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**Placement of the new draft Chapters in the third edition of the  
UNIDROIT Principles**

(Memorandum of the UNIDROIT Secretariat)

The third edition of the UNIDROIT Principles will address four new topics: restitution, illegality, plurality of obligors and/or obligees, and conditions. While restitution is dealt with in a number of provisions intended to be included in the chapters concerning the different cases of failure of contracts, i.e. avoidance for defects of consent, termination for non-performance, illegality, and fulfilment of a resolutive condition, the other three topics are the subject of chapters of their own, the placement of which has still to be decided. With respect to these new chapters the suggestions put forward below are based on two main criteria: first, to identify for the new chapters the most appropriate place from a systematic point of view, and second, to disrupt as little as possible the present structure and numbering of the UNIDROIT Principles.

## 1. RESTITUTION

The draft Rules on Restitution (UNIDROIT 2010 - Study L – Doc. 114) comprise three articles dealing with restitution in case of avoidance (Article 3.18) and with restitution in case of termination (Articles 7.3.6 and 7.3.7). Other provisions on restitution are Article 2 of the draft Chapter on Illegality (UNIDROIT 2010 - Study L – Doc. 116) and Article 5 of the draft Chapter on Conditions (UNIDROIT 2010 - Study L – Doc. 118). It is suggested to put

- Article 3.18 in the new Section 2 (“Defects of consent”) of Chapter 3 (see below);
- Articles 7.3.6 and 7.3.7 in Section 3 (“Termination”) of Chapter 7;
- Article 2 of the draft Chapter on Illegality in the new Section 3 (“Illegality”) of Chapter 3 (see below);
- Article 5 of the draft Chapter on Conditions in the new Section 2 (“Conditions”) of Chapter 5 (see below).

## 2. ILLEGALITY

The draft Chapter on Illegality (UNIDROIT 2010 - Study L – Doc. 116) comprises two articles. It is suggested that they be put in a section of their own to be included in Chapter 3 which should be divided into three sections:

- Section 1, entitled “General provisions” and composed of Article 3.1.1 (“Scope of the chapter) (new) (replacing Article 3.1 of the present Chapter 3 and defining the scope of the chapter), and of Articles 3.1.2 and 3.1.3 (corresponding to the present Articles 3.2 and 3.3 and dealing with the validity of mere agreements and with initial impossibility, respectively);
- Section 2, entitled “Defects of consent” and composed of Articles 3.2.1 to 3.2.13 (corresponding to Articles 3.4 to 3.16 of the present Chapter 3), Article 3.2.14 (corresponding to paragraph 1 of Article 3.17 of the present Chapter 3), Article 3.2.15 (“Restitution”) (new), and Articles 3.2.16 to 3.2.18 (corresponding to Articles 3.18 to 3.20 of the present Chapter 3);
- Section 3, entitled “Illegality” and composed of Articles 3.2.1 (“Contracts infringing mandatory rules”) and 3.2.2 (“Restitution”).

### 3. CONDITIONS

The draft Chapter on Conditions comprises five articles. It is suggested that they be put in a section of their own to be included in Chapter 5 which should be divided into three sections:

- Section 1, corresponding to the present Section 1 (“Content in general”);
- Section 2, entitled “Conditions” and composed of Articles 5.2.1 (“Types of condition”), 5.2.2 (“Effect of conditions”), 5.2.3 (“Duty to preserve rights”), 5.2.4. (“Interference with conditions”) and 5.2.5 (“Restitution in case of fulfilment of a resolute condition”);
- Section 3, corresponding to the present Section 2 (“Third party rights”).

### 4. PLURALITY OF OBLIGORS AND/OR OBLIGEES

It is suggested that the draft Chapter on Plurality of Obligors and/or Obligees, composed of two sections, be placed between Chapter 8 on Set-off and Chapter 9 on Assignment of Rights, Transfer of Obligations, Assignment of Contracts, thereby becoming the new Chapter 9, while the present Chapter 9 on Assignment of Rights, Transfer of Obligations, Assignment of Contracts, and Chapter 10 on Limitation Periods would become Chapter 10 and Chapter 11, respectively.

**UNIDROIT PRINCIPLES 2010****CONTENTS**

*(The new provisions are indicated in bold)*

PREAMBLE *(Purpose of the Principles)*

**CHAPTER 1: GENERAL PROVISIONS**

- Article 1.1 *(Freedom of contract)*
- Article 1.2 *(No form required)*
- Article 1.3 *(Binding character of contract)*
- Article 1.4 *(Mandatory rules)*
- Article 1.5 *(Exclusion or modification by the parties)*
- Article 1.6 *(Interpretation and supplementation of the Principles)*
- Article 1.7 *(Good faith and fair dealing)*
- Article 1.8 *(Inconsistent behaviour)*
- Article 1.9 *(Usages and practices)*
- Article 1.10 *(Notice)*
- Article 1.11 *(Definitions)*
- Article 1.12 *(Computation of time set by parties)*

**CHAPTER 2: FORMATION AND AUTHORITY OF AGENTS****Section 1: Formation**

- Article 2.1.1 *(Manner of formation)*
- Article 2.1.2 *(Definition of offer)*
- Article 2.1.3 *(Withdrawal of offer)*
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- Article 2.1.6 *(Mode of acceptance)*
- Article 2.1.7 *(Time of acceptance)*
- Article 2.1.8 *(Acceptance within a fixed period of time)*
- Article 2.1.9 *(Late acceptance. Delay in transmission)*
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- Article 2.1.13 *(Conclusion of contract dependent on agreement on specific matters or in a particular form)*
- Article 2.1.14 *(Contract with terms deliberately left open)*
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- Article 2.1.16 (*Duty of confidentiality*)
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- Article 2.1.20 (*Surprising terms*)
- Article 2.1.21 (*Conflict between standard terms and non-standard terms*)
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**Section 2: Authority of agents**

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- Article 2.2.2 (*Establishment and scope of the authority of the agent*)
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**CHAPTER 3: VALIDITY**

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- Article 3.1.2 (*Validity of mere agreement*)
- Article 3.1.3 (*Initial impossibility*)

**Section 2: Defects of consent**

- Article 3.2.1 (*Definition of mistake*)
- Article 3.2.2 (*Relevant mistake*)
- Article 3.2.3 (*Error in expression or transmission*)
- Article 3.2.4 (*Remedies for non-performance*)
- Article 3.2.5 (*Fraud*)
- Article 3.2.6 (*Threat*)
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- Article 3.2.8 (*Third persons*)
- Article 3.2.9 (*Confirmation*)
- Article 3.2.10 (*Loss of right to avoid*)
- Article 3.2.11 (*Notice of avoidance*)
- Article 3.2.12 (*Time limits*)
- Article 3.2.13 (*Partial avoidance*)
- Article 3.2.14 (*Retroactive effect of avoidance*)
- Article 3.2.15** (*Restitution*)
- Article 3.2.16 (*Damages*)

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<sup>1</sup> **Article 3.1.1** (*Scope of the Chapter*)

(1) This Chapter deals with:

- (a) mistake, fraud, threat and gross disparity;
- (b) illegality.

(2) It does not deal with lack of capacity.

- Article 3.2.17** (*Mandatory character of the provisions*)<sup>2</sup>  
 Article 3.2.18 (*Unilateral declarations*)

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<sup>2</sup> **Article 3.2.17** (*Mandatory character of the provisions*)

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## UNIDROIT Principles 2004

### CHAPTER 3 — VALIDITY

#### ARTICLE 3.1

*(Matters not covered)*

**These Principles do not deal with invalidity arising from**

- (a) lack of capacity;**
- (b) immorality or illegality.**

#### ARTICLE 3.2

*(Validity of mere agreement)*

**A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.**

#### ARTICLE 3.3

*(Initial impossibility)*

**(1) The mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract.**

**(2) The mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates does not affect the validity of the contract.**

[...]

#### ARTICLE 3.17

*(Retroactive effect of avoidance)*

**(1) Avoidance takes effect retroactively.**

**(2) On avoidance either party may claim restitution of whatever it has supplied under the contract or the part of it avoided, provided that it concurrently makes restitution of whatever it has received under the contract or the part of it avoided or, if it cannot make restitution in kind, it makes an allowance for what it has received.**

#### ARTICLE 3.18

*(Damages)*

**Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract.**

#### ARTICLE 3.19

*(Mandatory character of the provisions)*

**The provisions of this Chapter are mandatory, except insofar as they relate to the binding force of mere agreement, initial impossibility or mistake.**