but this cannot be presumed. It should be left to contractual arrangements, which would then be covered by “the circumstances indicating otherwise”.

**Article 2.6** (*Defences against joint claims*)

**(1) The obligor may assert against the joint obligees only the defences and rights of set-off that it can assert against all of them.**

**(2) A release granted to the obligor by one of the joint obligees has no effect.**

*Earlier discussions :*

77. Joint claims have not been discussed before (see above, under art. 2.1).

*Commentary on the proposal :*

78. Due to the nature of joint claims, the obligor may only assert common defences, and no co-obligee can on its own initiative grant any release to the obligor. For the same reasons, the special rules of articles 1.5 (performance and set-off), 1.7 (settlement), 1.8 (limitation) and 1.9 (effect of judgment) do not apply to joint claims “with appropriate adaptations”, as they do to joint and several claims (see above, art. 2.4).

**Article 2.7** (*Allocation between joint or joint and several obligees*)

**(1) Joint obligees and joint and several obligees are entitled to equal shares, unless the circumstances indicate otherwise.**

**(2) An obligee who has received more than its share must transfer the excess to the other obligees to the extent of their respective shares.**

**Earlier discussions :**

*Earlier discussions :*

79. The corresponding, and very similar, provisions of PECL (art. 10:204) and OHADA (art. 10/16) were submitted at Rome 2007, and met with the Group's approval (SR 2007, par. 164).

*Commentary on the proposal :*

80. The proposed provision is inspired by the PECL model (DCFR art. 4:206 is similar). The principle of equal shares is also expressed in some other codifications, such as the German BGB (§ 430), the Italian Civil code (art. 1298) and the Russian Civil code, art. 326, 4°. The obligation to transfer performance received in excess of one's share is most often implicit. The proposal has extended the rules to joint obligees.