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**Item No. 4 on the agenda: Principles of International Commercial Contracts –  
Consideration and adoption of additional Chapters**

(Memorandum prepared by the Secretariat)

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|---------------------------|---|
| <i>Summary</i>            | <i>Preparation of a new edition of the UNIDROIT Principles of International Commercial Contracts</i>                                |
| <i>Action to be taken</i> | <i>Consideration and adoption of additional Chapters</i>  |
| <i>Mandate</i>            | <i>Work Programme 2006-2010</i>   |
| <i>Priority level</i>     | <i>High</i>   |
| <i>Status</i>             | <i>On target</i>  |
| <i>Related documents</i>  | <i>UNIDROIT 2009 – Study L – Misc. 29; UNIDROIT 2010 – Study L – Doc. 114, 115, 116, 117, 118; Annual Report 2009 (C.D. (89) 2)</i> |

**Preparation of a new edition of the UNIDROIT Principles of International Commercial  
Contracts: A progress report**

INTRODUCTION

- I. DRAFT CHAPTER ON UNWINDING OF FAILED CONTRACTS (NOW "DRAFT RULES ON RESTITUTION")
- II. DRAFT CHAPTER ON ILLEGALITY
- III. DRAFT CHAPTER ON PLURALITY OF OBLIGORS AND/OR OBLIGEEES
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APPENDIX: DRAFT TABLE OF CONTENTS OF THE NEW EDITION OF THE UNIDROIT PRINCIPLES

## INTRODUCTION

1. When adopting at its 83<sup>rd</sup> session (2004) the second edition of the UNIDROIT Principles, the Governing Council recommended that in view of the Principles' success worldwide they should figure in the Institute's Work Programme as an ongoing project.

2. In 2005 the Council instructed the Secretariat to set up a new Working Group to prepare a third edition of the Principles containing additional chapters or rules on unwinding of failed contracts, illegality, plurality of obligors and of obligees, conditions and termination of long-term contracts for cause. The Working Group, composed of B. Akhlaghi (Iran) G. Alpa (Italy), M. J. Bonell (UNIDROIT; Chairman of the Working Group), P.-A. Crépeau (Canada), S. K. Date-Bah (Ghana), B. Fauvarque-Cosson (France), P. Finn (Australia), M. Fontaine (Belgium), M. Furmston (United Kingdom), H. D. Gabriel (United States of America), L. Gama Jr. (Brazil) (since 2008), R. Goode (United Kingdom), A. Hartkamp (Netherlands), A. Komarov (Russian Federation), O. Lando (Denmark), T. Uchida (Japan), J.B. Villela (Brazil) (2006-2007), P. Widmer (Switzerland), Zhang Y. (China) and R. Zimmermann (Germany), has so far held four annual plenary sessions (2006-2009). The sessions were attended also by observers representing numerous international and national organisations and arbitral centres, including the United Nations Commission on International Trade Law (UNCITRAL) (R. Sorieul), the Hague Conference on Private International Law (M. Pertegás), the *Groupe de Travail Contrats Internationaux* (C. Chappuis), the Study Group for a European Civil Code (C. von Bar), the American Law Institute (N. Cohen), the International Bar Association (Space Law Committee) (E. Brödermann), the New York City Bar (A. Garro), the Emirates International Law Center (I. Al Mulla), National Law Center for Inter-American Free Trade (P. Perales Viscasillas), the ICC International Court of Arbitration (E. Jolivet), the China International Economic and Trade Arbitration Commission (W. Wang), the German Arbitration Institute (H. Raeschke-Kessler), the Swiss Arbitration Association (F. Dessemontet), the Arbitration Court of the Hungarian Chamber of Commerce and Industry (A. Harmathy), Institute for Transnational Arbitration of the Center for American and International Law (J. Sharpe) and the Chamber of National and International Arbitration of Milan (G. Schiavoni).

3. For each of the new topics a Rapporteur was appointed: R. Zimmermann on unwinding of failed contracts, M. Furmston (2006-2008) and M.J. Bonell (since 2009) on illegality; M. Fontaine on plurality of obligors and/or obligees, B. Fauvarque-Cosson on conditions, and F. Dessemontet on termination of long term contracts for just cause.

4. At its 1<sup>st</sup> session in May 2006 the Working Group proceeded to a general discussion on the topics suggested by the Governing Council for inclusion in the new edition of the Principles. At its 2<sup>nd</sup> session in June 2007, the Working Group examined the position papers presented by the Rapporteurs on their respective topics. At its 3<sup>rd</sup> session in May 2008 the Working Group proceeded to a first reading of the draft chapters on unwinding of failed contracts, illegality, plurality of obligors and/or obligees, and conditions as well as to an examination of the position paper on termination of long term contracts for just cause. At its 4<sup>th</sup> session in May 2009 the Working Group completed its second reading of the drafts of the first four chapters and invited the respective Rapporteurs to revise their drafts in the light of the Working Group's deliberations and submit them to the Working Group for a final reading at its next session to be held at the end of May 2010. At its 4<sup>th</sup> session the Working Group also made a first reading of the draft chapter on termination of long term contracts for just cause: however, in view of the fact that the draft was still in a rather preliminary phase, the Working Group decided no longer to include this topic in the third edition of the Principles but to postpone further work on it with a view to taking it up again in the future in another context.

5. The Governing Council, which has been kept regularly informed of the development of the project and is expected to approve the final version of the new edition of the UNIDROIT Principles, may wish to proceed to a closer examination of the draft chapters on unwinding of failed contracts, illegality, plurality of obligors and/or obligees, and conditions with a view to formulating comments and suggestions, if any, to be forwarded to the Working Group. In order to facilitate the Council's task the present report sets out the most important and/or controversial issues related to the new draft chapters together with a brief summary of the views expressed within the Working Group.

I. DRAFT CHAPTER ON UNWINDING OF FAILED CONTRACTS (NOW "DRAFT RULES ON RESTITUTION")  
(UNIDROIT 2010 – STUDY L – DOC. 114)

6. With respect to the draft chapter on unwinding of failed contracts (now renamed "Draft Rules on Restitution") the most important issue to be decided was how to structure the rules dealing with the topic, i.e. whether there should be a separate chapter dealing with restitution in general, or whether there should be rules on restitution in each of the chapters dealing with the different cases of failed contracts (avoidance, termination, illegality, fulfilment of a resolutive condition). The Working Group eventually decided not to adopt the unitary approach and to opt for the separate approach.<sup>1</sup> It was felt that the separate approach would disrupt the present structure of the Principles as little as possible and moreover would be more user-friendly as users would find in each of the chapters dealing with the different cases of failed contracts the relevant rules on restitution. However in order to avoid unnecessary repetition it was decided to deal comprehensively with restitution only in the chapters on avoidance (see UNIDROIT 2010 – Study L – Doc. 114, Article 3.18 in its amended version) and on termination (see UNIDROIT 2010 – Study L – Doc. 114, Article 7.3.6 in its amended version and new Article 7.3.7) and to have in the chapters on illegality and on conditions a mere reference to the rules on restitution laid down in the chapters on avoidance and termination, respectively (see UNIDROIT 2010 – Study L – Doc. 116, Article 2, paragraph 3; UNIDROIT 2010 – Study L – Doc. 118, Article 5).

7. Another issue discussed was how to present the rules on restitution with respect to termination. In the present edition of the Principles Article 7.3.6 states in paragraph 1 the general rule that on termination each party may claim restitution of whatever it has supplied under the contract provided that it concurrently makes restitution of whatever it has received, and provides in paragraph 2 as an exception to the general rule that if performance of the contract has extended over a period of time restitution can only be claimed for the period after termination has taken effect. It was felt that this mode of presentation was rather misleading insofar as it clearly took sales contracts as the paradigm case and degraded contracts to be performed over a period of time to be the exception, whereas in practice the latter are just as important – if not even more – as the former. Consequently it was decided to have two separate articles, one dealing with restitution with respect to contracts to be performed at one time (see UNIDROIT 2010 – Study L – Doc. 114, Article 7.3.6 in its amended version) and the other dealing with restitution with respect to contracts to be performed over a period of time (see UNIDROIT 2010 – Study L – Doc. 114, new Article 7.3.7), thereby putting the two sets of rules on an equal footing.<sup>2</sup>

8. Yet another controversial issue was whether the duty to return what has been performed should include the benefits derived from such performance. Initially the draft specifically provided that on avoidance or termination of the contract the parties have to return not only the performance(s) received but also the benefits derived from such performance(s), the term

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<sup>1</sup> Cf. UNIDROIT 2006 – Study L – Misc, 26, paras. 46, 53-83; UNIDROIT 2007 – Study L – Misc, 27, paras. 236-238; UNIDROIT 2008 – Study L – Misc, 28, paras. 111-113; UNIDROIT 2009 – Study L – Misc, 29, paras. 76-104.

<sup>2</sup> Cf. UNIDROIT 2007 – Study L – Misc, 27, paras. 240-269; UNIDROIT 2008 – Study L – Misc, 28, paras. 21-34, 73-93.

“benefits”, which had been taken from CISG (Art. 84), including the fruits of an object (both the natural fruits and the proceeds supplied by an object or a right by virtue of a legal relationship) and the advantage of being able to use an object. The rationale of the rule was that if an object has to be returned, it has been retained without good cause, and that consequently also all the benefits deriving from that object have to be returned.<sup>3</sup> However the proposed rule, though supported by several members of the Working Group, was criticised by others. The main argument raised against the rule was that, since in commercial practice it was often extremely difficult, if not impossible, to establish with sufficient certainty the value of the benefits received by the parties as a result of the performance, it would only engender litigation. Moreover, usually both parties receive benefits of roughly the same value so that the elaboration of a specific restitution rule would not appear to be necessary. It was ultimately decided to drop the reference to benefits (see UNIDROIT 2010 – Study L – Doc. 114, Article 3.18, paragraph 1 and Article 7.3.6, paragraph 1).<sup>4</sup>

## II. DRAFT CHAPTER ON ILLEGALITY (UNIDROIT 2010 – Study L – Doc. 115; UNIDROIT 2010 – Study L – Doc. 116)

9. The most controversial issue was whether in the chapter on illegality according to the seriousness of the unlawful behaviour a distinction should be made between contracts contrary to fundamental principles and contracts infringing mandatory rules. Initially the Working Group was in favour of such a two-tier approach, and indeed the first versions of the draft chapter distinguished between “contracts contrary to principles widely accepted as fundamental in legal systems throughout the world” and “contracts infringing mandatory rules of national, international or supranational origin applicable under Article 1.4 of these Principles”. As to the effects of a contract contrary to fundamental principles, the drafts provided that where both parties knew or ought to have known of the violation, neither party had the right to exercise any contractual remedy, while where only one party was aware of the violation the other might have been granted the contractual remedies as reasonable in the circumstances. By contrast, with respect to a contract infringing mandatory rules, the drafts provided that the effects depended first of all on what the infringed mandatory rule expressly prescribes, whereas in the absence of an express indication the effects depended on what was reasonable in the circumstances.<sup>5</sup>

10. At the Working Group’s session in May 2009 several members expressed strong reservations concerning the two-tier approach. The main objection was that the very notion of “principles widely accepted as fundamental in legal systems throughout the world” was too vague and would inevitably give rise to divergent interpretations in the different parts of the world, thereby undermining one of the main objectives of the UNIDROIT Principles which was to promote legal certainty in international contract practice. It was suggested that the Principles should address only one kind of illegality, i.e. the infringement of mandatory rules of national, international or supranational origin applicable under Article 1.4. At the same time however it was suggested that the Comments to Article 1.4 be amended to make it clear that the reference to “mandatory rules” in the black letter rule is intended as a reference not only to specific statutory provisions but also to the unwritten public policy of the respective national legal systems.<sup>6</sup>

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<sup>3</sup> Cf. UNIDROIT 2007 – Study L – Misc, 27, paras. 270, 354.

<sup>4</sup> Cf. UNIDROIT 2007 – Study L – Misc, 27, paras. 271-295; 355-371; UNIDROIT 2008 – Study L – Misc. 28, paras. 52-64.

<sup>5</sup> Cf. UNIDROIT 2006 – Study L – Misc, 26, paras. 84-153; UNIDROIT 2007 – Study L – Misc, 27, paras. 166-222, 502-597; UNIDROIT 2008 – Study L – Misc. 28, paras. 115-267.

<sup>6</sup> Cf. UNIDROIT 2009 – Study L – Misc. 29, paras. 283-360.

11. Notwithstanding the support other members and most of the observers expressed for the two-tier approach, the Working Group eventually decided to deal in the chapter on illegality only with “contracts infringing mandatory rules” (see UNIDROIT 2010 – Study L – Doc. 116, Article 1) and to amend the Comments to Article 1.4 in the sense indicated above (see UNIDROIT 2010 – Study L – Doc. 115: Comments 2 and 4 to Article 1.4).<sup>7</sup>

12. Another important issue discussed concerned the question as to whether, even where as a consequence of the infringement of a mandatory rule the parties are denied any remedies under the contract, they may still claim restitution of what they have rendered in performing the contract. Contrary to the traditional view that, at least where both parties were aware or ought to have been aware of the infringement of the mandatory rule, they should be left where they stand, i.e. should not even be entitled to recover the benefits conferred, there was a substantial majority within the Working Group in favour of adopting, in line with the modern trend, a more flexible approach.<sup>8</sup> As a result the draft provides that where there has been performance under a contract infringing a mandatory rule restitution may be granted where in the circumstances this would be reasonable (see UNIDROIT 2010 – Study L – Doc. 116, Article 2, paragraph 1). Thus in practice restitution may or may not be granted depending on whether, in the case at hand, it is more appropriate to allow the recipient to keep what it has received or to allow the performer to reclaim it. As to the criteria for determining whether the granting of restitution is reasonable they are the same as those for determining whether to grant remedies under the contract (see UNIDROIT 2010 – Study L – Doc. 116, Article 2, paragraph 2). However they may well lead, given the different nature of contractual remedies and restitutionary remedies, in one and the same case to different results, i.e. it may be reasonable to deny parties the remedies under the contract but to grant restitution.

### III. DRAFT CHAPTER ON PLURALITY OF OBLIGORS AND/OR OBLIGEES (UNIDROIT 2010 – Study L – Doc. 117)

13. With respect to Section 1 on plurality of obligors a first matter discussed was terminology. Once having decided to address two different situations of plurality of obligors, i.e. where each obligor is bound for the whole obligation and the obligee may require performance from any one of them, and where each obligor is bound only for its share, the question arose as to how to name the first of the two situations. Ultimately it was decided to adopt the term “joint and several obligations”, and not the term “solidary” proposed by some of the members of the Working Group, in view of the fact that the former is not only familiar in common law systems but is also commonly used in international commercial practice (see UNIDROIT 2010 – Study L – Doc. 117, Article 1.1, no.1).<sup>9</sup>

14. Concerning substance, the issue of the effects of release by the obligee of one joint and several obligor, or settlement with one joint and several obligor, with respect to the other obligors was discussed at length. Initially the Working Group thought that the two cases should be distinguished and subject to different rules: with respect to release the rule should be that release of one obligor discharges all the other obligors unless the obligee has reserved its rights against them, whereas in the case of settlement between the obligee and one obligor reducing that obligor’s share, the other obligor’s obligations are reduced by the initial amount of the settling obligor’s share.<sup>10</sup> Ultimately the Working Group however decided to have one and the same rule for

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<sup>7</sup> Cf. UNIDROIT 2009 – Study L – Misc. 29, paras. 374, 410-500.

<sup>8</sup> Cf. UNIDROIT 2006 – Study L – Misc. 26, para. 147; UNIDROIT 2007 – Study L – Misc. 27, paras. 195-222; UNIDROIT 2008 – Study L – Misc. 28, paras. 268-299; UNIDROIT 2009 – Study L – Misc. 29, paras. 388-409, 450-453.

<sup>9</sup> Cf. UNIDROIT 2006 – Study L – Misc. 26, para. 155, 157, 159, 161, 163-167, 176; UNIDROIT 2007 – Study L – Misc. 27, paras. 8-9, 26-28.

<sup>10</sup> UNIDROIT 2007 – Study L – Misc. 27, paras. 50-83.

both cases, and the draft now provides that release of, 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 (see UNIDROIT 2010 – Study L – Doc. 117, Article 1.6, paragraph 1).<sup>11</sup>

15. Another controversial issue was the effect of a court decision concerning the liability to the obligee of one joint and several obligor. At comparative level two are the solutions most often adopted: to give no effect or to give full effect to the judgment in relation to the other co-obligors. After a lengthy discussion the Working Group opted for an intermediate solution, actually adopted by some jurisdictions, i.e. that the court decision will in principle not affect the obligation of the co-obligors who were not called to the court but that the other joint and several obligors may avail themselves of such decision (see UNIDROIT 2010 – Study L – Doc. 117, Article 1.8).<sup>12</sup>

16. Yet another issue discussed at length was whether a joint and several obligor who has performed more than its share should be able not only to claim the excess from any of the other obligors but also to benefit from the rights of the obligee, including all rights securing the performance of the other obligors. While the possibility of benefiting from the obligee's rights is out of the question where the obligee has received full performance, two different approaches are conceivable in case the obligee has not been paid in full: either to deny any subrogation in favour of the obligor or to grant the obligor a partial subrogation, i.e. to the extent to which it has paid the obligee. The Working Group eventually decided to adopt the second approach which, though unknown in common law jurisdictions, corresponds to the solution generally adopted in civil law jurisdictions (see UNIDROIT 2010 – Study L – Doc. 117, Article 1.11).<sup>13</sup>

17. With respect to Section 2 on plurality of obligees, a first issue discussed concerned the very basic approach to be adopted, i.e. whether to treat the provisions on plurality of obligees in the traditional manner as the mirror image of the provisions on plurality of obligors, or to adopt the approach taken by the Dutch Civil Code and supported in legal writings particularly in Germany based on co-ownership combined with rules on agency. Opinions within the Working Group were divided but eventually a substantial majority was in favour of the traditional approach also in view of the fact that practical experience with the Dutch approach apparently was not too satisfactory.<sup>14</sup>

18. Another issue which was the subject of lengthy discussion concerned the question as to which of the three types of claims by several obligees against an obligor for the same performance, i.e. separate claims, joint and several claims, and joint claims, envisaged in the draft (see UNIDROIT 2010 – Study L – Doc. 117, Article 2.1) should be presumed if nothing is said in the contract. Initially there were proposals for a presumption in favour of separate claims, joint claims and joint and several claims, respectively, but in view of the fact that contract practice vary considerably from one trade sector to another, it was felt preferable to have no default rule at all, leaving it up to the parties to make the most appropriate arrangement in each single case.<sup>15</sup> However on further consideration of the matter the Working Group eventually decided, though with reservations on the part of some of its members, for a presumption in favour of joint and several claims (see UNIDROIT 2010 – Study L – Doc. 117, Article 2.2). In support of such a solution it was pointed out that a presumption in favour of separate claims would not be feasible in case of claims for services which

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<sup>11</sup> UNIDROIT 2008 – Study L – Misc. 28, paras. 402-443; UNIDROIT 2009 – Study L – Misc. 29, paras. 519-527.

<sup>12</sup> UNIDROIT 2009 – Study L – Misc. 29, paras. 536-559.

<sup>13</sup> UNIDROIT 2008 – Study L – Misc. 28, paras. 469-494, 616-618; UNIDROIT 2009 – Study L – Misc. 29, paras. 566-575.

<sup>14</sup> UNIDROIT 2006 – Study L – Misc. 26, paras. 155, 186-190; UNIDROIT 2007 – Study L – Misc. 27, paras. 134-137.

<sup>15</sup> UNIDROIT 2007 – Study L – Misc. 27, paras. 143-157; UNIDROIT 2008 – Study L – Misc. 28, paras. 509, 571-597.

are normally indivisible, and that the argument that the absence of a default rule would encourage parties to make their own arrangements was based on the assumption that parties (and their lawyers) all over the world would be sufficiently sophisticated to do so, while in actual fact this is not the case. At least in countries with less developed legal systems parties might be taken by surprise by the absence of any default rule. Moreover, a presumption in favour of joint and several claims would be in the interest of both the obligees and the obligor: in the interests of the obligees because, unless the circumstances clearly indicate otherwise, in most cases their expectation is that their claims are joint and several; in the interests of the obligor because, unless the circumstances clearly indicate otherwise, it would normally expect to be able to discharge its obligation vis-à-vis the co-obligees by making a single payment and not having to make a separate payment to each co-obligee and eventually to be sued by all of them.<sup>16</sup>

#### IV. DRAFT CHAPTER ON CONDITIONS (UNIDROIT 2010 – Study L – Doc. 118)

19. Also with respect to the chapter on conditions a first matter discussed was terminology. In accordance with most legal systems the draft distinguishes between two types of condition, i.e. when upon the occurrence of a future uncertain event the contract or the contractual obligation takes effect, and when upon the occurrence of a future uncertain event the contract or the contractual obligation comes to an end, and the question arose as to how to name the two types of condition. The Working Group eventually decided in favour of the civilian terms “suspensive condition” and “resolutive condition”, respectively (see UNIDROIT 2010 – Study L – Doc. 118, Article 1), as opposed to “condition precedent” and “condition subsequent” more familiar to common law systems, also in view of the fact that even within the latter the terms “condition precedent” and “condition subsequent” are far from being univocal.<sup>17</sup>

20. The Working Group also agreed that the Comments should make it clear that the chapter dealt only with conditions of contractual origin and not with conditions imposed by law such as public permission requirements which were addressed, at least to some extent, in Articles 6.1.14 - 6.1.17. At the same time however it should be stated that if parties incorporate into their contract conditions imposed by law, the provisions of this chapter might be applicable with the appropriate adaptations (see UNIDROIT 2010 – Study L – Doc. 118, Comment 1 to Article 1).<sup>18</sup>

21. Moreover, it was suggested mentioning in the Comments that the term “condition” itself may have a number of meanings in the various legal systems and that for the purpose of this chapter it is intended to refer only to future uncertain events and therefore is distinct from what in some jurisdictions is called a “term” and which designates a future but certain event (see UNIDROIT 2010 – Study L – Doc. 118, Comment 2 to Article 1).<sup>19</sup>

22. The Working Group discussed at length how to deal with the so-called condition entirely dependent on the will of a party. Given the considerable differences between common law and civil law systems in this respect it was ultimately decided not to have a black letter rule on this issue but to address it in the Comments. More precisely the Comments should point out that it ultimately all depends on the intention of the parties whether in the presence of this type of condition (e.g. a loan agreement subject to approval by the bank’s loan committee) a contract has already been concluded or not and whether the discretion granted to one of the parties (in the example at hand

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<sup>16</sup> UNIDROIT 2009 – Study L – Misc. 29, paras. 610-645.

<sup>17</sup> UNIDROIT 2007 – Study L – Misc. 27, paras. 393-402.

<sup>18</sup> UNIDROIT 2007 – Study L – Misc. 27, paras. 429-434; UNIDROIT 2009 – Study L – Misc. 29, paras. 230-255.

<sup>19</sup> UNIDROIT 2006 – Study L – Misc. 26, paras. 193-209.

the bank) is unlimited or subject to some objective test (see UNIDROIT 2010 – Study L – Doc. 118, Comment 5 to Article 1).<sup>20</sup>

23. The Working Group also decided to have in the Comments to Article 1 a special paragraph devoted to “closing”. As known, in international contract practice parties to complex and high value business transactions that involve prolonged negotiations more and more frequently provide for a so-called “closing” procedure, i.e. the formal acknowledgement (“closing”) at a certain point in time (“closing date”) that on or before that date all the stipulated conditions (“conditions precedent”) have been satisfied. Admittedly this kind of procedure had in actual practice many facets, and despite the terminology used by the parties, not all the events referred to as “conditions precedent” are “conditions” as defined in Article 1 of this draft chapter. It was felt that the Comments should provide some general information on the procedure, possibly with a sample clause taken from actual contract practice. It was also suggested having a reference to “closing” somewhere in the chapter on formation, the most appropriate place being Article 2.1.13 (see UNIDROIT 2010 – Study L – Doc. 118, Comment 6 to Article 1).<sup>21</sup>

24. While with respect to Article 2 which provides that unless otherwise agreed by the parties the fulfilment of a condition, be it suspensive or resolutive, has no retroactive effect, there was substantial agreement within the Working Group, notwithstanding the fact that at domestic level also the opposite solution is adopted,<sup>22</sup> Articles 3 and 4 as initially proposed and dealing with interference with conditions and duty to preserve rights, respectively, were the subject of considerable discussion. Some members even questioned the need for such provisions on the ground that they were clearly an application of the general principle of good faith as laid down in Article 1.7 of the Principles. However, the majority of the Working Group, though not denying that this was the case, nevertheless strongly supported retaining the two provisions which addressed issues of utmost importance in practice and not always sufficiently dealt with by the parties in their contract. It was however decided to invert the order of the two articles and to qualify further a party’s duty not to act so as to prejudice the other party’s rights in case of fulfilment of the condition by adding the words “contrary to the duty of good faith and fair dealing” (see UNIDROIT 2010 – Study L – Doc. 118, Article 3). It was also suggested mentioning in the Comments that in commercial practice parties may include in their contract a specific provision (often named “covenant” or “ordinary course of business”) which for the period between the date of signature and the closing date restricts the parties rights on their assets to so-called ordinary administration while requiring for more important acts specific agreement between the parties.<sup>23</sup>

## V. PLACEMENT OF THE DRAFT CHAPTERS IN THE NEW EDITION OF THE UNIDROIT PRINCIPLES

25. So far the Working Group has not yet discussed the placement of the four draft chapters in the new edition of the Principles, and the Governing Council may wish to express its views in this respect. The suggested table of contents of the new edition as set forth in Appendix I follows two basic criteria: first, to identify for the new provisions the most appropriate place from a systematic point of view, and secondly, to disrupt as little as possible the present structure and numbering of the Principles.

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<sup>20</sup> UNIDROIT 2006 – Study L – Misc. 26, paras. 233-236; UNIDROIT 2007 – Study L – Misc. 27, paras. 421-428; UNIDROIT 2009 – Study L – Misc. 29, paras. 170-189.

<sup>21</sup> UNIDROIT 2009 – Study L – Misc. 29, paras. 190-202.

<sup>22</sup> UNIDROIT 2007 – Study L – Misc. 27, paras. 473-478; UNIDROIT 2008 – Study L – Misc. 28, paras. 311-316.

<sup>23</sup> UNIDROIT 2006 – Study L – Misc. 26, paras. 214-225; UNIDROIT 2007 – Study L – Misc. 27, paras. 448-472; UNIDROIT 2009 – Study L – Misc. 29, paras. 219-228, 256-278.

**UNIDROIT PRINCIPLES 2010**

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