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 resolutive 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.
APPENDIX I

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)
Article 2.1.4  (Revocation of offer)
Article 2.1.5  (Rejection of offer)
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)
Article 2.1.10 (Withdrawal of acceptance)
Article 2.1.11 (Modified acceptance)
Article 2.1.12 (Writings in confirmation)
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)
Article 2.1.15 (Negotiations in bad faith)
Article 2.1.16 (Duty of confidentiality)
Article 2.1.17 (Merger clauses)
Article 2.1.18 (Modification in a particular form)
Article 2.1.19 (Contracting under standard terms)
Article 2.1.20 (Surprising terms)
Article 2.1.21 (Conflict between standard terms and non-standard terms)
Article 2.1.22 (Battle of forms)

Section 2: Authority of agents
Article 2.2.1 (Scope of the Section)
Article 2.2.2 (Establishment and scope of the authority of the agent)
Article 2.2.3 (Agency disclosed)
Article 2.2.4 (Agency undisclosed)
Article 2.2.5 (Agent acting without or exceeding its authority)
Article 2.2.6 (Liability of agent acting without or exceeding its authority)
Article 2.2.7 (Conflict of interests)
Article 2.2.8 (Sub-agency)
Article 2.2.9 (Ratification)
Article 2.2.10 (Termination of authority)

CHAPTER 3: VALIDITY

Section 1: General provisions

Article 3.1.1 (Scope of the chapter) ¹
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)
Article 3.2.7 (Gross disparity)
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)

¹ 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)  
Article 3.2.18 (Unilateral declarations)

Section 3: Illegality

Article 3.3.1 (Contracts infringing mandatory rules)  
Article 3.3.2 (Restitution)

CHAPTER 4: INTERPRETATION

Article 4.1 (Intention of the parties)  
Article 4.2 (Interpretation of statements and other conduct)  
Article 4.3 (Relevant circumstances)  
Article 4.4 (Reference to contract or statement as a whole)  
Article 4.5 (All terms to be given effect)  
Article 4.6 (Contra proferentem rule)  
Article 4.7 (Linguistic discrepancies)  
Article 4.8 (Supplying an omitted term)

CHAPTER 5: CONTENT AND THIRD PARTY RIGHTS

Section 1: Content in general

Article 5.1.1 (Express and implied obligations)  
Article 5.1.2 (Implied obligations)  
Article 5.1.3 (Co-operation between the parties)  
Article 5.1.4 (Duty to achieve a specific result. Duty of best efforts)  
Article 5.1.5 (Determination of kind of duty involved)  
Article 5.1.6 (Determination of quality of performance)  
Article 5.1.7 (Price determination)  
Article 5.1.8 (Contract for an indefinite period)  
Article 5.1.9 (Release by agreement)

Section 2: Conditions

Article 5.2.1 (Types of condition)  
Article 5.2.2 (Effect of conditions)  
Article 5.2.3 (Duty to preserve rights)  
Article 5.2.4 (Interference with conditions)  
Article 5.2.5 (Restitution in case of fulfilment of a resolutive condition)

Section 3: Third party rights

Article 5.3.1 (Contracts in favour of third parties)  
Article 5.3.2 (Third party identifiable)  
Article 5.3.3 (Exclusion and limitation clauses)  
Article 5.3.4 (Defences)  
Article 5.3.5 (Revocation)  
Article 5.3.6 (Renunciation)

2 Article 3.2.17 (Mandatory character of the provisions)  
The rules on fraud, threat and gross disparity contained in this Section are mandatory.
CHAPTER 6: PERFORMANCE

Section 1: Performance in general
Article 6.1.1 (Time of performance)
Article 6.1.2 (Performance at one time or in instalments)
Article 6.1.3 (Partial performance)
Article 6.1.4 (Order of performance)
Article 6.1.5 (Earlier performance)
Article 6.1.6 (Place of performance)
Article 6.1.7 (Payment by cheque or other instrument)
Article 6.1.8 (Payment by funds transfer)
Article 6.1.9 (Currency of payment)
Article 6.1.10 (Currency not expressed)
Article 6.1.11 (Costs of performance)
Article 6.1.12 (Imputation of payments)
Article 6.1.13 (Imputation of non-monetary obligations)
Article 6.1.14 (Application for public permission)
Article 6.1.15 (Procedure in applying for permission)
Article 6.1.16 (Permission neither granted nor refused)
Article 6.1.17 (Permission refused)

Section 2: Hardship
Article 6.2.1 (Contract to be observed)
Article 6.2.2 (Definition of hardship)
Article 6.2.3 (Effects of hardship)

CHAPTER 7: NON-PERFORMANCE

Section 1: Non-performance in general
Article 7.1.1 (Non-performance defined)
Article 7.1.2 (Interference by the other party)
Article 7.1.3 (Withholding performance)
Article 7.1.4 (Cure by non-performing party)
Article 7.1.5 (Additional period for performance)
Article 7.1.6 (Exemption clauses)
Article 7.1.7 (Force majeure)

Section 2: Right to performance
Article 7.2.1 (Performance of monetary obligation)
Article 7.2.2 (Performance of non-monetary obligation)
Article 7.2.3 (Repair and replacement of defective performance)
Article 7.2.4 (Judicial penalty)
Article 7.2.5 (Change of remedy)

Section 3: Termination
Article 7.3.1 (Right to terminate the contract)
Article 7.3.2 (Notice of termination)
Article 7.3.3 (Anticipatory non-performance)
Article 7.3.4 (Adequate assurance of due performance)
Article 7.3.5  (Effects of termination in general)
Article 7.3.6  (Restitution with respect to contracts to be performed at one time)
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Section 4: Damages
Article 7.4.1  (Right to damages)
Article 7.4.2  (Full compensation)
Article 7.4.3  (Certainty of harm)
Article 7.4.4  (Foreseeability of harm)
Article 7.4.5  (Proof of harm in case of replacement transaction)
Article 7.4.6  (Proof of harm by current price)
Article 7.4.7  (Harm due in part to aggrieved party)
Article 7.4.8  (Mitigation of harm)
Article 7.4.9  (Interest for failure to pay money)
Article 7.4.10 (Interest on damages)
Article 7.4.11 (Manner of monetary redress)
Article 7.4.12 (Currency in which to assess damages)
Article 7.4.13 (Agreed payment for non-performance)

CHAPTER 8: SET-OFF
Article 8.1  (Conditions of set-off)
Article 8.2  (Foreign currency set-off)
Article 8.3  (Set-off by notice)
Article 8.4  (Content of notice)
Article 8.5  (Effect of set-off)

CHAPTER 9: PLURALITY OF OBLIGORS AND OF OBLIGEES

Section 1: Plurality of obligors
Article 9.1.1  (Definitions)
Article 9.1.2  (Presumption of joint and several obligations)
Article 9.1.3  (Obligee’s rights against joint and several obligors)
Article 9.1.4  (Availability of defences and rights of set-off)
Article 9.1.5  (Effect of performance or set-off)
Article 9.1.6  (Effect of release or settlement)
Article 9.1.7  (Effect of expiration or suspension of limitation period)
Article 9.1.8  (Effect of judgment)
Article 9.1.9  (Apportionment between joint and several obligors)
Article 9.1.10 (Extent of contributory claim)
Article 9.1.11 (Rights of the obligee)
Article 9.1.12 (Defences in contributory claims)
Article 9.1.13 (Inability to recover)

Section 2: Plurality of obligees
Article 9.2.1  (Definitions)
Article 9.2.2  (Presumption of joint and several claims)
Article 9.2.3  (Effects of joint and several claims)
Article 9.2.4  (Availability of defences against joint and several obligees)
Article 9.2.5  (*Allocation between joint and several obligees*)

CHAPTER 10: ASSIGNMENT OF RIGHTS, TRANSFER OF OBLIGATIONS, ASSIGNMENT OF CONTRACTS

Section 1: Assignment of rights
- Article 10.1.1 (Definitions)
- Article 10.1.2 (Exclusions)
- Article 10.1.3 (Assignability of non-monetary rights)
- Article 10.1.4 (Partial assignment)
- Article 10.1.5 (Future rights)
- Article 10.1.6 (Rights assigned without individual specification)
- Article 10.1.7 (Agreement between assignor and assignee sufficient)
- Article 10.1.8 (Obligor's additional costs)
- Article 10.1.9 (Non-assignment clauses)
- Article 10.1.10 (Notice to the obligor)
- Article 10.1.11 (Successive assignments)
- Article 10.1.12 (Adequate proof of assignment)
- Article 10.1.13 (Defences and rights of set-off)
- Article 10.1.14 (Rights related to the right assigned)
- Article 10.1.15 (Undertakings of the assignor)

Section 2: Transfer of obligations
- Article 10.2.1 (Modes of transfer)
- Article 10.2.2 (Exclusion)
- Article 10.2.3 (Requirement of obligee's consent to transfer)
- Article 10.2.4 (Advance consent of obligee)
- Article 10.2.5 (Discharge of old obligor)
- Article 10.2.6 (Third party performance)
- Article 10.2.7 (Defences and rights of set-off)
- Article 10.2.8 (Rights related to the obligation transferred)

Section 3: Assignment of contracts
- Article 10.3.1 (Definitions)
- Article 10.3.2 (Exclusion)
- Article 10.3.3 (Requirement of consent of the other party)
- Article 10.3.4 (Advance consent of the other party)
- Article 10.3.5 (Discharge of the assignor)
- Article 10.3.6 (Defences and rights of set-off)
- Article 10.3.7 (Rights transferred with the contract)

CHAPTER 11: LIMITATION PERIODS
- Article 11.1 (Scope of the Chapter)
- Article 11.2 (Limitation periods)
- Article 11.3 (Modification of limitation periods by the parties)
- Article 11.4 (New limitation period by acknowledgement)
- Article 11.5 (Suspension by judicial proceedings)
- Article 11.6 (Suspension by arbitral proceedings)
Article 11.7  (Alternative dispute resolution)
Article 11.8  (Suspension in case of force majeure, death or incapacity)
Article 11.9  (Effects of expiration of limitation period)
Article 11.10  (Right of set-off)
Article 11.11  (Restitution)
APPENDIX II

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.