



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

**Working Group for the preparation of
Principles of International Commercial Contracts (3rd)**

UNIDROIT 2010
Study L – Doc. 123
English only
June 2010

Draft Chapter 11
on
Plurality of Obligors and of Obligees

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CHAPTER 11

PLURALITY OF OBLIGORS AND OF OBLIGEEES

Section 1 : Plurality of obligors

ARTICLE 11.1.1

(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.

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. Companies A, B and C are co-obligors of the obligation to reimburse the loan.

2. Further to the submission they have filed together, Contractors A and B are awarded the contract for the construction of a bridge. Contractors A and B are co-obligors of the obligation to build the 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. These insurers are co-obligors of the obligation to cover the risk.

4. Bank X grants a loan to Company A but requires guarantee. Parent Company B accepts to bind itself together with Company A to reimbursement of the loan. Companies A and B are co-obligors of the obligation to reimburse 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. They are not co-obligors subject to the rules of the present section.

Illustration

5. A new airplane is being built. 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 "co-obligors".

The "same obligation" usually arises from a single contract, but not necessarily. In Illustrations 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 guarantee 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 above, Article 9.2.1 *et seq.*).

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

3. Two main types of obligations

Article 11.1.1 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 of them (see below, Article 11.1.3), subject to contributory claims between obligors at a later stage (see below, Article 11.1.10).

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 11.1.2), obligations are called "joint and several". In the latter situation, obligations are called "separate".

Whether co-obligors, in Illustrations 1 to 4, are jointly and severally, or separately bound, is determined according to Article 11.1.2.

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 "joint" or "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.

ARTICLE 11.1.2

(Presumption of joint and several obligations)

When several obligors are bound by the same obligation towards an 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 11.1.2.

Illustration

1. Companies A, B and C have together obtained a loan from Bank X (as in Illustration 1 under Article 11.1.1). 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 11.1.1). 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. The facts are the same as in Illustration 2, but 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 may be considered as a circumstance indicating that Insurers D, E and F are only bound for their respective shares.

3. Suretyship and joint and several obligations

A different situation is that of suretyship, an accessory agreement by which a person binds itself for another already bound, in case the main obligor defaults. The surety is not bound as a principal, but will only have to perform if the main obligor fails to do so. Principal and surety are bound separately – and in a successive order.

Illustration

4. Company A wants to borrow EUR 1,000,000 from Bank X. The loan is granted on the condition that Parent Company B will act as surety for reimbursement of the loan. Company A is Bank X's main obligor. Company B will be required to pay only if and when Company A defaults.

However, it may happen that the technique of joint and several obligations is used as a mechanism by which the economic benefit of suretyship may be obtained. The obligee requests the company willing to guarantee the initial obligor's obligation to intervene next to the latter as a joint and several obligor, instead of entering into a separate agreement of suretyship. The obligee's advantage is that in such a case, it can directly require payment from the intervening company. This does not necessarily deprive the intervening company of the special rights provided to a surety under the law of suretyship.

Illustration

5. The initial facts are the same as in Illustration 4, but Bank X requires Parent Company B to bind itself as a joint and several obligor, next to Company A, for reimbursement of the loan. Bank X may require then reimbursement directly from Company B as well as from Company A.

This particular use of the technique of joint and several obligations has some specific consequences: see Comment 3 under article 11.1.9 below, concerning apportionment among joint and several obligors. The law of suretyship may, of course, provide additional consequences.

ARTICLE 11.1.3

(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 11.1.1 above : each obligor is bound for the whole obligation.

Article 11.1.3 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. The facts are the same as in Illustration 1. A pays only USD 30,000 (in spite of being bound for USD 45,000). X, while still retaining a claim against A for the unpaid part, may claim that amount of 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, as well as from A and B.

ARTICLE 11.1.4

(Availability of defences and rights of set-off)

A joint and several obligor against whom a claim is made 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 purchased machinery from Manufacturer X, to be used in their respective plants for a common project. Part of the purchase price still has to be paid at a future date, the outstanding amount being jointly and severally due. Company A has obtained a separate undertaking from Manufacturer X that the machinery would meet a certain performance level. If Manufacturer X requires Company A to pay the outstanding amount of the price, Company A may assert the fact that the machinery does not meet the guaranteed level of performance. On the other hand, if Manufacturer X claims payment from Companies B and C, the latter may not assert that the level of performance is insufficient, since the defence is personal to Company A.

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 performance of the contract unlawful. 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 11.1.5 below. On the contrary, Obligor B may not assert this right, which is personal to A.

Article 11.1.5

(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. The facts are the same as in Illustration 1, but Company A only reimbursed EUR 30,000. Companies B and C are still jointly and severally bound for EUR 70,000 (see above, Article 11.1.3), 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 11.1.4, where the issue was to determine which of the co-obligors could assert rights of set-off. Article 11.1.5 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. The facts are the same 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 3, 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.

Article 11.1.6

(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 no longer have a contributory claim against the released obligor under article 11.1.10.

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 11.1.6 is that the release concerns the share of the released obligor only, as determined by Article 11.1.9 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. 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 11.1.9 below. The other obligors will be discharged only for the amount of that released pArticle All obligors will remain jointly and severally bound for the reduced total amount.

Illustration

3. 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 11.1.6 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.

4. 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

4. The facts are the same as 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.

5. The facts are the same as 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.

Article 11.1.7

(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 11.1.10.

(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 the expiration of a period of limitation.

Illustration

1. Companies A and B are jointly and severally bound to pay Consultant X fees of USD 500,000, on January 1, 2007. 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 2009, Company B comes to acknowledge Consultant X's rights, but Company A continues to challenge them. In March 2010, 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 in accordance with Article 11.1.10 of these Principles, even against the co-obligor who could avail itself of the expiration of a period of limitation against the obligee, in accordance with article 10.9 of these Principles. 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 11.1.7 (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, 2007. In spite of several reminders, A and B are still in default near the end of the three-year limitation period. On December 20, 2010, 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 11.1.7 (2), which creates effects towards all co-obligors, adopts a different approach than the rule in Article 11.1.7 (1), which provides for individual effects. Indeed, different effects are

concerned : those of expiration of the limitation period, and those of initiating legal proceedings. The solution adopted in paragraph (2) saves the expenses involved in initiating proceedings against all obligors. The obligee will however keep in mind the rule in article 11.1.8, concerning effect of judgment.

Article 11.1.8

(Effect of judgment)

(1) 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 11.1.10.

(2) However, the other joint and several obligors may rely on such a decision, except if it was based on grounds personal to the obligor concerned. In such a case, the rights of recourse between the joint and several obligors under article 11.1.10 are affected accordingly.

COMMENT

1. No effect on the other obligors' obligations

If the obligee sues only one (or some) of the joint and several obligors, any judicial decision will not in principle 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. Bank X has loaned EUR 1,000,000 to joint and several Borrowers A and B. Borrower A is sued for reimbursement by Bank X and the court orders Borrower A to pay EUR 1,000,000 to Bank X. This decision in itself does not affect Borrower B's obligation; B is still bound to pay EUR 1,000,000 to Bank X.

Naturally, if the judgment is enforced and Borrower A pays EUR 1,000,000 to Bank A, Borrower B' obligation towards X will be extinguished under Article 11.1.5 and B will be subject to A's contributory recourse under Article 11.1.10.

2. Company A and Company B have jointly and severally undertaken to provide transportation for Company X's deliveries to its clients. Performance is defective and Company X sues Company A. The court orders Company A to pay damages. Company B is not bound by that finding of defective performance, and its obligations are not increased by the amount of the damages.

2. No effect on the rights of recourse

A court decision rendered against one joint and several obligor has also no effect on the rights of recourse between the joint and several obligors under article 11.1.10.

Illustration

3. The facts are the same as in Illustration 2. Company A pays the damages ordered by court to Company X. Company A may not claim to recover part of such damages from Company B.

3. Right of the other joint and several obligors to avail themselves of the decision

The principle stated in paragraph (1) of this Article does not have to be enforced when the other co-obligors find it in their interest to rely on the decision. For such cases, paragraph (2) grants the other joint and several obligors the right to rely on it. However, the rule does not apply when the decision was based on grounds personal to the obligor concerned.

Illustrations

4. 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, which appears to have been restored, and reduces the price to GBP 600,000. Collector B may rely on that decision to benefit from the same reduction of its obligations towards the auction house.

5. The initial facts are the same as in Illustration 4, but Collector A's refusal to pay the auction house is grounded on a claim that the painting is a fake. This is confirmed by an expertise ordered by the court. Accordingly, the court avoids the contract. Collector B may also rely on that decision to be discharged of its obligations towards the auction house.

6. The initial facts are the same as in Illustration 4, but Collector A had separately obtained from the auction house a certificate stating that the painting had been shown at some major exhibitions. This turns out to be untrue, and a court orders the auction house to pay damages to Collector A. Collector B may not rely on that decision, since it is based on a ground personal to Collector A.

4. Rights of recourse affected accordingly

If a joint and several obligor avails itself of a court decision rendered against its co-obligor, the right of recourse of the latter will be affected accordingly.

Illustration

7. The initial facts are the same as in Illustration 4. Collector A's obligation towards the auction house has been reduced to GBP 600,000. If Collector A, after having paid this amount to the auction house, initiates a contributory recourse against Collector B, the latter may avail itself of the court decision to have its contributory share reduced accordingly.

Article 11.1.9

(Apportionment among joint and several obligors)

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

COMMENT

Articles 11.1.9 to 11.1.13 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 11.1.9 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 EUR 500,000 each.

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. The facts are the same as in Illustration 1, except that A and B have agreed that their respective participations in the acquisition would be 75 % and 25 %. There is a presumption that 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 its own interest in the operation, but to serve as guarantor for the other ("main") obligor. See Comment 3 under Article 11.1.2 above.

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. As between the two Companies, it is understood that Company B only serves as a guarantor. The circumstances indicate that the shares in the final allocation should be 100 % for A and 0 % for B.

Article 11.1.10

(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. Companies A and B have borrowed EUR 10,000,000 from Bank X to finance an acquisition of stock 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. The initial facts are the same as in Illustration 1, except that A and B have agreed that their respective participations in the acquisition would be 75 % and 25 %. If A has to finally bear 75 % of the reimbursement, it can only recuperate the excess, i.e. B's share of EUR 2,500,000.

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. As between the two Companies, it is understood that Company B only serves as a guarantor. Company A's share is 100 %. If Company B has repaid the loan to Bank X, it can claim full reimbursement from Company A.

The rule in Article 11.1.10 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.

Articles 11.1.6 (2), 11.1.7 (1)(b) and 11.1.8 (b) provide for particular rules on the availability of contributory claims under the circumstances these provisions respectively govern.

Article 11.1.11

(Rights of the obligee)

(1) A joint and several obligor to whom article 11.1.10 applies may also exercise the rights of the obligee, including all rights securing their performance, 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 joint and several obligor who has paid more than its share to the obligee has a contributory claim against the other obligors under Article 11.1.10 of these Principles. Article 11.1.11 (1) gives the co-obligor who has such a contributory claim the possibility of benefiting from the rights of the obligee, including all rights securing their performance. This possibility is of particular value to the joint and several obligor

when the rights of the obligee are secured, because the contributory right under Article 11.1.10 is not secured.

Illustration

1. Bank X has loaned EUR 500,000 to Companies A and B as joint and several obligors, secured by a mortgage on Company A's premises. Company B reimburses the full amount of the loan. Under Article 11.1.10, Company B has an unsecured claim against Company A for contribution in the amount of EUR 250,000. Company B may also exercise Bank X's rights against Company A up to the amount of EUR 250,000, including enforcement of the mortgage on Company A's premises.

2. Obligee's rights reserved and preferred

By providing that an obligee who has not received full performance retains its rights against the joint and several obligors, and by giving those retained rights of the obligee precedence over the rights of the performing obligor, the rule in Article 11. 1. 11 (2) assures that the benefit given to the joint and several obligor in Article 1. 11 (1) does not detrimentally affect the remaining rights of the obligee. This precedence may be effectuated by deferring enforcement of the claim of the performing joint and several obligor under Article 11.1.11 (1) until full performance is received by the obligee.

Illustration

2. The facts are the same as in Illustration 1, except that Company B has reimbursed only EUR 400,000 of the loan, and the remaining EUR 100,000 remain unpaid. 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). Company B also has the right to exercise Bank X's rights against Company A up to that amount, including enforcement of the mortgage on Company A's premises. However, as Bank X's rights with respect to the remaining EUR 100,000 have precedence over the rights of Company B, enforcement of Company B's rights against Company A may not occur until after Bank X has received repayment of the remaining EUR 100,000.

This rule on precedence is subject to the possible application of mandatory rules providing otherwise in insolvency proceedings.

Article 11.1.12

(Defences in contributory claims)

A joint and several obligor against whom a claim is made by the co-obligor who has performed the obligation:

(a) may raise any common defences and rights of set-off that were available to be asserted by the co-obligor against the obligee;

(b) may assert defences which are personal to itself;

(c) may not assert defences and rights of set-off 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 11.1.4 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 purchased a know-how licence together. Licensor X has undertaken that the technology was fit for both licencees. If this appeared not to be the case, each obligor could invoke this common defence against Licensor X. If 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

A co-obligor may also assert a defence 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. Company A, however, was induced to enter the contract by fraud within the meaning of Article 3.8 of these Principles. Company B pays the full price to Seller X. Company A may assert the fraud it was subject to as a personal defence against Company B's contributory claim.

Under this Article 11.1.12 (2), rights of set-off are not subject to the same rule as defences as they usually are in these Principles. This cannot be the case when it comes to the issue of asserting a personal right of set-off against the obligee to counter a contributory claim. Actually, under Article 11.1.5, performance by the other co-obligor has discharged the first obligor from its obligations towards the obligee, with the consequence that the right of set-off does not exist any more. The first obligor will have to pay its contributory share to the other obligor, while being in a position to exercise its distinct claim against the obligee.

Illustration

3. Bank X has loaned EUR 3,000,000 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, thus giving Company A a right of set-off for that amount. Bank X claims reimbursement of EUR 3,000,000 from Company B, which pays the full amount. If Company B then claims contribution from Company A, the latter may not assert its own right of set-off against Company B. Such right does not exist any more since payment to Bank X by Company B has also discharged Company A towards Bank X. Company A will have to pay its contributory share to Company B and will be able to exercise its own claim of EUR 500,000 against Bank X.

3. Defences and rights of set-off personal to other co-obligors

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

Illustrations

4. The facts are the same as in Illustration 2. If Company B claims contribution against Company C, the latter may not invoke the fraud to which Company A was subject, since this defence is personal to Company A.

5. The initial facts are the same as in Illustration 3. If Company B claims contribution from Company C, the latter may not assert Company A's right of set-off, since this right is personal to another obligor.

Article 11.1.13

(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, Company 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 11.1.13, Company A must establish that it has exerted all reasonable efforts to recover from Company A, such as reminders, injunctions, attachments or legal proceedings, as may be appropriate.

Section 2 : Plurality of obligees

Article 11.2.1 *(Definitions)*

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

(a) the claims are separate when each obligee can only claim its share;

(b) the claims are joint and several when each obligee can claim the whole performance;

(c) the claims are joint when all obligees have to claim performance together.

COMMENT**1. Several obligees**

Plurality of obligees 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. The three banks are plural obligees with regard to claiming reimbursement from 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.

On the other hand, when different actors in a construction project join in a consortium and claim one payment for all their services, they are to be considered as plural obligees for that payment.

The "same obligation" usually derives from a single contract. 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.

Illustration

3. Eight insurance companies agree to co-insure the liability risks of a pharmaceutical group. The co-insurance agreement provides that each co-insurer has a distinct contractual relationship with the insured, but the latter's obligations towards the co-insurers are the same (payment of the agreed premium, required prevention measures, loss notification, etc...). These co-insurers are plural obligees, subject as such to the rules in this Section.

3. Three main types

Article 11.2.1 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.

Illustration

4. The facts are the same as in Illustration 1. If Banks A, B and C's claims against Company X, totalling USD 12,000,000, 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 11.2.2), subject to subsequent allocation between the different obligees (see below, article 11.2.4).

Illustration

5. 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" when all obligees have then to claim together; consequently, the obligor may only perform in favour of all of them together. This situation is sometimes also referred to as "communal claims".

Illustration

6. 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.

4. No presumption provided

In the case of plurality of obligors, Article 11.1.2 above sets a presumption of joint and several obligations, because this corresponds to the most frequent commercial practice.

On the contrary, when it comes to determining to which of the three types defined in this Article 11.2.1 claims by plural obligees belong, the Principles do not provide any presumption. The reason is that none of these types seems to be dominant in practice ; choices vary considerably, mainly depending on the operations concerned.

Consequently, in situations where plural obligees are involved, parties are encouraged to choose the relevant type by an express stipulation.

Illustrations

1. Banks A, B and C join in a syndicated loan agreement to offer financing to Company X. Typically for such operations, the agreement provides that *"All amounts due, and obligations owed, to each Bank are separate and independent obligations. Each Bank may separately enforce its rights under this agreement"*. This express provision makes the Banks' claims separate.

2. 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. The contract stipulates that each seller can claim payment of the whole price. The claims are joint and several.

3. The initial facts are the same as in Illustration 2, but on the contrary, the sales contract with the Museum provides that A and B's claims are separate. This means each of them can only claim payment of the price for its own share of the claim, normally corresponding to its previous share of ownership.

Before making such a contractual choice, parties should pay attention to the respective advantages and disadvantages of the different types of plural claims.

In particular, joint and several claims have the advantage to avoid the multiplication of law suits, an especially important concern in international trade. Any of the obligees may claim the whole performance. Joint and several claims also simplify the situation of the obligor, who will not have to divide performance between its different obligees. From the point of view of the plural obligees themselves, claims are also made easier if they are joint and several.

On the other hand, plural obligees have to be aware that if their claims are joint and several, they lose exclusive control on their respective shares. Any other joint and several obligee may claim and collect the whole performance, with the risk that later allocation under article 11.2.5 below could create difficulties. This explains why separate claims seem to be more prevalent in certain sectors (see for instance Illustration 1).

If the parties have failed to make an explicit contractual choice, the type to which a plural claim should be assigned will be determined by interpretation of the contract, under the principles set in Chapter 4 of these Principles. In many instances, circumstances such as the nature or the purpose of the contract will be especially relevant (see Article 4.3 (d)).

Illustrations

4. Company A, located in Japan, and Company B, located in China, join in ordering a large quantity of cars from a manufacturer. The cars for Japan are right hand-drive, those for China left hand-drive. When delivery is to be claimed, these circumstances indicate that Companies A and B are separate obligees, each one being entitled to claim its variety of cars.

5. Tax consultant X has undertaken to give tax advice to Companies A and B, concerning the operations of a joint venture in which the latter are involved. Since the tax advice concerns Companies A and B's common venture and such advice is hardly divisible, Companies A and B are to be considered as joint and several obligees when claiming performance from Tax consultant X.

5. Possible designation of an agent

In practice, plural obligees often designate an agent with authority to deal with the obligor on behalf of all of them, within the agreed

limits. This seems to be especially frequent, for practical reasons, when the claims are separate. However, in that case, each obligee intends to keep full control of its own rights, often reserving the possibility to revoke the agent's authority at any time.

Illustration

6. 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.

It can also happen that the initiative of designating an intermediary comes from an obligor who wants to exert some control over the claims which could be separately exercised by its numerous obligees.

Illustration

7. Under the terms of issue of a bearer bond trustees are appointed to represent the interests of bondholders. The issuer covenants to make payments to each bondholder in accordance with the terms of issue and gives the trustee a parallel payment covenant. Upon the issuer's default the trustee may in its discretion enforce payment and must do so if so required by a given percentage in value of bondholders. Individual bondholders are precluded from taking action on default by the issuer unless the trustee for the bondholders has failed to fulfil its obligation under the trust deed to take enforcement action. Each bondholder is a separate obligee; the purpose of the trust is simply to monitor performance by the issuer and co-ordinate enforcement in order to avoid precipitate action by an individual bondholder.

Article 11.2.2

(Effects of joint and several claims)

Full 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**

The main effect of joint and several claims has already been stated in the definition of Article 11.2.1 (2) above. 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 11.2.4 below.

2. Obligor's choice

The present Article 11.2.2 states two other major effects of joint and several claims.

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

Illustration

2. The facts are the same as in Illustration 1. Buyer X takes the initiative of paying the price before being invited to do so by either of its obligees. Buyer X may validly pay to Seller A or to Seller B.

3. Obligor's discharge

Another main effect of joint and several claims is that the obligor who has rendered full performance in favour of one of the obligees is discharged towards the other obligees.

Illustration

3. The facts are the same as in Illustration 1. 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 11.2.2 (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 or 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 are always applicable (Article 1.7).

Article 11.2.3

(Availability of defences against joint and several obligees)

(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 11.1.5, 11.1.6, 11.1.7 and 11.1.8 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 seeds to Companies A, B and C, who are engaged in 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 the premises where the seeds have to be delivered are not equipped with certain facilities for convenient unloading, the availability of which Company A alone had guaranteed. Producer X may invoke this as a defence 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. The initial facts are the same as in Illustration 1. Grain producer X finds out that the agricultural project involves child labour by Companies A, B and C, in violation of applicable mandatory rules. This is a common defence that Producer X may assert against any obligee claiming delivery of the wheat seeds.

2. Effects of certain defences

Section 1 of the present Chapter contains particular rules about the effects of certain types of defences (Articles 11.1.5, 11.1.6, 11.1.7 and 11.1.8) available to joint and several obligors. Paragraph 3 of this Article provides that these rules apply, with appropriate adaptations, to joint and several claims.

- **Performance, set-off (Article 11.2.3, 2° referring to Article 11.1.5)**

Article 1.5 provides that "*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*". Similarly, performance received by (or set-off exercised by) one of the joint and several obligees discharges the obligor towards the other obligees to the extent of the performance of set-off.

Illustrations

3. Companies A, B and C have jointly and severally loaned EUR 300,000 to Borrower X. Company A receives full payment. If Company B or C still claims reimbursement, Borrower X may assert that it has fully performed in favour of Company A.

4. The facts are the same as in Illustration 3, but in a different context, Borrower X can claim EUR 300,000 from Company A for the sale of office equipment. Borrower X exercises the right of 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 , settlement (Article 11.2.3, 2° referring to Article 11.1.6)

Article 1.6 provides that "*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*". Similarly, release granted to the obligor by one of the obligees (or settlement with the obligor by one of the obligees) discharges the obligor towards the other obligees to the extent of the release or the settlement.

Illustrations

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 from A's share of X's 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 11.2.4 below (comp. Article 11.1.6, 2°).

6. The facts are the same as in Illustration 3, but 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. The joint and several claims of Companies B and C against X are reduced by the full amount of A's share, i.e. by EUR 100,000, and both Companies remain Borrower X's joint and several obligees for EUR 200,000. Settling obligee A has no

more recourse under article 11.2.4 against Companies B or C (comp. Article 11.1.6, 2°).

As in Article 11.1.6, with appropriate adaptations, the reference to settlement 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 (Article 11.2.3, 2° referring to Article 11.1.7)

Article 1.7 provides that expiration of the limitation period of the obligee's rights against one joint and several obligor affects neither (a) the obligations to the obligee of the other joint and several obligors, nor (b) the rights of recourse between the joint and several obligors under article 11.1.10. Similarly, expiration of the limitation period of one of the obligees' rights against the obligor affects neither (a) the obligor's obligations towards the other joint and several obligees, nor (b) the rights of recourse between the joint and several obligees under article 11.2.4.

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.

Article 11.1.7 also provides that 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. Similarly, if one of the obligees initiates proceedings against the obligor, the running of the limitation period is also suspended in favour of the other joint and several obligees.

- Effect of judgment (Article 11.2.3, 2° referring to Article 11.1.8)

Article 11.1.8 provides that a decision by a court as to the liability to the obligee of one joint and several obligor affect neither (a) the obligations to the obligee of the other joint and several obligors, nor (b) the rights of recourse between the joint and several obligors under article 11.1.10. Similarly, a decision by a court as to the obligor's liability towards one of the joint and several obligees affects neither (a) the obligor's obligations towards the other joint and several obligees, nor (b) the rights of recourse between the joint and several obligees under article 11.2.4.

Illustration

8. 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 11.2.4.

However, article 11.1.8, 2° also provides that the other joint and several obligors may rely on such a decision, except if it was based on grounds personal to the obligor concerned. In such a case, the rights of recourse between the joint and several obligors under article 11.1.10 are affected accordingly. Correspondingly, the other joint and several obligees may rely on the decision if they find it in their interest, except if it was based on grounds personal to the obligee concerned.

Illustration

9. The initial facts are the same as in Illustration 8. This time, however, the judgment gives full satisfaction to Obligee A, including the award of additional damages. The other obligees may avail themselves of this favourable decision.

Article 11.2.4

(Allocation between joint and several obligees)

(1) As among 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 11.2.2. However, as among 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 factory for SFR 10,000,000, and they are joint and several obligees concerning payment of the price. However, once the buyer has paid SFR 10,000,000, 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 5,000,000.

However, the circumstances may indicate otherwise.

Illustration

2. The shares of co-ownership of the factory were not equal, but 75 % for A and 25 % for B. This will indicate that Seller A should receive SFR 7,050,000 and Seller B SFR 2,050,000.

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 11.2.2. 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 factory, i.e. SFR 10,000,000, and its share of co-ownership was 50 %. Seller A must transfer SFR 5,000,000 to Seller B.

Whether the claim of the other obligees to the excess is a property right or merely a personal claim against the obligee who received more than its share is outside the scope of these Principles.