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**Draft Chapter
on
Plurality of Obligors and/or Obligees**

Revised draft rules with Comments prepared by Professor Marcel Fontaine in the light
of the discussions of the Working Group at its 3rd session held in Rome, 26-29 May
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INTRODUCTION TO THE DRAFT

This is a revised draft of the future chapter of the Unidroit Principles on Plurality of obligors and/or obligees, taking into account the discussions which took place at the Rome meeting in 2008. The document has been prepared for the Rome meeting of May 25-29, 2009.

For the first time, Comments are submitted. “*Notes by the Rapporteur*” are explanations given to the members of the Working Group.

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Abbreviations

Posit. Pap. 2007 = Unidroit 2007 – Study L – Doc. 102 (*Position Paper submitted by the Rapporteur to the Rome meeting in 2007*)

SR 2007 = Unidroit 2007 – Study L – Misc. 27 (*Summary records of the Rome meeting in 2007*)

Draft 2008 = Unidroit 2008 – Study L – Doc. 107 (*draft submitted by the Rapporteur to the Rome meeting in 2008*)

SR 2008 = Unidroit 2008 – Study L – Misc. 28 (*Summary records of the Rome meeting in 2008*)

Section 1 : Plurality of obligors

Article 1.1 (Definitions)

When several obligors are bound by 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.**

COMMENT

This Chapter deals with situations where an obligation binds several obligors, or gives rights to several obligees.

Section 1 concerns plurality of obligors, the more common situation.

1. Several obligors

There are frequent cases when an obligation binds several obligors.

Illustrations

1. Companies A, B and C decide to join efforts to penetrate a new market abroad. They need financing and they obtain a loan together from Bank X.
2. Further to the submission they have filed together, Contractors A and B are awarded the contract for the construction of a bridge.
3. A large industrial plant has to be insured against fire and other hazards. The risk is too large for the capacity of any single insurer. Several insurers co-insure the risk.
4. Bank X grants a loan to Company A and but requires suretyship. Mother Company B accepts to bind itself with Company A to reimbursement of the loan.

2. The same obligation

This Section only applies if the different obligors are bound by the same obligation.

It also frequently happens that several obligors are involved in the same operation, but with distinct obligations.

Illustration

5. A new airplane is being conceived. Many sub-contractors are involved in the various elements. For instance, Sub-contractor A is in charge of profiling the wings

and Sub-contractor B of studying the electronic equipment. Their respective obligations are different. They are not subject to the rules in the present Section, but to the respectively applicable legal provisions.

The “same obligation” usually arises from a single contract, but not necessarily. In Illustration 1 and 2 above, there will normally be a single loan contract, or a single construction contract binding the different obligors. But in co-insurance (Illustration 3), it is frequent that each insurer, even though undertaking to cover the same risk, has its own distinct contract with the insured. The suretyship offered in Illustration 4 will often be granted in a distinct contract. Other examples of obligations being undertaken by a different contract appear when obligations are transferred by agreement (see below, Article 9.2.1 *et seq.*).

However the obligations concerned must be contractual, whether they stem out of a single or out of several contracts. Tortious obligations of multiple tortfeasors are not ruled by the present Chapter, since these Principles govern international commercial contracts. But contractual damage claims may fall under this Chapter.

3. Two main types

Article 1.1 defines the two main types of obligations appearing in practice when several obligors are bound by the same obligation towards an obligee.

Either each obligor is bound for the whole obligation, which means the obligee may require performance from any one or more of them (see below, article 1.3), subject to contributory claims between obligors at a later stage (see below, article 1.10).

Or each obligor is bound only for its share, entitling the obligee to claim only that much from each of the obligors.

In the former situation, which will be the default rule (see below, article 1.2), obligations are called “joint and several”. In the latter situation, obligations are called “separate”.

4. Other possible situations

These two main types are the most common, but this Section does not intend to cover all possible arrangements.

Other situations which can occur are those of so-called “communal” obligations, in which the obligors are bound to render performance together, and the obligee may claim performance only from all of them together. A sometimes cited example is that of a group of musicians having undertaken to perform a string quartet. Situations of this type are of less practical importance. When they occur, they are subject to their own contractual arrangements, which often treat them as either separate or joint and several obligations.

Note by the Rapporteur

The black letters were already accepted at Rome 2008. In the opening sentence, “undertake” has been replaced by “are bound”. The suggestions made for inclusion in the Comments have been taken into consideration. Cf. SR 2008, Nos. 370-376.

For earlier discussions, see Draft 2008, Nos. 1-5.

Article 1.2
(Presumption of joint and several obligations)

When several obligors are bound by the same obligation towards the same obligee, they are presumed to be jointly and severally bound, unless the circumstances indicate otherwise.

COMMENT

1. Default rule

In commercial practice the normal case is that several obligors having undertaken the same obligation are jointly and severally bound towards the obligee. This justifies the default rule expressed in Article 1.2.

Illustration

1. Companies A, B and C have together obtained a loan from Bank X (as in Illustration 1 under Article 1.1). The loan contract fails to indicate how each of them is bound. They are presumed to be joint and several obligors, i.e., towards the bank, each of them is bound for the whole amount of the loan.

2. Circumstances indicating otherwise

The presumption of joint and several obligations is rebutted when the circumstances indicate otherwise. This will often be the result of an explicit contractual provision to the contrary.

Illustration

2. Insurers A, B and C have agreed to co-insure an industrial plant (as in Illustration 3 under Article 1.1). The scheme will usually provide that each co-insurer is only bound for a percentage of the risk.

Other circumstances can also discard the presumption that plural obligors are jointly and severally bound.

Illustration

3. In a similar co-insurance arrangement, Insurers D, E and F have omitted to stipulate that they are not jointly and severally bound. However, the very purpose of co-insurance is to cover large risks without putting any insurer beyond the limits of its own capacity. This can be considered as a circumstance indicating that Insurers D, E and F are only bound for their respective shares.

Note by the Rapporteur

This default rule has already been accepted by the Group. The black letters have been amended on two questions of terminology raised at Rome 2008 : “liable” has been replaced by “bound”, and “deemed” has been replaced by “presumed”. Cf. SR 2008, Nos. 377-303.

For earlier discussions, see Draft 2008, Nos. 9-11.

Article 1.3

(Obligee’s rights against joint and several obligors)

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

COMMENT

The main effect of joint and several obligations from the obligors’ point of view has already been stated in the definition given in Article 1.1 above : each obligor is bound for the whole obligation.

Article 1.3 states the main effect for the obligee : it may require performance from each obligor, until full performance has been received.

Illustrations

1. Farmers A, B and C have bought a tractor together, for shared use in their respective fields. They are jointly and severally bound to pay the price of USD 45,000. Seller X may require payment of the whole sum from A, B or C. X’s claim is extinguished when it has received full performance, from one of more of its obligors.

2. In the preceding illustration, in case A pays only USD 30,000 (in spite of being bound for USD 45,000), X may then claim USD 15,000 from B or C. If X, at this stage, only receives USD 10,000 from B (though B was still bound for USD 15,000), X may still claim USD 5,000 from C.

Note by the Rapporteur

The black letters were accepted at Rome 2008, subject to linguistic amendments which have been taken into consideration : “several obligors” has been replaced by “obligors”, “liable” by “bound”, “any one of them” by “any one or more of them” and “the whole performance” by “performance”. Cf. SR 2008, Nos. 384-392.

For earlier discussions, see Draft 2008, No. 15.

Article 1.4

(Availability of defences and rights of set-off)

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 or rights of set-off that are personal to one or several of the other co-obligors.

COMMENT

This provision deals with the possibilities for a joint and several obligor to assert different defences and rights of set-off. It distinguishes between, on one side, defences and rights of set-off that are personal to one of the obligors, or common to all of them, and, on the other side, defences and rights of set-off which are personal to one or several of the other co-obligors.

Illustrations

1. Together, Companies A, B and C have bought from Licensor X a licence permitting shared use of know-how apt to improve the manufacture of their respective products. The royalties are in principle jointly and severally due. Company A then discovers that when it joined B and C in purchasing the licence, it was under the influence of a relevant mistake, within the meaning of Article 3.5 of these Principles : the concerned technology is not adequate for A's manufacturing process. If X requires Company A to pay the royalties, A may invoke its own mistake against X. On the contrary, if B and C did not make any similar mistake when purchasing the license (they can use the technology), they may not refuse to pay the royalties if invited by X, because the defence is personal to A. But if all were mistaken, each obligor may invoke the mistake against X.

2. Companies A and B jointly and severally have undertaken to purchase a certain quantity of steel abroad, from Seller X. Government authorities in the buyers' country declare an embargo on all trade with X's country, rendering the purchase illegal. This is a common defence which each of the co-obligors may assert against X.

3. Bank X has loaned EUR 2,000,000 to joint and several obligors A and B. As a result of the selling of shares belonging to A on the stock market, Bank X then becomes A's obligor for an amount of EUR 500,000. Obligor A may exercise its right of set-off against Bank X, with the effects provided in Article 1.5 below. On the contrary, Obligor B may not assert this right, which is personal to A.

Note by the Rapporteur

The black letters were accepted at Rome 2008, subject to linguistic amendments which have been taken into consideration : "defences and rights of set-off" was replaced by

“defences or rights of set-off”, and “purely personal” by “personal”. The title has also been modified, since the previous heading (“Defences in general”) was misleading. Article 1.4 is not a general provision as opposed to special rules stated the following provisions. Actually the levels are different : article 1.4 deals with the availability of all defences and rights of set-off, while the following provisions deal with the effects of asserting some of these defences or rights on the other obligors’ obligations. Cf. SR 2008, Nos. 393-396.

For earlier discussions, see Draft 2008, No. 17.

Article 1.5

(Effect of 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.

COMMENT

1. Performance by a joint and several obligor

If one of the co-obligors has already performed the obligation, fully or partially, the other obligors may successfully assert this as a defence should the obligee still attempt to claim performance from them.

Illustrations

1. Companies A, B and C are jointly bound to reimburse a loan of EUR 100,000. Upon Lender X’s request, Company A fully reimburses the loan. Co-obligors B and C can avail themselves of Company A’s performance in case Lender X would still claim against them.
2. In the same circumstances, Company A could only reimburse EUR 30,000. Companies B are still jointly and severally bound for EUR 70,000 (see above, Article 1.3), but they may invoke Company A’s partial payment in case Lender X would still require the full amount from them.

2. Set-off

A similar rule is applicable in the case of set-off between the obligee and one of the obligors. Rights of set-off were already mentioned in Article 1.4, where the issue was to determine which of the co-obligors could assert rights of set-off. Article 1.5 deals with the subsequent issue of the effects of set-off, once it has been exercised (on the rules governing set-off itself, see Articles 8.1 to 8.5 of these Principles).

Illustration

3. As in the preceding illustrations, Companies A, B and C are jointly bound to reimburse a loan of EUR 100,000 to Lender X. However, in a different context, Company A has become X's obligee for an amount of EUR 60,000. If Company A exercises its right of set-off against X by serving appropriate notice (as provided in Article 8.1.3 of these Principles), it will have the same effect as partial performance by A of its joint and several obligation, thus discharging B and C for the corresponding amount.

The same rule applies if the right of set-off has been exercised by the obligee against one of the joint and several obligors.

Illustration

4. The initial facts are the same as in Illustration 4, but it is X who takes the initiative to give the set-off notice to A. The effects are identical. Company A is discharged for the amount of set-off (EUR 60,000), and the other co-obligors B and C are also discharged for the same amount.

3. Other circumstances

There can be other circumstances where an obligation can be discharged without being performed, such as the case of merger of obligations. This can happen when an obligor inherits from its obligee (or vice-versa), or, in a situation more relevant in the context of international trade, when the obligor and obligee companies merge.

However, since the Principles do not include any chapter on merger of obligations, no specific black letter rule has been provided concerning the effect of merger of obligations on joint and several obligors.

Note by the Rapporteur

The black letters were accepted at Rome 2008, subject to linguistic amendments which have been taken into consideration : “liable” was replaced by “bound”, “any one of them” by “any one or more of them” and “the whole performance” by “performance”. The title has been made more precise (“Effects” of performance and set-off). Cf. SR 2008, Nos. 397-401.

The Comments include a reference to merger of obligations (point 3), as suggested at Rome 2008 (No. 397).

For earlier discussions, see Draft 2008, No. 19.

Article 1.6
(Effect of release or settlement)

(1) Release of one joint and several obligor, or settlement with one joint and several obligor, discharges all the other obligors for the share of the released or settling obligor, unless the circumstances indicate otherwise.

(2) When the other obligors are discharged for the share of the released obligor, they have no more contributory claim against the released obligor under article 1.10.

COMMENT

1. Release of one joint and several obligor

If the obligee releases one of its joint and several obligors with no further specification, the default rule stated in Article 1.6 is that the release concerns the share of the released obligor only, as determined by Article 1.9 below. As a consequence, the other obligors are discharged for the share of the released obligor only, and remain bound for the difference.

Illustration

1. Bank X lends EUR 300,000 to Companies A, B and C. The obligors are jointly and severally bound; their respective contributory shares are equal, i.e. EUR 100,000 each. Bank X releases Company A, with no further specification. The consequence for Companies B and C is that they are released for the amount of Company A's share of EUR 100,000. Companies B and C remain jointly and severally bound towards Bank X for an amount of EUR 200,000.

2. Settlement with one joint and several obligor

Sometimes the obligee receives payment from one of the co-obligors of an amount less than that obligor's share as determined by Article 1.9 below, as part of a separate settlement with that obligor, pursuant to which the payment received is accepted as discharging all of the settling obligor's share. Consequently, the other obligors' joint and several obligations are reduced by the full initial amount of the settling obligor's share, and not only by the paid amount.

Illustration

2. Investors A, B and C are jointly and severally bound to pay USD 3,000,000 to Seller X for an acquisition of shares. Investor A and Seller X come to a settlement of different disputes between themselves. One of the terms of the settlement is that Investor A will be discharged of its obligations towards Seller X under the share purchase agreement by paying an amount of USD 600,000, i.e. USD 400,000 less than Investor A's contributory share towards the other co-obligors. Under such circumstances, Seller X may not claim the whole remaining USD 2,400,000 against Investors B and C. Their joint and several obligations are reduced by the full initial

amount of Company A's share, i.e. USD 1,000,000. They are still jointly and severally bound for USD 2,000,000 only.

3. No more contributory claim

When the obligee has released one of the co-obligors, or settled with it, and the other co-obligors have been discharged of the released obligor's share, the other co-obligors have no more contributory claim against the released obligor.

Illustrations

3. In Illustration 1, Company A was released by Bank X, while Companies B and C remained jointly and severally bound for an amount of EUR 200,000. If Company B pays EUR 200,000 to Bank X, it has a contributory claim of EUR 100,000 against Company C, but no claim against Company A.

4. In Illustration 2, Investors B and C remained jointly and severally bound for an amount of USD 2,000,000. If Investor B pays USD 2,000,000 to Seller X, it has a contributory claim of USD 1,000,000 against Investor C; but it has no claim against Investor A, even though the latter has paid only USD 600,000 to Seller X, as agreed in their separate settlement.

4. Circumstances indicating otherwise

There can be circumstances where the other obligors are discharged for another amount than that of the released or settling obligor's share.

For instance, the obligee may release one of its obligors only for part of the latter's share, as determined by Article 1.9 below. The other obligors will be discharged only for the amount of that released part. All obligors will remain jointly and severally bound for the reduced total amount.

Illustration

5. In the same situation as in Illustration 1, Bank X releases Company A for an amount of EUR 60,000. The consequence for Companies B and C is that they are released for the same amount of EUR 60,000. Companies A, B and C remain jointly and severally bound towards Bank X for an amount of EUR 240,000.

On the other hand, the obligee may also intend to fully release all of its obligors. If the obligee expresses its intention to do, Article 1.6 will not be applicable.

As to settlement, it will very frequently not be separate, but concern all joint and several obligors. The consequences on the different obligors' obligations will then be determined by the terms of the settlement agreed by all parties, and the contributory claims will be adjusted accordingly.

Note by the Rapporteur

This article 1.6 is a new proposal to merge into a single provision the rules on release and settlement, formerly contained in distinct articles (1.6 and 1.7),

Release and settlement have generated much debate in the Group (see Draft 2008, No. 22 and 31, SR 2008, Nos. 402-407 and 418-443). Concerning release, Variant 2 was retained at Rome 2008 after discussion of three submitted Variants. Concerning settlement, the Rapporteur was invited to redraft the provision along certain lines. It turned out that the respective solutions were basically identical : the other obligors were released for the share of the released or settling obligor. Under such circumstances, we suggest that it is sensible to have one single provision covering both release and settlement.

This was actually our starting point, given the precedents of PECL, art. 10:108 and DCFR, art. III-4:109 (it will be recalled that, with the exception of the Italian Civil code, none of the consulted domestic codifications even refers to settlement; sometimes, however, instead of “release”, they use broad formulas that could be interpreted as covering settlement as well as release). But then we considered other solutions, which could have been different for the two situations, and this led to discussing successive versions of separate provisions. If at the end of the day we decide to have the same rule, there is no more reason to have separate provisions, provided the Comments give the necessary explanations and illustrations.

Merging had already been suggested by some members of the group during earlier discussions. It may also have the advantage of reducing the risks deriving from different perceptions that could exist of the meaning of “settlement”. Finally, one should also point out that in article 5.1.9 of these Principles concerning “release by agreement”, the Comments explicitly include settlement in the concept of release.

The formula “unless the circumstances indicate otherwise” has been added to the basic rule, to insure the necessary flexibility. Our discussions have revealed that the issues of release and settlement are very complex, and that many different arrangements can occur in practice. The Comments give some examples.

Article 1.7

(Effect of expiration or suspension of limitation period)

(1) 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 1.10.

(2) If the obligee initiates proceedings under Articles 10.5, 10.6 or 10.7 against one joint and several obligor, the running of the limitation period is also suspended against the other joint and several obligors.

COMMENT

1. Expiration of the limitation period against one obligor

It can happen that the obligee's rights against one (or several) of the joint and several obligors have become time-barred. This will not prevent the obligee from exercising its claim against other co-obligors whose obligations are not yet affected by limitation.

Illustration

1. Consultant X claims that Companies A and B are jointly and severally bound to pay fees of USD 500,000 on January 1, 2006. A and B refuse to pay, arguing that the services rendered by X were unsatisfactory. The parties enter into lengthy discussions. In the course of 2008, Company B finally acknowledges Consultant X's rights, but Company A continues to challenge them. In March 2009, X finally sues both clients for payment. More than three years after the date when X's fees were due (see article 10.2 of these Principles), X's claim against Company A is time barred. The situation is different for Company B, who has acknowledged the right of the obligee before the expiration of the limitation period, thus triggering the running of a new period (see article 10.4 of these Principles). Consultant X can still claim USD 500,000 from Company B.

Co-obligors who have paid the obligee under such circumstances can exercise their rights of recourse pursuant to article 1.10 below, even against the co-obligor who could avail itself of limitation against the obligee. Such rights of recourse are subject to their own limitation periods.

Illustration

2. In the case described in Illustration I, Company B, after paying USD 500,000 to Consultant X, can claim contribution against Company A under Article 1.10 below.

2. Suspension of the limitation period against one obligor

Initiation by the obligee of legal or arbitral proceedings or an A.D.R. procedure against one of the joint and several obligors suspends the running of the limitation period against that obligor, under Articles 10.5, 10.6 or 10.7 of these Principles. Article 1.7 (2) extends the effect of suspension against the other co-obligors.

Illustration

3. Co-buyers A and B are jointly and severally bound to pay a price of GBP 800,000 to Seller X, which was due on December 31, 2005. In spite of several reminders, A and B are still in default near the end of the three-year limitation period. On December 20, 2008, Seller X initiates legal proceedings against Buyer A. The limitation period is suspended not only against Buyer A, but also against Buyer B.

The rule in Article 1.7 (2), which creates effects towards all co-obligors, corresponds to a different approach than the rule in Article 1.7 (1), which provides for individual effects. There is no contradiction, since different effects are concerned : those of expiration of the limitation period, and those of initiating legal proceedings. The solution retained in paragraph (2) has the cost advantage of avoiding the necessity to initiate proceedings against all obligors. The obligee will however keep in mind the rule in article 1.8, concerning effect of judgment.

Note by the Rapporteur

The provision in Paragraph (1) has been accepted at Rome 2008. Cf. SR 2008, Nos. 446-447.

Further to the wish expressed at Rome 2008 (SR 2008, Nos. 448-451), Paragraph (2) is submitted as a new rule dealing with suspension of limitation.

For earlier discussions, see Draft 2008, No. 42.

Article 1.8 *(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 1.10.

COMMENT

If the obligee sues only one (or some) of the joint and several obligors, any judicial decision will not affect the obligations of the co-obligors who were not called to court. Whatever the decision, the other obligors will still be bound in the original terms.

Illustrations

1. Art collectors A and B have joined in purchasing a painting at an auction and they are jointly and severally bound to pay the price of GBP 800,000. The price is not paid and the auction house sues Collector A. The tribunal accepts some of A's arguments concerning the quality of the painting and reduces the price to GBP 600,000. Collector B's obligations towards the auction house still amount to GBP 800,000.

2. In the same circumstances, the tribunal condemns A to pay GBP 800,000 plus interests and costs. If the auction house chooses to require payment from Collector B, it can still only claim GBP 800,000.

Co-obligors who have paid the obligee under such circumstances can exercise their rights of recourse pursuant to article 1.10 below, without being affected by the court decision.

Illustrations

3. In the case described in Illustration 1, Collector B, after paying GBP 800,000 to the auction house, can claim contribution against Collector A under Article 1.10 below, for A's share calculated on the amount of GBP 800,000.

4. The situation is the same in the case described in Illustration 2. A's contributory share will be calculated on the amount of GBP 800,000, without taking the interests and costs awarded by the judgement into consideration.

These solutions should incite obligees to bring action against all joint and several obligors, and all joint and several obligors to intervene together in court proceedings concerning their obligation.

Note by the Rapporteur

This provision has been accepted at Rome 2008. Cf. SR 2008, No. 446-451.

For earlier discussions, see Draft 2008, No. 42.

Article 1.9

(Apportionment between joint and several obligors)

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

COMMENT

Articles 1.9 to 1.13 of this Section deal with contributory claims. An obligor who has performed the obligation in favour of the obligee has a claim against the other joint and several obligors to recuperate their respective shares.

The first issue is to determine these respective shares. As a default rule, Article 1.9 states that such shares are equal.

Illustration

1. Companies A and B have borrowed EUR 10,000,000 from Bank X to finance the acquisition of stock in another company. In principle, A and B's shares in the final allocation will be equal.

However, circumstances can indicate otherwise, i.e. that the shares are unequal. This will often result from the contractual arrangements between the co-obligors.

Illustration

2. As in Illustration 1, Bank W has loaned EUR 10,000,000 to Companies A and B to finance an acquisition of stock. However, A and B have agreed that their respective participations in the acquisition would be 75 % and 25 %. These percentages will also govern the final allocation.

It can even happen that the circumstances will indicate that some obligors are to finally bear the whole amount of the obligation. This is the case when a party agreed to be bound as joint and several obligor not because of an own interest in the operation, but to serve as surety for the other ("main") obligor.

Illustration

3. Company A applies for a loan of EUR 10,000,000 from Bank X. The loan is granted on the condition that Company B would intervene as joint and several obligor. The circumstances indicate that the shares in the final allocation should be 100 % for A and 0 % for B.

Note by the Rapporteur

This provision has been accepted at Rome 2008, subject to the replacement of "liable" by "bound". Cf. SR 2008, Nos. 454-462.

For earlier discussions, see Draft 2008, No. 48.

Article 1.10

(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.

COMMENT

After a joint and several obligor has paid more than its share to the obligee, it has contributory claims against the others to recover the excess, on the basis of the respective shares.

Illustrations

1. In Illustration 1 under Article 1.9, Companies A and B have borrowed EUR 10,000,000 from Bank X to finance an acquisition of shares in another company. A and B's shares are in principle equal. If A has reimbursed the full amount to Bank X, it can claim contribution from B for the amount in excess of A's own share of 50 %, i.e. EUR 5,000,000.
2. In the circumstances described in Illustration 2 under Article 1.9, where the shares are unequal, A has to finally bear 75 % of the reimbursement, and it can only recuperate the excess, i.e. B's share of EUR 2,500,000.
3. In Illustration 3 under Article 1.9, Company B's intervention as joint and several obligor was a form of suretyship, and Company A's share in 100 %. If Company B has repaid the loan to Bank W, it can claim full reimbursement from A.

The rule in Article 1.10 can also apply in more complex circumstances.

Illustration

4. Investors A, B and C have joined efforts to buy an office building. The total price amounts to USD 1,000,000, but the respective agreed shares are 50 %, 30 % and 20 %. The seller is entitled to request payment of USD 1,000,000 from any of the obligors, but it can only recover USD 650,000 from A ; the seller then recovers the remaining USD 350,000 from B. Buyer A has paid USD 150,000 in excess of its share of USD 500,000 ; Buyer B has paid USD 50,000 in excess of its share of USD 300,000. Buyer C's share, on the other hand, is totally unpaid. A and B will respectively have contributory claims of USD 150,000 and USD 50,000 against C.

Note by the Rapporteur

This provision has been accepted at Rome 2008. Subject to further discussion, however, we did not replace "from any" by "from all or any". Cf. SR 2008, Nos. 463-464.

For earlier discussions, see Draft 2008, No. 52.

Article 1.11

(Rights of the obligee)

(1) A joint and several obligor to whom article 1.10 applies may also exercise the rights of the obligee, including accessory

securities, to recover the excess from all or any of the other obligors to the extent of each obligor's unperformed share.

(2) An obligee who has not received full performance retains its rights against the co-obligors to the extent of the unperformed part [, with precedence over co-obligors exercising contributory claims].

COMMENT

1. Subrogation in the obligee's rights

A co-obligor who has paid more than its share to the obligee has a contributory claim against the other obligors under Article 1.10 of these Principles. Article 1.11 (1) gives the co-obligor exercising such contributory claim the possibility of benefiting from the rights of the obligee, including accessory security rights.

Illustration

1. Bank X has loaned EUR 500,000 to Companies A and B, guaranteed by a mortgage on Company A's premises. Company B reimburses the full amount of the loan, and claims Company A's contribution of EUR 250,000. In case Company A fails to pay, Company B may avail itself of the Bank's mortgage up to the amount of its claim against Company A.

2. Obligee's rights reserved [and preferred]

The benefit given to the co-obligor does not affect the remaining rights of the obligee who has not been paid in full. The obligee retains these rights against the co-obligors to the extent of the unperformed part.

Illustration

2. The case is the same as in Illustration 1, but Company B has only reimbursed EUR 400,000 of the loan. Company B has a contributory claim against Company A for the amount in excess of its own share, i.e. EUR 150,000 (EUR 400,000 – EUR 250,000). Bank X is still entitled to claim the unpaid amount of the loan, i.e. EUR 100,000. If Bank X claims that amount from Company A, both Company B and Bank X will be able to rely on the mortgage, up to respectively EUR 150,000 and EUR 100,000.

[In case concurrent claims are exercised by the obligee and a co-obligor against another co-obligor, and if the latter co-obligor proves to be partly insolvent, precedence will be given to the obligee's claim.

Illustration

3. The case is the same as in Illustration 3, but Company A fails to pay and the value of the mortgaged premises is down to EUR 200,000. Bank X will have

precedence to recover its claim of EUR 100,000, and Company B will only recuperate EUR 100,000 of its claim of EUR 150,000.]

Note by the Rapporteur

1. *The initially submitted provision did not provoke any controversy in earlier discussions (cf. Draft 2008, No. 42). At Rome 2008, on the contrary, there was a vivid debate (SR 2008, Nos. 465-494 and 616-618). It was suggested that several provisions would be prepared for the next session, reflecting all the solutions that had been discussed (SR 2008, Nos. 492-494).*

This is done below, but we have taken the initiative to express our preference for Variant 6, which has been retained above in the proposed black letters. All proposed texts include slight formal changes decided at Rome 2008 : the initial formula “rights and actions of the obligee” has been changed into “rights of the obligee” (SR Nos. 466-468).

On the substance, the main issue raised concerned the situation where the obligee has not received full performance.

At the end of the discussion at Rome 2008, we were asked to give some explanations on “the different meanings of the concept of subrogation in civil law and common law systems” (SR 2008, No. 617). Even though we imprudently agreed to do so (SR 2008, No. 618), we soon realised that it would involve considerable research. Simply in the French/Belgian legal system, one has to distinguish between “personal” (a person replaces another person) and “real” (an asset replaces another asset) subrogation. Personal subrogation can occur by agreement or by the operation of law. Subrogation by agreement can be initiated either by the obligee or by the obligor. There are many different cases of statutory subrogation. Etc... Even assuming that some other legal systems may be simpler (subrogation by agreement, for instance, seems to be absent in some jurisdictions, where its functions are adequately filled by assignment of rights), this would lead us very far – and we believe unnecessarily for the purpose of finding the adequate rules for the precise issue to be governed by article 1.11.

We obviously remain available for any further research that the Group may want us to do, but at this stage we have only collected some comparative information on statutory or de iure (as opposed as by agreement) subrogation in favour of a person paying another person’s obligation, more particularly in favour of a joint and several obligor paying more than its share to the obligee.

- In the civil law systems we have examined, such joint and several obligors benefit from the transfer of the obligee’s rights against the other obligors, either by virtue of a general provision on subrogation to the benefit of a performing third party (French and Belgian Civil Codes, art. 1251, 3°; Italian Civil Code, art. 1203, 3°; Quebec Civil Code, art. 1656, 3°), or on the basis of a provision specific to joint and several obligations (German BGB, § 426 (2); Swiss CO, art. 149; Dutch BW, art. 6.12). If there is a general provision, it is sometimes recalled in the chapter on joint and several obligations (Quebec Civil Code, art. 1536).

Some of these provisions consider the case of partial payment. The traditional principle “nemo censetur subrogasse contra se” is implemented in some systems (French and Belgian Civil Codes, art. 1252 ; BGB, § 426 (2); Quebec Civil Code, art. 1658) : subrogation in favour of an obligor who has only paid part of the obligation cannot prejudice the obligee, who has precedence when exercising the remaining part of its rights against the other obligors.

The Swiss Code of Obligations is silent on this issue of concurrent recourses (art. 149); Swiss case law and part of Swiss legal authors consider that the traditional principle of precedence is applicable (in this respect, see SR 2008, No. 482), but another view is expressed that there is no reason to give preference to an obligee who would have been entitled to refuse partial payment (Commentaire romand, Code des obligations I, L. Thévenoz and F. Werro ed., 2006, p. 656, No. 20 under article 110). In the Netherlands, while the old BW followed the French Civil Code and provided for precedence, the NBW has abandoned this approach, with the consequence that subrogation will now work pro parte of the claims (cf. SR 2008, No. 471 and a decision rendered in 2008 by the Dutch Hoge Raad and provided by A. Hartkamp). The Italian Civil Code explicitly adopts this solution of proportionality (art. 1205).

The above Civil law systems are divided on the issue of precedence vs. proportionality, but they all take it for granted that subrogation can be partial (otherwise the issue would not be raised).

- In common law systems, at least in English law, on the contrary, there can be no subrogation until the obligation has been fulfilled in its entirety (SR 2008, Nos. 473, 477); Australian law seem to have the same rule (SR 2008, Nos. 478, 483), but comp. SR 2008, No. 484 about the United States. Further information on common law approaches could be gathered with the help of the concerned members of the Group.

- It will finally be recalled that PECL (art. 10:106, 2°) and DCFR (art. III-4:107,2°) provide for subrogation “subject to any prior right and interest of the creditor”.

The above brief comparative analysis shows that legal systems are divided on two main aspects : 1) can there be subrogation in case of partial payment ? – 1) if so, does the partially paid obligee enjoy precedence in the ensuing recourse against the other obligors, or is there proportional allocation ?

2. Having that in mind, we prepared several proposals for the different variants envisaged at Rome 2008.

Variant 1 : *no provision at all on this matter (SR 2008, No. 492).*

Personally we would regret to omit from the Principles a rule that is extremely widespread in domestic legal systems and very useful in practice for co-obligors exercising contributory claims.

Variant 2 : keep the provision as it was submitted before (SR 2008, No. 493).

A joint and several obligor to whom article 1.10 applies may also exercise the rights 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.

This text was inspired by PECL art. 10:106, 2° and DCFR art. 4:107 (2), but it omitted the expression “subject to any prior right or interest of the obligee” – with the idea that some explanation could be given in the Comments for the situation where the obligee had only received part performance (cf. SR 2008, No. 472). In some systems the normal rule is that subrogation operates only within the limits of what has been paid. Admittedly this does not go without saying in our Principles, but it could still be stated in the Comments without adding to the black letters.

Variant 3 : limit subrogation to the case where the obligee has received full performance (SR 2008, No. 483, 492).

When the obligation has been performed in full, a joint and several obligor to whom article 1.10 applies may also exercise the rights 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.

Personally we do not favour such a solution in our Principles, as it would deprive co-obligors of the very useful advantage of subrogation in the frequent cases when the obligee has not received full performance (SR 2008, No. 488). Also, if the obligee has received partial payment there is no reason why it should retain the security rights for the whole amount (SR 2008, No. 476).

The last three variants below have in common to accept subrogation in case of partial performance, without causing prejudice to the obligee – but this last requirement is expressed in different formulas.

Variant 4 : make subrogation subject to any prior rights and interest of the obligee (SR 2008, Nos. 489 and 492).

A joint and several obligor to whom article 1.10 applies may also, subject to any prior right or interest of the obligee, exercise the rights 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.

This is the PECL (art. 10:106, 2°) and DCFR (art. 4:107 (2)) approach. Personally we have reservations about the rather obscure formula “subject to any prior rights and interest of the obligee”, which can open several interpretations and will obviously need to be explained in the Comments. The PECL Comment under the corresponding provision only refers to the obligee's precedence over the co-obligor claiming contribution, but the vagueness of the formula does not immediately suggest that this is what is meant.

Variant 5 : make subrogation subject to causing no harm to the obligee (SR 2008, No. 484, 492).

A joint and several obligor to whom article 1.10 applies may also, provided this causes no harm to the obligee, exercise the rights 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.

This open formula may be more adequate for our Principles than the more technical language in Variant 5 (“subject to any prior right and interest”). Obviously some examples would have to be given in the Comments. However, we would prefer still another approach, where what is intended is explicitly stated in the black letters : see the following Variant 6.

Variant 6 : a second paragraph explicitly stating what is intended.

(1) A joint and several obligor to whom article 1.10 applies may also exercise the rights 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.

(2) An obligee who has not received full performance retains its rights against the co-obligors to the extent of the unperformed part [, with precedence over co-obligors exercising contributory claims].

This Variant has our preference, and we have retained it for the proposed black letters above.

The passage between brackets, and its developments in the Comments, correspond to the traditional solution in some jurisdictions. They should be deleted if the Dutch and Italian solutions of proportional allocation were to be retained (SR 2008, No. 471) – then it would have to be decided whether or not to express it in the black letters.

Incidentally, we believe that the precedence solution is also implied by the formulas used in Variants 4 and 5 (if so, it could be illustrated in the Comments).

Article 1.12 (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 personal to one or several of the other co-obligors.

COMMENT

This provision deals with the defences and rights of set-off that may be asserted between co-obligors, when contributory claims are exercised.

1. Common defences and rights of set-off

Pursuant to Article 1.4 above, the co-obligor asked to perform by the obligee may assert all defences and rights of set-off common to all the co-obligors. If that co-obligor has failed to raise such a defence or right of set-off, which would have extinguished or reduced the obligation, any other joint and several obligor against which the former obligor exercises a contributory claim may assert that defence or right of set-off.

Illustration

1. Joint and several obligors A and B have made the same mistake when buying a know-how licence together (the technology was fit for none of them); each obligor could invoke this common mistake against Licensor X. Buyer A fails to do so when required to pay the fees by Licensor X. Buyer B may refuse to pay its contributory share to A.

2. Personal defences and rights of set-off

A co-obligor may also assert a defence or right of set-off personal to itself against a contributory claim.

Illustration

2. Companies A, B and C are jointly and severally bound to pay the price of products to be purchased from Seller X, located in another country. Company A's required import licence is cancelled by authorities. Company B pays the full price to Seller X. Company A may assert its loss of licence as a personal defence against Company B's contributory claim.

But a co-obligor may not assert a defence or right of set-off personal to one or several of the other co-obligors.

Illustration

3. In the situation described in Illustration 2, if Company B claims contribution against Company C, the latter may not invoke Company A's loss of licence, a defence which was personal to Company A.

Note by the Rapporteur

This provision has been accepted at Rome 2008. In the last sentence, we have modified "purely personal" into "personal", in harmony with the decision taken concerning Article 1.4 above. Cf. SR 2008, Nos. 495-496.

For earlier discussions, see Draft 2008, No. 57.

Article 1.13
(Inability to recover)

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.

COMMENT

1. Proportional sharing of the loss

It can happen that a co-obligor exercising a contributory claim against another co-obligor is unable to recover because the latter is insolvent, or its assets are out of reach, or it has disappeared. The burden of the loss is then spread among the other co-obligors.

Illustration

1. Companies A, B and C borrow EUR 6,000,000 from Bank X, their contributory shares being equal. After reimbursing the loan, Company A claims EUR 2,000,000 from Company B and EUR 2,000,000 from Company C. Company B turns out to be insolvent. The loss of EUR 2,000,000 has to be borne proportionally by the other co-obligors, including the one who has performed. Since their shares are identical, both Company A and Company C will bear an equal part of the loss, i.e. EUR 1,000,000 each. Consequently, Company A can recover EUR 3,000,000 from Company C.

2. All reasonable efforts

Before invoking this rule in order to claim increased contributions from the other co-obligors, the obligor who has performed must exert all reasonable efforts to recover from the defaulting co-obligor, in the light of Article 5.1.4 (2) of these Principles.

Illustration

2. In the situation described in Illustration 1, Firm A does not question Firm B's assertion that it is unable to pay because of financial difficulties, and immediately asks for increased contributions from the other co-obligors. This is not acceptable. In order to avail itself of Article 1.13, Firm A must establish that it has exerted all reasonable efforts to recover from Firm A, such as reminders, injunctions attachments, legal proceedings, etc..., as may be appropriate.

Note by the Rapporteur

This provision has been accepted at Rome 2008, subject to changing the title from “Insolvency of a co-obligor” to “Inability to recover”. Cf. SR 2008, Nos. 497-507.

For earlier discussions, see Draft 2008, No. 60.

Section 2 : Plurality of obligees

Note by the Rapporteur

Basic options have to be finally decided by the group, after two different orientations have already been taken in the past, and the present draft suggests still another approach. It concerns the determination of the most frequent type of plural claims, which should govern the choice of the default rule and accordingly, the general structure of this section.

It will be remembered that PECL, followed by DPCR, distinguishes between three types of plural claims : solidary, separate and communal. The notion of “communal” claims is an addition to the traditional distinction between solidary and separate claims.

When discussing plurality of obligors (section 1 above), after discussions at Rome 2006 and 2007, our group decided against retaining the similar tripartite distinction, also adopted by PECL, between joint and several, separate and communal obligations. Communal (or “joint”) obligations are not mentioned in the black letters, but only in the Comments (see above, point 4 of the Comments under Article 1.1). At the 2007 session, when it came to discussing plurality of obligees, “joint” claims were sometimes mentioned, but the group did not explicitly decide on whether or not to refer to them in the black letters. However, it was suggested, after some discussion, to provide a presumption of joint and several claims (SR 2007, Nos. 143-157).

On the basis of new information received when preparing the 2008 meeting in Rome, the notion of joint claims was after all introduced in the black letters (article 2.1 as submitted in Draft 2008) and it was even suggested to presume that plural claims were joint claims, unless the circumstances indicate otherwise (article 2.2 as submitted in Draft 2008). The basis for this change of orientation was an assumption that joint claims appeared to be the most frequent in practice.

The discussions at Rome 2008 raised several questions and some doubts about this new approach, and the introduction of the notion of joint claims was again questioned by some. Since the choice of the appropriate default rule should be inspired by the most common usage, it was decided to gather more information on actual practice (SR 2008, Nos. 588-597).

This has been attempted. Information has been collected from several sources, concerning different types of operations. However the answers received were not always sufficiently elaborate or precise. Also this preliminary enquiry is still open and some other significant results could still come in. Here is a summary of the information received :

- Construction consortium agreements (*one answer*)

No general pattern. Each contract decides whether or not each member can claim performance from the obligor. Often a “leader” is designated who is entitled to claim for all. Insistence that all depends on contractual provisions, no generalisation is possible and there should be no default rule.

- Joint ventures of petroleum companies (*two divergent answers*)

According to one practitioner, if the companies are contractually bound in a joint venture, their claims are joint and several; otherwise they are “joint”, in the meaning of English law (usually applicable to such contract).

According to another answer, petroleum companies acting in a joint venture always designate a “leader” who is alone entitled to deal with the Contractor, pursuant to a very precise clause in the contract with the latter. Frequently the co-venturers’ identity is not even disclosed to the Contractor.

- Joint bank accounts (*one example consulted*)

The general conditions of an important French-Belgian bank provide for two formulas : either joint and several claims (each client alone can do any operation) or “common” claims (all must act together). The former type seems to be the normal one.

Obviously more examples could be examined and compared.

- Co-insurance (*several contracts consulted*)

The contract with the insured always lists the different co-insurers’ respective shares. Solidarity is explicitly excluded concerning the obligation to indemnify. We have found no corresponding explicit provision concerning the claims for payment of the premiums, but it seems that generally, each co-insurer separately claims its part of them.

- Group of travellers against tour operator (*French case*)

A group of travellers have a bad experience in an organised tour. They all take the same lawyer to sue the tour operator. Even though their claims are based on identical contracts and concern the same breaches from the same obligor, they were always treated as separate. The tour operator was condemned to indemnify each member of the group separately.

- Syndicated loans (*several contracts and several sources in legal literature consulted*)

This is the most conclusive evidence gathered, since all contracts (and other sources) consulted unanimously indicate that the main concern of the participating banks is to keep their claims separate. All syndicated loan contracts consulted have a clause such as this :

« 2.3. Rights several

2.3.1. The rights of the Agent, the Arrangers and each Bank under this Agreement are several. All amounts due, and obligations owed, to each of them are separate and independent debts or, as the case may be, obligations.

2.3.2. The Agent, the Arrangers and each Bank may, except as otherwise stated in this Agreement, separately enforce its rights under this Agreement ».

This, of course, does not preclude the designation of an Agent with authority to act on behalf of all co-obligees within the stipulated limits. But the separate character of the different claims is always affirmed at a prominent place in the contract.

On the basis of the above, it seems that the arrangements can be very different from sector to sector. Some formulas even eliminate the question of the qualification of the different claims, when an agent is designated as the only person to act with third parties – in its own name, without revealing the co-venturers' identities. In other cases, contrary to a suggestion made by one of the experts consulted, we would still prefer to have a default rule (from which anyone can always deviate). For this purpose, our perception is that the two most common types are on one hand separate, on the other hand joint and several claims, the former being especially dominant in two of the most important sectors where there is a plurality of obligees, co-insurance and syndicated loans. However, as the information gathered earlier had revealed, joint (or communal) claims are also frequent in some jurisdictions.

Consequently, the Rapporteur has been lead to come with a new proposal. Firstly, the three basic types would appear in the black letters : separate claims, joint and several claims and joint (or communal) claims. Secondly, the default rule should be that plural claims are presumed to be separate.

The following provisions are submitted to the group. For the third category, the term "communal" has been tentatively retained.

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 all obligees have to claim performance together.**

COMMENT

1. Several obligees

Though plurality of obligees seems to be less frequent in practice than plurality of obligors (see section 1 above), it occurs in different situations.

Illustration

1. Banks A, B and C join in a syndicated loan agreement to lend USD 12,000,000 to Company X.

Other instances of plurality of obligees occur, among others, with co-insurers, multiple buyers and/or sellers in share acquisition agreements and partners in consortium agreements in various sectors, such as construction or the petroleum industry.

2. The same obligation

This Section applies when the different obligees can claim performance of the same obligation from the obligor. This was the case in Illustration 1 (reimbursement of the syndicated loan). Situations where different obligees of the same obligor have rights deriving from different obligations do not fall under the scope of this Section.

Illustration

2. Architect A and Contractor B are both involved in the construction of a new industrial plant. Their respective claims against the Client concern different obligations (payment of their respective types of services). They are not subject to the rules in the present Section, but to the respectively applicable legal provisions.

The “same obligation” usually derives from a single contract, not necessarily. In Illustration 1 above, the syndicated loan agreement is a single contract. But it could also happen, in the same situation, that each lender would choose to have its own contract with the borrower. Co-insurers joining to cover the same risk usually have distinct contractual relationships with the insured.

3. Three main types

Article 2.1 defines three main types of claims appearing in practice when several obligees can claim performance of the same obligation from an obligor.

The claims can be separate. Each obligee can then only claim its share, which will be presumed to be the case (see below, article 2.2).

Illustration

3. In Illustration 1, if Banks A, B and C’s claims against Company X are separate and if their shares are equal, each bank may only claim reimbursement of USD 4,000,000 from Company X.

The claims can be joint and several, which means that each obligee can claim full performance (see below, article 2.3), subject to subsequent allocation between the different obligees (see below, article 2.5).

Illustration

4. Companies A and B are co-owners of a storage house, which they rent to transport Company X. The contract provides that the co-owners' claims concerning the rent are joint and several. Company A and Company B may each claim payment of the full amount of the rent from Company X.

The claims are joint (or “communal”), when all obligees have then to claim together; consequently, the obligor may only perform in favour of all of them together.

Illustration

5. Companies A and B rent an office together, to share in a foreign capital. Due to the nature of their claim on occupation of the office, they can be considered as joint obligees. This would not prevent them from designating one of them as agent for dealings with the owner of the premises.

Note by the Rapporteur

Besides what has been said in the beginning of this Section, also see, concerning earlier discussions, Draft 2008, No. 64.

Article 2.2

(Presumption of separate claims)

When several obligees can claim performance of the same obligation from the same obligor, they are presumed to have separate claims, unless the circumstances indicate otherwise.

COMMENT

1. Presumption : separate claims

When an obligor owes performance of the same obligation to several obligors, it is presumed that the claims are separate. This corresponds to the most frequent situation in practice, when there is an explicit provision. In a syndicated loan agreement, for instance, a typical clause will provide that the rights of each bank are separate, that all

amounts due to each of them are separate and that each bank may separately enforce its rights against the borrower. In the absence of such an explicit provision, Article 2.2 creates a presumption of separate claims, in conformity with the most common practice.

Illustration

1. Art collectors A and B, co-owners of a painting by Rothko, sell it to a Museum for a price of USD 20,000,000. It is presumed that each seller can claim payment of the price only for its previous share of ownership.

2. Circumstances indicating otherwise

However, circumstances can indicate otherwise.

First of all, the obligees may have contractually agreed that their claims would not be separate, but joint and several, or joint.

Illustration

2. As in Illustration 1, but there is an explicit clause in the sales contract stating that A and B's claims are joint and several. This means each of them is entitled to claim the full price from the Museum, subject to the obligation, in the next stage, to transfer the due share to the other obligee.

Other circumstances can also cause deviation from the presumption of separate claims.

Illustration

3. With the price paid by the Museum, Collectors A and B buy a painting by Bacon at an auction. They cannot have separate claims for delivery of the painting, since such performance is necessarily indivisible. Their claim will be joint and several, i.e. each of them can claim full performance.

3. Possible designation of an agent

The fact that the claims are separate does not prevent the obligees to designate an agent with authority to deal with the obligor on behalf of all of them, within the agreed limits. This seems to be frequent, for practical reasons. Each obligee, however, intends to keep full control of its own rights, often reserving the possibility to revoke the agent's authority at any time.

Illustration

4. Banks A, B and C have joined in a syndicated loan agreement to lend USD 12,000,000 to Company X. The claims are separate, USD 4,000,000 for each bank. However, Bank A has been designated as agent of the consortium, with authority to collect reimbursement of the full amount.

Note by the Rapporteur

Besides what has been said in the beginning of this Section, also see, concerning earlier discussions, Draft 2008, No. 67.

Article 2.3

(Effects of joint and several claims)

(1) Any of the joint and several obligees can claim the whole performance from the obligor.

(2) Performance of an obligation in favour of one of the joint and several obligees discharges the obligor towards the other obligees.

COMMENT

1. Each obligee can claim full performance

When claims are joint and several, each obligee is entitled to claim full performance from the obligor.

Illustration

1. Co-owners A and B have sold their hotel to Buyer X for a price of EUR 5,000,000. Their shares of co-ownership were equal. The sales contract provides that the sellers' claims concerning payment of the price are joint and several. Seller A may claim EUR 5,000,000 from Buyer X, subject to further allocation under Article 2.5 below.

2. Obligor's choice

If the obligor takes the initiative to spontaneously perform its obligation, it is entitled to render performance in the hands of any of its obligees.

Illustration

2. Buyer X takes the initiative of paying the price before being invited to do so by either of its obligees. Buyer W may validly pay to Seller A or to Seller B.

3. Obligor's discharge

The obligor who has rendered full performance in the hands of one of the obligees is discharged towards the other obligees.

Illustration

3. Buyer X has paid the whole price of EUR 5,000,000 to Seller A. Seller B, having difficulties to recover its share from Seller A, requires payment of EUR 2,500,000 from Buyer X. Under Article 2.3 (2), the claim will be rejected since full payment to Seller A has discharged Buyer X towards the other obligee.

4. Practical aspects

The right given to each of the joint of several obligees to claim full performance may call for some coordination, to avoid duplication of initiatives and unnecessary costs. Either the obligees have agreed in advance on which of them will claim performance, or at least the obligee envisaging to take the initiative should consult with its co-obligees.

On the other hand, when the obligor takes the initiative, its choice of the obligee to whom it will perform may be affected by the fact that another obligee is already requesting performance. Some prior consulting may then be appropriate. Also, an obligee who has received payment should immediately inform the others that performance has been rendered.

Such solutions could usefully be agreed in advance by all parties involved. Otherwise the requirements of good faith can always come into play (Article 1.7).

Note by the Rapporteur

Paragraph 3 of the corresponding provision submitted at Rome 2008 has been deleted, as was decided after considerable discussion (SR 2008, Nos. 519-555). That paragraph provided that when the obligor had been sued by a joint and several obligee it could no longer perform to the other obligees. One of the main concerns was that such provision could lead to collusions between the obligor and one of its obligees. In the Comments (Point 4), we have attempted to give some indications about the practical problems raised in the course of the discussion at Rome 2008.

Paragraph 1 somehow repeats what has already been said in the definition in Article 2.1 (2). This is unavoidable for a concept which is characterised by its main effect. From a pedagogical point of view, we think it is useful to re-state the main effect in the provision dealing with effects.

In Paragraph (2) we have replaced “releases” by “discharges” in order to avoid any risk of confusion with “release” in the meaning of Article 2.4 (2).

Concerning earlier discussions, see Draft 2008, No. 70.

Article 2.4

(Availability of 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) The rules of articles 1.5, 1.6, 1.7 and 1.8 apply, with appropriate adaptations, to joint and several claims.

COMMENT

1. Availability of defences

The defences which may entitle the obligor to refuse to perform do not necessarily exist against all obligees. Some of them may be personal to the obligor's relationship with one obligee only. Such defences can be asserted against the concerned obligee only.

Illustration

1. Grain producer X has agreed to supply a certain quantity of wheat to Companies A, B and C, who are engaged into a common agricultural project in a developing country. The contract provides that Companies A, B and C are joint and several obligees as concerns the deliveries. Producer X discovers that Company A is controlled by some of its former employees; if it had known that circumstance Producer X would not have contracted with Company A. Producer X may invoke this mistake under Article 3.5 against Company A requiring delivery, but not against Companies B and C.

The obligor may also assert defences that it has in common against all obligees.

Illustration

2. Grain producer X then finds out that the agricultural project involves massive use of child labour, making the contract illegal under Article ... This is a common defence that Producer X may assert against any obligee claiming delivery of the wheat.

2. Effects of certain defences

Section 1 of the present Chapter contained particular rules about the effects of certain types of defences (Articles 1.5, 1.6, 1.7 and 1.8). Paragraph 3 of this Article provides that these rules apply, with appropriate adaptations, to joint and several claims. Some examples will be given.

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

Illustrations

3. Companies A, B and C have jointly and severally loaned EUR 300,000 to Borrower X. Company A receives full payment. In case Company B or C would still endeavour to claim reimbursement, Borrower X may assert that it has fully performed in the hands of Company A.

4. The same loan has taken place, but in a different context, Borrower X can claim EUR 300,000 from Company A for the sale of office equipment. Borrower X exercises set-off under Article 8.3. Its obligation under the loan agreement is extinguished not only towards Company A but also towards Companies B and C.

- Release (art. 2.4, 3° referring to art. 1.6)

Illustration

5. Pamela, a famous racing horse, has been sold by its co-owners A and B to Buyer X. Concerning payment of the price, the contract provides that A and B are joint and several obligees. If Co-owner A releases Buyer X of its obligation, Co-owner B's claim against Buyer X is reduced by the amount of releasing Co-owner A's share. Co-owner A has no contributory recourse against Co-owner B under article 2.5 below.

N.B. See below, in the "Note by the Rapporteur", concerning this solution.

- Settlement (art. 2.4, 3° referring to art. 1.6)

Illustration

6. In the same situation as in Illustration 3, Company A, whose share in the loan is EUR 100,000, settles with Borrower X, accepting a payment of EUR 60,000, i.e. an amount below its share. Co-obligees B and C's joint and several claim against W is reduced by the full amount of A's share, i.e. by EUR 100,000, and they remain Borrower X's joint and several obligees for EUR 200,000. Settling obligee A has no more recourse under article 2.5 against Companies B or C (comp. art. 1.6, 2°).

As in Article 1.6, *mutatis mutandis*, this concerns the special case where a separate settlement intervenes between the obligor and one of the joint and several obligees, for the latter's share. Then the issue to be solved is that of the consequences of such settlement on the other obligees' claims.

In the more frequent situation where the settlement concerns the whole joint and several claims, the consequences on the different obligees' claims will be determined by the terms of the settlement agreed by all parties, and the contributory claims will be adjusted accordingly.

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

Illustration

7. Obligor X has three joint and several obligees, A, B and C. Co-obligee A's claim against obligor X is time-barred. This does not affect co-obligees B and C's claims against X. If B or C receives performance from X, A can claim its share from the co-obligee having received payment.

- Effect of judgment (art. 2.4, 3° referring to art. 1.8)

Illustration

8. In the same situation where Obligor X has three joint and several obligees, A, B and C, Obligee A acting alone sues Obligor X for performance; the judgement grants Obligee A only part of its claim. Such judgment does not affect the obligations of obligor X towards co-obligees B or C, nor the recourses between co-obligees under article 2.5.

Note by the Rapporteur

1. Paragraph 1 and most of paragraph 2 of this provision have already met with general support from the Group.

2. The discussions at Rome 2008 centered on the issues of release and settlement. Since the corresponding issues with joint and several obligations were still under discussion, it was decided to postpone final decisions on paragraph 2 and on the reference to article 1.6 in paragraph 3 (SR 2008, Nos. 556-570).

The present revised version of Section 1 of the draft, above, proposes to merge the provisions on release and settlement into the single article 1.6 above, since the proposed rules are finally identical : reduction of the other obligors' obligation by the amount of the released or settling obligor's share.

*In the previous version of this Section 2 on plurality of obligees, the effects of most defences (performance, set-off, settlement, limitation, effect of judgement) were dealt with by mere reference to the corresponding provisions of Section 1. An exception was made for release, for which the former paragraph (2) of article 2.4 had a specific rule : **"Release granted to the obligor by one of the joint and several obligees has no effect on the other obligees"**.*

Subject to further discussions in the Group, which would show a preference for reinstating the earlier provision, we suggest to align the rule on release by one co-obligee on the corresponding rule concerning plurality of obligors, as well as on the rules concerning settlement, the more so as it has been proposed (art. 1.6 above) not to distinguish the rules on release and settlement any more. This would create a simpler and more harmonious set of rules concerning the effects of the concerned defences. On

the substance, we also believe that the proposed solution concerning release by one co-obligee is fairer to all parties concerned.

Concerning earlier discussions on Article 2.4, see Draft 2008, No. 72.

Article 2.5

(Allocation between joint and several obligees)

(1) As between themselves, 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.

COMMENT

1. Presumption of equal shares

Joint and several obligees may each claim full performance of the whole obligation under Article 2.3. However, as between themselves, they are only entitled to their respective shares. Such shares are presumed to be equal.

Illustration

1. Co-owners A and B have sold their house for SFR 1,000,000, and they are joint and several obligees concerning payment of the price. However, once the buyer has paid SFR 1,000,000, each co-owner will be entitled to receive its share in the final allocation. In principle, the shares are considered to be equal. Each co-owner should receive SFR 500,000.

However, the circumstances may indicate otherwise.

Illustration

2. The shares of co-ownership of the house were not equal, but 75 % for A and 25 % for B. This will indicate that probably Seller A should eventually receive SFR 750,000 and Seller B SFR 250,000.

2. Transfer of excess received

It will usually happen that the co-obligee claiming payment receives more than its share, since it is entitled to claim full performance under Article 2.3. When an obligee has

received more than its share, it must transfer the excess to the other obligees to the extent of their respective shares.

Illustration

3. Seller A has been paid the full price of the house, i.e. SFR 1,000,000, and its share of co-ownership was 50 %. Seller A must transfer SFR 500,000 to Seller B.

Note by the Rapporteur

This text was already submitted to Rome 2008 and raised no objection, as it lays down a generally accepted rule. The reference to joint claims has been deleted, since such claims are no longer considered in the black letters. As suggested, the opening words "As between themselves" has been added in paragraph 1. Cf. SR 2008, Nos. 614-615.

Concerning earlier discussions, see Draft 2008, No. 67.