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International Institute for the Unification of Private Law

WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Preparation of a second enlarged edition of the UNIDROIT Principles of International Commercial Contracts

(Secretariat Memorandum)

Rome, January 1998

I. Introduction

1. - When deciding in 1994 the publication and widest distribution of the UNIDROIT Principles the Governing Council of UNIDROIT stressed the need "to monitor their use *with a view to a possible reconsideration of them at some time in the future*" (emphasis added) (cf. UNIDROIT 1994, C.D.(73) 18, p. 22). At its 75th session held in 1996 the Governing Council was seized of a report by the Secretariat containing first proposals as to the future work on the UNIDROIT Principles (cf. UNIDROIT 1996, C.D. (75) 8). Following this report the Governing Council requested the Secretariat "[...] to prepare for the next Council session one or more papers suggesting areas not dealt with in the first edition of the Principles that could be included in a revised version and, eventually, indicating problem areas that might have been identified in relation to the present text." The Governing Council also decided that a Sub-committee composed of members of the Governing Council should meet before the Council session to formulate proposals to the Council as to the terms of reference of the Working Group which would be responsible for the preparation of the second edition of the UNIDROIT Principles (cf. UNIDROIT 1996, C.D. (75) 23, p. 16).

2. - At its 76th session held in 1997 the Governing Council was seized of a report by the Secretariat (cf. "UNIDROIT Principles of International Commercial Contracts (Second): Proposed new topics, problem areas and working method" - UNIDROIT 1997, C.D. (76) 8). This document was first examined by the Sub-committee composed of Mssrs Farnsworth (Chairman), Boggiano, Dlamini, Hartkamp, Loewe, Lyou, Madl, Rose, Ms Trahan and Mr Widmer. The meeting was also attended by Mr Bonell.

3. - On the basis of the conclusions reached by the Sub-committee, the Governing Council decided "[...] [that] work be resumed with priority with a view to publication of an enlarged second edition of the Principles [...]; [that] a Working Group of the same size as before be convened and that a smaller drafting committee be appointed to prepare the preliminary drafts, taking account of linguistic and terminological difficulties [...]; [and that] the additional topics to be dealt with in the second edition of the Principles are those indicated in CD (76) 8, on the understanding that their precise scope be determined by the Working Group which may also suggest other topics".

II. Revision of the present text of the UNIDROIT Principles

4. - Since their publication the UNIDROIT Principles have been discussed at numerous seminars and are the subject of a growing number of scholarly writings world-wide. The comments so far expressed have been extremely favourable. Critical remarks have been few and generally related to a relatively small number of provisions.

5. - The intrinsic quality of the UNIDROIT Principles has also been confirmed by the inquiry undertaken in September 1996 by the Secretariat of UNIDROIT as to their use in practice. Only 20 replies (10% of the total number) made critical remarks on individual provisions, and not all of them referred to the substance of the provisions but merely considered the wording not to be sufficiently clear.

6. - The individual provisions which were considered inappropriate or at least unclear are the following (in brackets the number of replies criticising them):

- Art. 3.10 (*Gross disparity*) (4 replies);
- Chapter 6, Section 2 (*Hardship*) (3 replies);
- Art. 2.20 (*Surprising terms*) (2 replies)
- Art. 3.17 (*Retroactive effect of avoidance*) (2 replies)
- Art. 7.4.13 (*Agreed payment for non-performance*) (2 replies);
- Preamble (1 reply)
- Arts.1.5 *Exclusion or modification by the parties*) and Comment 3 (1 reply)
- Art. 1.8(2) (*Usages and practices*) and Comment 4 (1 reply)
- Art. 1.9(2)(3) (*Notice*) (1 reply)
- Art. 2.4(2)(a) (*Revocation of offer*) (1 reply)
- Art. 2.6(2)(3) (*Mode of acceptance*) (1 reply)
- Art. 2.11(2) (*Modified acceptance*) (1 reply)
- Art. 2.12 (*Writings in confirmation*) (1 reply)
- Art. 2.14 (*Contract with terms deliberately left open*) (1 reply)
- Art. 2.15 (*Negotiations in bad faith*), 2.15 (Comment 3) (1 reply)
- Art. 2.16 (*Duty of confidentiality*) (1 reply)
- Art. 2.19 (*Contracting under standard terms*) (1 reply)
- Art. 3.5 (*Relevant mistake*) (1 reply)
- Art. 3.7 (*Remedies for non-performance*) (1 reply)
- Art. 3.9 (*Threat*) (1 reply)
- Art. 3.14 (*Notice of avoidance*) (1 reply)
- Art. 3.18 (*Damages*) (1 reply)
- Art. 3.19 (*Mandatory character of the provisions*) (1 reply)
- Art. 3.20 (*Unilateral declarations*) (1 reply)
- Art. 4.1 (*Intention of the parties*) (1 reply)
- Art. 4.6 (*Contra proferentem rule*) (1 reply)
- Art. 4.7 (*Linguistic discrepancies*) (1 reply)
- Art. 4.8 (*Supplying an omitted term*) (1 reply)
- Art. 5.3 (*Co-operation between the parties*) (1 reply)
- Art. 5.4 (*Duty to achieve a specific result. Duty to best efforts*) (1 reply)
- Art. 5.5 (*Determination of kind of duty involved*) (1 reply)
- Art. 6.1.3 (*Partial performance*) (1 reply)
- Art. 6.1.5 (*Earlier performance*) (1 reply)
- Art. 6.1.6(2) (*Place of performance*) (1 reply)
- Art. 6.1.9(1) (*Currency of payment*), 6.1.9(4) (1 reply)
- Art. 6.1.10 (*Currency not expressed*) (1 reply)
- Art. 6.1.16 (*Permission neither granted nor refused*) (1 reply)
- Art. 6.1.17 (*Permission refused*) (1 reply)
- Art. 6.2.3 (*Effects of hardship*) in relation to Art. 7.3.1 (*Right to terminate the contract*) (1 reply)

- Art. 7.1.4 (*Cure by non-performing party*) (1 reply)
- Art. 7.1.5 (*Additional period for performance*) (1 reply)
- Art. 7.1.6 (*Exemption clauses*) (1 reply)
- Art. 7.2.2 (*Performance of non-monetary obligation*) (1 reply)
- Art. 7.2.3 (*Repair and replacement of defective performance*) (1 reply)
- Art. 7.2.4 (*Judicial penalty*) (1 reply)
- Art. 7.2.5 (*Change of remedy*) (1 reply)
- Art. 7.3.1 (*Right to terminate the contract*) (1 reply)
- Art. 7.3.2 (*Notice of termination*) (1 reply)
- Art. 7.3.4 (*Adequate assurance of due performance*) (1 reply)
- Art. 7.4.2(2) (*Full compensation*) (1 reply)
- Art. 7.4.4 (*Foreseeability of harm*) (1 reply)
- Art. 7.4.7 (*Harm due in part to aggrieved party*) (1 reply)
- Art. 7.4.9 (*Interest for failure to pay money*) (1 reply)
- Art. 7.4.10 (*Interest on damages*) (1 reply)
- Art. 7.4.11 (*Manner of monetary redress*) (1 reply)
- Art. 7.4.12 (*Currency in which to asssess damages*) (1 reply)

7. - To sum up, of the 120 provisions of the UNIDROIT Principles 7 have been criticised by more than one reply, while another 51 provisions have been criticised only once. Yet what is even more important, 80% of all critical remarks have been made by one and the same person.

8. - In conclusion there seem to be few problem areas in the present edition of the UNIDROIT Principles. Naturally, in order to have a complete picture, it will be necessary also to take into account the growing body of case law relating to the UNIDROIT Principles which might reveal additional difficulties as concerns their application in practice. It is therefore suggested that only at a later stage a decision be taken as to the extent to which individual provisions and/or comments of the present edition of the UNIDROIT Principles should be amended in the envisaged second edition.

9. - The Secretariat will in the meantime continue monitoring the application of the present edition of the UNIDROIT Principles, with special attention to the case law. The Centre for Comparative and Foreign Law Studies is considering the feasibility of extending UNILEX - a data base, set up by the Centre, relating to international case law and bibliography on the UN Convention on Contracts for ther International Sale of Goods - to include international case law and bibliography on the UNIDROIT Principles. For each provision a list of issues likely to arise in relation to its application is being drawn up and under each of these issues the decisions which actually address them are indicated. In addition a bibliography on each provision is being prepared. As to the case law, so far 3 State court decisions and 22 arbitral awards have been collected and are included in the data base at least in the form of abstracts. Moreover there is a reference to recommendations by a Panel of Commissioners of the United Nations Compensation Commission set up to process claims against Iraq for damages arising from the invasion of Kuwait in 1990 mentioning on several occasions the UNIDROIT Principles as a source of general principles of international law. The bibliography on the UNIDROIT Principles already numbers 5 books and some 150 articles.

10. - With respect to the case law it is however very difficult to obtain access to the awards rendered world-wide which in one way or another apply the UNIDROIT Principles. Informal contacts have been established with a view to receiving information from the most important arbitration centers concerning the relevant arbitral awards. Results however are still far from being satisfactory. Most of the decisions of which the Secretariat is aware have come to its knowledge thanks to the personal relations which exist with individual arbitrators and/or counsels. As a consequence not only is it likely that many decisions which would be of interest remain unknown, but those known to the Secretariat are often communicated only in a very summarized form. The Working Group may consider the steps to be taken with a view to remedying this unsatisfactory situation.

III. New topics to be included in the second edition of the UNIDROIT Principles

11. - The content of the present edition of the UNIDROIT Principles basically reflects the recommendations made by the Steering Committee set up in 1974 by the President of UNIDROIT to lay the foundation of the project. The Steering Committee, which was composed of Professors R. David, T. Popescu and C. Schmitthoff, suggested that work focus on formation, interpretation, content, performance (including prescription and novation), non-performance, damages, unjust enrichment and restitution and proof. However, in order to accelerate work on the project, it was subsequently decided to give priority to the topics of formation, interpretation, validity, performance and non-performance.

12. - After the completion of the first edition of the UNIDROIT Principles devoted to these topics, attention may now be turned to additional topics to be dealt with in the envisaged second edition.

13. - In the context of the Secretariat's inquiry a considerable number of replies recommended the enlargement of the present content of the UNIDROIT Principles and the topics most frequently indicated in this respect were agency, prescription, contracts to the benefit of third parties, assignment of debts and/or contracts and set-off. Yet mention was also made of transfer of title, the binding character of unilateral promises, subrogation, suspensive or dissolving conditions. One reply suggested that the new edition of the UNIDROIT Principles contain a model clause to be used by parties who intend to have the Principles as the rules of law governing their contract.

14. - The new topics which the Governing Council at its 76th session decided to submit to the Working Group for consideration are eight in number: agency (a), limitation of actions (extinctive prescription) (b), assignment of contractual rights and duties (c), contracts for the benefit of a third party (d), price reduction (e), conditions (f), set-off (g) and waiver (h). The Working Group is requested to consider the feasibility of actually including these topics in the second edition of the UNIDROIT Principles and, if it so decides, determine in more detail how each of them should be

approached. The Working Group may, moreover, wish to add other topics to this list and, if so, establish their priority.

15. - Brief presentations of each of the eight topics followed by a list of issues possibly to be dealt with are set out below.

(a) ***Agency***

16. - The first topic suggested for inclusion in the second edition of the UNIDROIT Principles is agency, i.e. the situation where a person (the agent) has the authority or purports to have the authority to conclude a contract or to undertake any other related act on behalf of another person (the principal).

17. - It is true that in this area considerable contrasts exist among the various legal systems. Thus the civil law systems make a distinction between "direct representation" and "indirect representation" and require for the establishment of a direct relationship between the principal and the third party that the agent act not only on behalf, but also in the name, of the principal (*contemplatio domini*). On the contrary, in common law countries, the decisive factor is that the agent is acting in the interest of another person, with the result that a direct relationship may be established between the principal and the third party not only where the name of the principal is not disclosed but also where the third party does not even know that the person with whom he is contracting directly, instead of acting on his own behalf, is acting simply as an agent of an undisclosed principal. Yet differences exist even among continental legal systems themselves, insofar as some of them (e.g. France, Belgium, Austria) do not distinguish between the internal relationship between agent and principal and the external relationship between principal and third party, while others (e.g. Germany, Italy, The Netherlands) consider the authority of the agent to be independent of the underlying contract that may exist between the agent and the principal.

18. - One might argue that, in view of the non-binding nature of the UNIDROIT Principles, it would be difficult to extend their scope to cover, in addition to (pre-) contractual relationships between two parties, also a typical tri-partite relationship such as agency. Yet this objection does not seem to be conclusive. First of all, the UNIDROIT Principles may serve as a model to States when legislating in this field. Moreover, nothing prevents the principal and/or the agent, when dealing with the third party, from making express reference to the UNIDROIT Principles in order to have them accepted also by the latter. In addition, the UNIDROIT Principles may well be applied by judges and arbitrators even in the absence of an express reference to them by the parties, for instance, when the parties have agreed that their contract be governed by "general principles of law", the "lex mercatoria" or the like, and when it proves impossible to establish the relevant rule of the applicable law (cf. Preamble, paragraphs 3 and 4 of the UNIDROIT Principles).

19. - A starting point in the preparation of the envisaged section on agency of the UNIDROIT Principles could be the 1983 Geneva Convention on Agency in the International Sale of Goods, prepared by UNIDROIT (see ANNEX I). This convention, although not yet in force, has been ratified by five States (France, Italy, Mexico, South

Africa and The Netherlands) and has strongly influenced a number of recently adopted national codifications. However since the scope of the Geneva Convention is restricted to agency in relation to the sale of goods, it remains to be seen to what extent its provisions can be extended to contracts in general or whether they need to be adapted at least with respect to specific types of transactions (e.g. those involving immovables).

20. - It may be considered worthwhile to deal in the envisaged section on agency of the UNIDROIT Principles also with types of agency expressly excluded from the 1983 Geneva Convention, but of particular importance in international trade practice. This is the case in particular of the authority of those acting on behalf of a company (board of directors, managing director, executive officer, etc.) to bind their company vis-à-vis third parties. According to Art. 4 of the 1983 Geneva Convention "[f]or the purposes of this Convention [...] an organ, officer or partner of a corporation, association, partnership or other entity, whether or not possessing legal personality, shall not be regarded as the agent of that entity insofar as, in the exercise of his functions as such he acts by virtue of an authority conferred by law or by the constitutive documents of that entity [...]". By contrast the problem of the authority of the board of directors or persons actually authorised by it has been dealt with in EEC Council Directive No. 68/151 of 9 March 1968 which has been implemented in all Member States of the European Union, and could represent a useful source of inspiration for the envisaged provision on this issue in the UNIDROIT Principles (see ANNEX II).

21. - It may be recalled that the "Principles of European Contract Law", prepared by the Commission on European Contract Law[1], contain a special chapter on agency which has been based largely on the 1983 Geneva Convention (see ANNEX III).

22. - It is suggested that the envisaged section on agency of the UNIDROIT Principles focus, among others, on the following issues:

- establishment of the agent's authority
- scope of the agent's authority
- apparent authority

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[1] The Commission on European Contract Law is a private body chaired by Professor O. Lando and its members have been chosen exclusively from the fifteen member States of the European Union. The Commission published in 1995 a first part of the "Principles of European Contract Law" dealing mainly with performance and non-performance of contracts. A second edition containing additional chapters on formation, validity, interpretation and agency, finalised by the Commission in 1997, is expected to be published in 1998.

Contrary to what might at first sight appear, the UNIDROIT Principles and the European Principles do not represent a duplication of work. While it is true that both instruments address basically the same issues of general contract law and are very similar in terms of formal presentation, they definitely differ as to their scope. The UNIDROIT Principles relate specifically to international commercial contracts, while the European Principles are intended to apply to all kinds of contracts, including transactions of a purely domestic nature and those between merchants and consumers. What is even more important, the territorial scope of the UNIDROIT Principles is universal, whereas that of the European Principles is limited to the member States of the European Union.

- legal effects of acts carried out by the agent (in the name) (on behalf) of the (undisclosed) principal
- ratification
- liability of the agent acting without (or exceeding its) authority vis-à-vis the third party
- termination of authority
- authority of directors and other executive officers to bind their company vis-à-vis third parties

(b) ***Limitation of actions (Extinctive prescription)***

23. - Another suggested topic is the limitation of actions or - as it is also sometimes called - extinctive prescription, i.e. the loss of the right to exercise a claim by reason of the expiration of a given period of time.

24. - It is a universally accepted principle that claims may not be put forward indefinitely but are barred after a given period of time. However, domestic laws vary considerably with respect to questions of detail. Thus, limitation periods range from six months to thirty years; they may start to run from the date when the claim accrues, when the plaintiff knew or ought to have known of the existence thereof, or when the goods are handed over; they may be capable of being suspended and/or interrupted for a variety of reasons (e.g. lack of knowledge by the obligee of the existence of the claim; force majeure; the existence of a special personal relationship between the obligor and the obligee; the commencing of judicial proceedings by the obligee; the acknowledgement of the claim by the obligor, etc.); at expiry the claim may be considered as ceasing to exist or merely barred, with the result that in the first case limitation may be declared by a court of its own motion, while in the second it must be pleaded by the defendant; the duration of the limitation period may be mandatory or the parties are free to modify it by agreement, at least in the sense that they may reduce it.

25. - In the area of contract law the solutions provided by domestic laws sometimes differ not only with respect to the various types of contract, but also to claims relating to one and the same type of contract. This is the case, for instance, of sales contracts where even within one and the same legal system different limitation periods may be provided depending on whether the claims relate to a case of invalidity of the contract, non-conformity of the goods or any other breach.

26. - In addition, there are cases in which a party must bring forward its claim vis-à-vis the other party within a - usually short - period of time which however is not considered to be a veritable limitation period. The problem of distinguishing these cases, which are called forfeiture (French: *délais préfixes*; German: *Ausschlußfrist*; Italian: *decadenza*) from limitation of actions in a strict sense (French: *préscription extinctive*; German: *Verjährung;* Italian: *prescrizione*), is further complicated by the fact that some claims (e.g. to avoid the contract for defects of consent or to terminate the contract for non-performance) are subject to one or the other type of time limit depending on whether in the given legal system they may be exercised by mere notice to the other party or require intervention by a court.

27. - It goes without saying that the situation described gives rise to great uncertainty whenever cross-border transactions are involved, all the more so since in some legal systems limitation of claims is considered as a question of substantive law while in others as a matter of procedural law. As a result, in the former it is regulated by the law governing the contract (*lex contractus*) while in the latter by the law of the court (*lex fori*).

28. - Nevertheless recent developments indicate that there might be room for a new and more uniform approach to the limitation of contractual claims. At domestic level, a number of national legislators have adopted or are considering the adoption of a much more simplified and rationalised regime in this field. Suffice it to mention the new Civil Codes of Quebec and The Netherlands or the proposals for the amendment of the existing law formulated by the Ontario Law Reform Commission, the New Zealand Law Reform Commission and the Special Commission for the Revision of the German Law of Obligations.

29. - At international level, mention may be made of the 1974 United Nations Convention on the Limitation Period in the International Sale of Goods (as amended by the 1980 Protocol). This Convention, which has been adopted by no less than 19 States, among which Brazil, Ghana, Mexico, Russia, and the United States, has introduced, at least with respect to international sales contracts, a uniform limitation regime in countries of both civil law and common law traditions (see ANNEX IV).

30. - In view of the non-binding nature of the UNIDROIT Principles and the mandatory nature of most national rules on limitation of claims, the question arises as to the impact the former might have on the latter. Art. 1.4 of the UNIDROIT Principles expressly states that "[n]othing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law". It should however be borne in mind that national limitation rules are in general not of an internationally mandatory character, i.e. do not claim to be applied irrespective of which law is applicable to the contract. This is expressly confirmed by, among others, Art. 3 (3) of the 1974 United Nations Limitation Convention which permits the parties to exclude the application of the Convention in its entirety. As a result, mandatory domestic rules on limitation of actions, more precisely those of the State the law of which governs the contract, will prevail over the UNIDROIT Principles whenever - as is normally the case when an action is brought before a State court - the parties' reference to the UNIDROIT Principles is considered as a mere agreement to incorporate them in their contract. On the contrary, whenever - as may well be the case in arbitration proceedings - the UNIDROIT Principles are applied as the *lex contractus*, the limitation rules contained therein may replace national limitation rules.

31. - Should special provisions on limitation of actions be included in the second edition of the UNIDROIT Principles, it may be advisable to give some consideration to the relationship between these new provisions and the rules on time limits to be found in the present edition. Indeed, while some time limits such as those provided in Articles 3.15 concerning avoidance and 7.3.2(2) concerning termination,

are clearly not limitation periods, the nature of others, such as that provided in Article 7.2.2(e) with respect to the right to require performance, is less obvious.

32. - It is suggested that the envisaged section on limitation of actions of the UNIDROIT Principles focus, among others, on the following issues:

- distinction between limitation of actions and forfeiture
- length of the limitation period
- commencement of the limitation period
- suspension of the limitation period
- interruption of the limitation period
- effects of the expiry of limitation period
- mandatory/non-mandatory character of rules on limitation period

(c) ***Assignment of contractual rights and duties***

33. - In actual commercial practice it frequently happens that a party intends to assign to somebody else its contractual rights and/or duties. Thus, a right to payment may be assigned to a third party - normally a financial institution - by way of sale or by way of security in order to obtain immediate payment or a loan. As to the transfer of other rights and duties arising out of a contract, it typically occurs when a party sells its entire business or ceases to carry out the activity to which the rights and duties in question relate. Actually in such cases, which include also mergers and de-mergers, acquisitions and assets sales among companies, it is quite normal that all the rights and duties arising from the different contracts pass from one party to another, so that one may even speak of a transfer or assignment of contract(s).

34. - The possibility of assigning contractual rights is nowadays generally recognised. However, considerable differences exist among the various legal systems with respect to a number of specific issues, such as the form of assignment, the requirements for the assignment to become effective between the assignor and the assignee and/or the debtor and/or other third parties, the conflict between several assignees of the same right, the assignability of future receivables and of bulk assignments, the effect of no assignment clauses stipulated between the assignor and the debtor, the possibility for the debtor to assert against the assignee the defences it could have raised against the assignor, the extent to which the debtor may set off against the assignee cross-claims it has against the assignor, the possibility for the debtor who pays the assignee in advance of performance by the assignor to recover the payment if the assignor fails to perform, limitations provided by law on the assignability of rights on the ground of their nature and/or the status of the assignor, etc.

35. - In the field of the assignment of rights some attempts have been made to bring about uniformity at international level. Mention may be made first of all of the 1988 UNIDROIT Convention on International Factoring which entered into force in 1995 between France, Italy and Nigeria (see ANNEX V). This Convention contains provisions, among others, on the assignability of future receivables, the effects of no-assignment clauses, of the conditions of the debtor's duty to pay and its discharge from liability as the result of payment. However, the scope of the Convention is limited to

receivables arising from international sales contracts and assigned pursuant to a factoring contract.

36. - Another important initiative is the UNCITRAL draft Convention on Assignment in Receivables Financing. Although wider in scope than the Factoring Convention, the sphere of application of this draft Convention is nevertheless restricted, at least so far, to assignments of receivables for financing purposes. The draft, which is still under preparation, provides uniform rules concerning, among others, the form of assignment, the time of assignment, bulk assignments and the effect of no-assignment clauses, the transfer of any rights securing the assigned receivables, the notification of assignment and the debtor's discharge, the defences and set-offs of the debtor against the assignee, rights of third parties, conflicts of priority among several assignees, competing rights of the assignee and the assignor's creditors, and subsequent assignments. The future Convention also envisages an Annex providing for the establishment of a Registry and regulations for the registration of data about assignments under the Convention.

37. - With respect to assignment of contractual duties - also known as "delegation", "novation" or "assumption of debt", although the precise meanings of these terms often differ in the various legal systems - the main problems concern the determination of the performances which are not assignable at all and, as far as the other duties are concerned, the effects of their assignment on the liability of the assignor and/or the assignee vis-à-vis the obligee. In particular, while it is universally held that in the absence of any special agreement between the parties the assignor remains the only liable party vis-à-vis the obligee, under what conditions can the obligee sue also the assignee and/or can the assignor free itself of its liability vis-à-vis the obligee?

38. - The assignment *en bloc* of all of a party's rights and duties arising out of a contract to another person is as such unknown in most domestic laws. The Italian Civil Code is an exception in that it provides specific rules on what is called *cessione del contratto* (see Arts. 1406-1410). Under these rules a party may, with the consent of the other party, transfer in a single act of assignment all its rights and duties arising out of the contract to a third person. Such an assignment becomes effective vis-à-vis the other party by mere notice, with the consequence that the assignor is as a rule no longer liable vis-à-vis that party, and the latter may assert against the new party only the defences arising out of the contract.

39. - Since the assignment of contactual rights and duties by its very nature involves at least three parties, it may again be argued that, in view of the non-binding nature of the UNIDROIT Principles, they could hardly deal with such a topic. However, it seems that in this respect the remarks already made in connection with agency (see para. 18 above) apply *mutatis mutandis*.

40. - It is suggested that the envisaged section on assignment of the UNIDROIT Principles focus, among others, on the following issues:

- assignment of contract rights
    - assignability of future rights and bulk assignments

- no assignment clause
- form of assignment
- notice of assignment
- relations between assignor and/or assignor's creditors and assignee
- relations between debtor and assignee
- conflict of priority among several assignees
- subsequent assignments

- assignment of contract duties
  - assignability of contract duties
  - form of assignment
  - relations between assignor and/or assignee and obligee
- assignment of contracts
  - assignability *en bloc* of all of a party's right and duties arising out of a contract
  - form of assignment
  - relations between assignor and/or assignee and the other party to the contract

(d) ***Contracts for the benefit of a third party***

41.- Contracts for the benefit of a third party may be described as those stipulations whereby one of the parties (promisor) promises the other (promisee) that it will perform an obligation to a third party (beneficiary). In commercial practice the most important examples are insurance contracts in which the insurance company agrees with the insured party to pay when a given event occurs the amount insured to a third party (which might be a relative of the insured party or any subsequent policy holder) and contracts for the carriage of goods where the consignee is a different person from the consignor. Yet, reference may also be made to the contracts a tour operator makes with a hotel-keeper or an airline concerning the accommodation or travel of its customers.

42. - Civil law systems generally recognise the validity of contracts for the benefit of a third party whereas common law systems traditionally do not on account of the doctrines of privity of contract and of consideration. However, at least in the United States there have always been significant departures from this position and even in English law the need for change is increasingly being felt.

43. - The most important questions which arise with respect to contracts for the benefit of third parties are the precise conditions under which the third party beneficiary acquires the right to sue the promisor, the possibility for the promisor and/or the promisee of revoking their stipulation in favour of the beneficiary, the extent to which the promisor may assert against the beneficiary the defences arising out of its agreement with the promisee.

44. - It may be recalled that the "Principles of European Contract Law", prepared by the Commission on European Contract Law, contain a special provision on "Stipulation in favour of a third party" (Art. 6:110) (see ANNEX VI).

45. - It is suggested that the envisaged section on contracts for the benefit of a third party of the UNIDROIT Principles focus, among others, on the following issues:

- form of stipulation between promissor and promisee
- effectiveness of stipulation between promisor and promisee vis-à-vis third party beneficiary
- relationship between promisor and third party beneficiary
- revocability of stipulation by promisor and/or promisee

(e) ***Price reduction***

46. - In case a party's performance is defective, incomplete or otherwise fails to conform to the contract, the aggrieved party may be granted the right to a reduction in the contract price in proportion to the deduction in the value of the promised performance. The problems arising in connection with such a remedy - sometimes referred to as *actio quanti minoris* - are above all the criteria to be followed in determining the reduction, the relationship between price reduction and damages, and whether the remedy is available also where the other party's non-performance is excused.

47. - The remedy of price reduction is found in a number of domestic laws as well as in the 1980 United Nations Convention on Contracts for the International Sale of Goods (see ANNEX VII). Although traditionally limited to sales contracts, there may be good reasons for extending it also to apply to other kinds of contracts such as construction contracts, work contracts, lease, etc.

48. - The "Principles of European Contract Law", prepared by the Commission on European Contract Law, contain a special provision on "Price reduction" (Art. 9:401) (see ANNEX VIII).

49. - It is suggested that the envisaged section on price reduction of the UNIDROIT Principles focus, among others, on the following issues:

- scope of application of price reduction
- criteria for determining reduction
- relationship between price reduction and damages
- price reduction and force majeure

(f) ***Conditions***

50. - Where the parties make their contract or individual terms thereof dependent on the occurrence of a future uncertain event, such an event is commonly referred to as a "condition" and the contract or the individual terms thereof as "conditional". A condition may be either suspensive, i.e. the obligation(s) arising out of the contract will not exist unless and until the event occurs ("condition precedent"), or resolutive, i.e. the obligation(s) will cease to exist if the event occurs ("condition subsequent").

51.- Questions arising in this context are, among others, the rights and duties of the parties pending the occurrence of the event (e.g. in case of a suspensive condition, the obligor's duty to abstain from any behaviour which could jeopardise the obligee's legitimate interests and the obligee's right to take what steps are necessary to protect his rights); the extent to which the occurrence of the event has retrospective effects; when the condition occurs or, conversely, when it is too late for it to occur; the case where the occurrence of the condition has been prevented by an act or omission by the party which had an interest in its non-occurrence; the case of so-called potestative or self-enabling conditions, etc. Yet consideration may also be given to matters of interpretation, such as the distinction between an event which is a condition and an event which is a simple means of measuring time of the performance ("terms"), or between an event which is a condition and an event which is the subject of a duty.

52. - It is suggested that the envisaged section on conditions of the UNIDROIT Principles focus, among others, on the following issues:

- notion (condition and term; potestative condition)
- condition precedent and condition subsequent
- condition affecting existence of contract; condition affecting contract performance
- rights and duties of parties pending the condition
- retrospective or non retrospective effects of occurence of condition

(g) ***Set-off***

53. - It is a generally recognised principle that if two persons are mutually bound by an obligation of the same kind, either party may set off its claim against the claim of the other party. Sometimes these claims arise from one and the same contract, but they may also relate to separate transactions, as is often the case when two business persons are engaged in prolonged business relationships. The rationale of the possibility of setting off the two claims is clear: the avoidance of unnecessary back and forth movements of money or goods reduces litigation costs.

54. - The most important questions to be dealt with in this context are, among others, whether set-off should be regarded as a matter of substantive or procedural nature, and if - as is the prevailing view at the comparative level - it is to be considered a matter of substantive law, it operates automatically or whether it is subject to an express declaration by one of the parties; whether set-off operates retroactively or not; what type of claims can be set off against one another (e.g. claims relating to obligations which are "certain, liquid and exigible"; claims relating to a sum of money or other "fungible goods"); the possibility to set-off claims which are subject to a defence or barred on account of the expiry of a limitation period; the relationship between set-off and assignment; the operation of set-off in the context of insolvency proceedings, etc.

55. - It is suggested that the envisaged section on set-off of the UNIDROIT Principles focus, among others, on the following issues:

- notion (procedural or substantive nature of set-off)

- operation of set-off (*ipso iure* or by a party's declaration; retroactivity or *ex nunc* effect)
- conditions of set-off (mutuality; both debts of the same nature; certainty, liquidity and enforceability of the debts)
- claims subject to a defence or barred on account of the expiry of a limitation period
- set-off and insolvency

(h) ***Waiver***

56. - For the purposes of this paper "waiver" refers to the loss of a party's right or defence as a consequence of its conduct which led the other party reasonably to believe that it no longer wished to exercise its right or rely on its defence, and to act accordingly. As such, waiver (French: *renonciation tacite*; German: *Verwirkung*; Italian: *rinuncia tacita*) may be considered an application of the general principle of good faith and the prohibition of *venire contra factum proprium* (in civil law systems) or, alternatively, of the doctrine of equitable or promissory estoppel (in common law systems).

57. - The present edition of the UNIDROIT Principles already contains some provisions dealing with specific instances of waiver. This is the case, for instance, of Art. 2.4.(2)(b) ("[...] [A]n offer cannot be revoked [...] if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer"), of Art. 2.18 (" A contract in writing which contains a clause requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has acted in reliance on that conduct") and, to a certain extent at least, also of Art. 3.12 ("If the party entitled to avoid the contract expressly or impliedly confirms the contract after the period of time for giving notice of avoidance has begun to run, avoidance of the contract is excluded").

58. - It may be argued that since the UNIDROIT Principles expressly state the duty of the parties "[to] act in accordance with good faith and fair dealing in international trade" (Art. 1.7.(1)) and to co-operate with each other in the course of performance (Art. 5.3), no further provision(s) on waiver are needed.

59. - However, a reason for specifically dealing with waiver might be seen in its practical importance and the need to distinguish it from other cases of voluntary relinquishment of a given legal position, such as unilateral discharge (French: *remise de debt*; German: *Erlaß*; Italian: *remissione del debito*) and discharge or modification by agreement (French: *novation*; German: *Novation*; Italian: *novazione*). Although the borderline is not at all definite and the exact meaning of the different concepts may vary from one legal system to another, at least in theory the distinction is fairly clear. While in cases of unilateral discharge and discharge by agreement there must be the intention of the party(ies) to modify the terms of an existing obligation, the characteristic feature of waiver is that a party loses a right or defence as a consequence

of the other party's reliance on the former's conduct irrespective of whether or not that party knew of the effect its conduct would have.

60. - It is suggested that the envisaged section on waiver of the UNIDROIT Principles focus, among others, on the following issues

- notion and scope of waiver
- waiver as distinct from unilateral discharge and discharge by agreement

IV. Working method

61. - As was the case in the preparation of the present edition of the UNIDROIT Principles, the Working Group may wish to appoint among its members a Rapporteur for each of the new topics to be dealt with in the second edition. The task of the Rapporteurs would be to prepare the preliminary draft provisions and comments of the sections assigned.

62. - The preliminary drafts could be first discussed by a smaller Drafting Committee, mainly composed of the English speaking and French speaking members of the Working Group, also in order to ensure a sufficient degree of editorial uniformity, and subsequently submitted to the Working Group for final approval.

63. - The Governing Council, as the Institute's highest scientific body, will be constantly informed of the work in progress. It is suggested that the drafts prepared by the Working Group be submitted to the Governing Council at its annual sessions and that the Governing Council be requested to express its opinion on the policy to be followed, especially in those cases where the Working Group had found it difficult to reach a consensus.

ANNEX I

CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS

THE STATES PARTIES TO THIS CONVENTION,

DESIRING to establish common provisions concerning agency in the international sale of goods,

BEARING IN MIND the objectives of the United Nations Convention on Contracts for the International Sale of Goods,

CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States, bearing in mind the New International Economic Order,

BEING OF THE OPINION that the adoption of uniform rules which govern agency in the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

HAVE AGREED as follows:

CHAPTER I - SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1

(1) This Convention applies where one person, the agent, has authority or purports to have authority on behalf of another person, the principal, to conclude a contract of sale of goods with a third party.

(2) It governs not only the conclusion of such a contract by the agent but also any act undertaken by him for the purpose of concluding that contract or in relation to its performance.

(3) It is concerned only with relations between the principal or the agent on the one hand, and the third party on the other.

(4) It applies irrespective of whether the agent acts in his own name or in that of the principal.

Article 2

(1) This Convention applies only where the principal and the third party have their places of business in different States and:

(a) the agent has his place of business in a Contracting State, or

(b) the rules of private international law lead to the application of the law of a Contracting State.

(2) Where, at the time of contracting, the third party neither knew nor ought to have known that the agent was acting as an agent, the Convention only applies if the agent and the third party had their places of business in different States and if the requirements of paragraph 1 are satisfied.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract of sale is to be taken into consideration in determining the application of this Convention.

Article 3

(1) This Convention does not apply to:

(a) the agency of a dealer on a stock, commodity or other exchange;

(b) the agency of an auctioneer;

(c) agency by operation of law in family law, in the law of matrimonial property, or in the law of succession;

(d) agency arising from statutory or judicial authorisation to act for a person without capacity to act;

(e) agency by virtue of a decision of a judicial or quasi-judicial authority or subject to the direct control of such an authority.

(2) Nothing in this Convention affects any rule of law for the protection of consumers.

Article 4

For the purposes of this Convention:

(a) an organ, officer or partner of a corporation, association, partnership or other entity, whether or not possessing legal personality, shall not be regarded as the agent of that entity in so far as, in the exercise of his functions as such, he acts by virtue of an authority conferred by law or by the constitutive documents of that entity;

(b) a trustee shall not be regarded as an agent of the trust, of the person who has created the trust, or of the beneficiaries.

Article 5

The principal, or an agent acting in accordance with the express or implied instructions of the principal, may agree with the third party to exclude the application of this Convention or, subject to Article 11, to derogate from or vary the effect of any of its provisions.

Article 6

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 7

(1) The principal or the agent on the one hand and the third party on the other are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) They are considered, unless otherwise agreed, to have impliedly made applicable to their relations any usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to agency relations of the type involved in the particular trade concerned.

Article 8

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract of sale, having regard to the circumstances known to or contemplated by the parties at the time of contracting;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

CHAPTER II - ESTABLISHMENT AND SCOPE OF THE AUTHORITY OF THE AGENT

Article 9

(1) The authorisation of the agent by the principal may be express or implied.

(2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authorisation was given.

Article 10

The authorisation need not be given in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Article 11

Any provision of Article 10, Article 15 or Chapter IV which allows an authorization, a ratification or a termination of authority to be made in any form other than in writing does not apply where the principal or the agent has his place of business in a Contracting State which has made a declaration under Article 27. The parties may not derogate from or vary the effect of this paragraph.

CHAPTER III - LEGAL EFFECTS OF ACTS CARRIED OUT BY THE AGENT

Article 12

Where an agent acts on behalf of a principal within the scope of his authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly bind the principal and the third party to each other, unless it follows from the circumstances of the case, for example, by a reference to a contract of commission, that the agent undertakes to bind himself only.

Article 13

(1) Where the agent acts on behalf of a principal within the scope of his authority, his acts shall bind only the agent and the third party if:

(a) the third party neither knew nor ought to have known that the agent was acting as an agent, or

(b) it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent undertakes to bind himself only.

(2) Nevertheless:

(a) where the agent, whether by reason of the third party's failure of performance or for any other reason, fails to fulfil or is not in a position to fulfil his obligations to the principal, the principal may exercise against the third party the rights acquired on the principal's behalf by the agent, subject to any defences which the third party may set up against the agent;

(b) where the agent fails to fulfil or is not in a position to fulfil his obligations to the third party, the third party may exercise against the principal the rights which the third party has against the agent, subject to any defences which the agent may set up against the third party and which the principal may set up against the agent.

(3) The rights under paragraph 2 may be exercised only if notice of intention to exercise them is given to the agent and the third party or principal, as the case may be. As soon as the third party or principal has received such notice, he may no longer free himself from his obligations by dealing with the agent.

(4) Where the agent fails to fulfil or is not in a position to fulfil his obligations to the third party because of the principal's failure of performance, the agent shall communicate the name of the principal to the third party.

(5) Where the third party fails to fulfil his obligations under the contract to the agent, the agent shall communicate the name of the third party to the principal.

(6) The principal may not exercise against the third party the rights acquired on his behalf by the agent if it appears from the circumstances of the case that the third party, had he known the principal's identity, would not have entered into the contract.

(7) An agent may, in accordance with the express or implied instructions of the principal, agree with the third party to derogate from or vary the effect of paragraph 2.

Article 14

(1) Where an agent acts without authority or acts outside the scope of his authority, his acts do not bind the principal and the third party to each other.

(2) Nevertheless, where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

Article 15

(1) An act by an agent who acts without authority or who acts outside the scope of his authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority.

(2) Where, at the time of the agent's act, the third party neither knew nor ought to have known of the lack of authority, he shall not be liable to the principal if, at any time before ratification, he gives notice of his refusal to become bound by a ratification. Where the principal ratifies but does not do so within a reasonable time, the third party may refuse to be bound by the ratification if he promptly notifies the principal.

(3) Where, however, the third party knew or ought to have known of the lack of authority of the agent, the third party may not refuse to become bound by a ratification

before the expiration of any time agreed for ratification or, failing agreement, such reasonable time as the third party may specify.

(4) The third party may refuse to accept a partial ratification.

(5) Ratification shall take effect when notice of it reaches the third party or the ratification otherwise comes to his attention. Once effective, it may not be revoked.

(6) Ratification is effective notwithstanding that the act itself could not have been effectively carried out at the time of ratification.

(7) Where the act has been carried out on behalf of a corporation or other legal person before its creation, ratification is effective only if allowed by the law of the State governing its creation.

(8) Ratification is subject to no requirements as to form. It may be express or may be inferred from the conduct of the principal.

Article 16

(1) An agent who acts without authority or who acts outside the scope of his authority shall, failing ratification, be liable to pay the third party such compensation as will place the third party in the same position as he would have been in if the agent had acted with authority and within the scope of his authority.

(2) The agent shall not be liable, however, if the third party knew or ought to have known that the agent had no authority or was acting outside the scope of his authority.

CHAPTER IV - TERMINATION OF THE AUTHORITY OF THE AGENT

Article 17

The authority of the agent is terminated:

(a) when this follows from any agreement between the principal and the agent;

(b) on completion of the transaction or transactions for which the authority was created;

(c) on revocation by the principal or renunciation by the agent, whether or not this is consistent with the terms of their agreement.

Article 18

The authority of the agent is also terminated when the applicable law so provides.

Article 19

The termination of the authority shall not affect the third party unless he knew or ought to have known of the termination or the facts which caused it.

Article 20

Notwithstanding the termination of his authority, the agent remains authorised to perform on behalf of the principal or his successors the acts which are necessary to prevent damage to their interests.

ANNEX II

FIRST COUNCIL DIRECTIVE (EEC) 68/151

of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community

(J.O. 1968, L65/8; O.J. 1968, 41)

Article 9

1. Acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs.

However, Member States may provide that the company shall not be bound where such acts are outside the objects of the company, if it proves that the third party knew that the act was outside those objects or could not in view of the circumstances have been unaware of it; disclosure of the statutes shall not of itself be sufficient proof thereof.

2. The limits on the powers of the organs of the company, arising under the statutes or from a decision of the competent organs, may never be relied on as against third parties, even if they have been disclosed.

3. If the national law provides that authority to represent a company may, in derogation from the legal rules governing the subject, be conferred by the statutes on a single person or on several persons acting jointly, that law may provide that such a provision in the statutes may be relied on as against third parties on condition that it relates to the general power of representation; the question whether such a provision in the statutes can be relied on as against third parties shall be governed by Article 3.

35. – (1) The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum.

Power of directors to bind the company

35A. – (1) In favour of a person dealing with a company in good faith, the power of the board of directors to bind the company or authorise others to do so, shall be deemed to be free of any limitation under the company's constitution.

(2) For this purpose –

(a) a person "deals with" a company if he is a party to any transaction or other act to which the company is a party;

(b) a person shall not be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution; and

(c) a person shall be presumed to have acted in good faith unless the contrary is proved.

(3) The references above to limitations on the directors' powers under the company's constitution include limitations deriving –

(a) from a resolution of the company in general meeting or a meeting of any class of shareholders, or

(b) from any agreement between the members of the company or of any class of shareholders.

(4) Subsection (1) does not affect any right of a member of the company to bring proceedings to restrain the doing of an act which is beyond the powers of the directors; but no such proceedings shall lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company.

35B. A party to a transaction with a company is not bound to enquire as to whether it is permitted by the company's memorandum or as to any limitation on the powers of the board of directors to bind the company or authorise others to do so.".

Art. 98. (*L. n°* 67-559 *du* 12 *juill.* 1967 ; *Ord. n°* 69-1176 *du* 20 *déc.* 1969). « Le conseil d'administration est investi des pouvoirs les plus étendus pour agir en toute circonstance au nom de la société ; il les exerce dans la limite de l'objet social et sous réserve de ceux expressément attribués par la loi aux assemblées d'actionnaires».

(*Ord. n°* 69-1176 *du* 20 *déc.* 1969) «Dans les rapports avec les tiers, la société est engagée même par les actes du conseil d'administration qui ne relèvent pas de l'objet social, à moins qu'elle ne prouve que le tiers savait que l'acte dépassait cet objet ou qu'il ne pouvait l'ignorer compte tenu des circonstances, étant exclu que la seule publication des statuts suffise à constituer cette preuve.

«Les dispositions des statuts limitant les pouvoirs du conseil d'administration sont inopposables aux tiers.»

Les cautions, avals et garanties donnés par des sociétés autres que celles exploitant des établissements bancaires ou financiers font l'objet d'une autorisation du conseil dans les conditions déterminées par décret. (*L. n°* 67-559 *du* 12 *juill.* 1967) «Ce décret détermine également les conditions dans lesquelles le dépassement de cette autorisation peut être opposé aux tiers».

V. infra. *Décr. n°* 67-236 *du* 23 *mars* 1967, *art.* 89, 90.

J.-P. Langlade, *Le pouvoir de fournir des sûretés dans les sociétés anonymes*, Rev. trim. dr. com. 1979, 355. – Nguyen Xuan Chanh, *Le sort des actes irrégulièrement accomplis au nom d'une société commerciale*, D. 1978. Chron., p. 69. – J.-F. Barbiéri, *Cautionnement et sociétés (dix ans de jurisprudencce)*, Cah. dr. entr. 1992, n° 2.

§ 82 Beschränkungen der Vertretungs- und Geschäftsführungsbefugnis

(1) Die Vertretungsbefugnis des Vorstands kann nicht beschränkt werden.
(2) Im Verhältnis der Vorstandsmitglieder zur Gesellschaft sind diese verpflichtet, die Beschränkungen einzuhalten, die im Rahmen der Vorschriften über die Aktiengesellschaft die Satzung, der Aufsichtsrat, die Hauptversammlung und die Geschäftsordnungen des Vorstands und des Aufsichtsrats für die Geschäftsführungsbefugnis getroffen haben.

CAPO V: DELLA SOCIETÀ PER AZIONI

2384. *Poteri di rappresentanza*. - Gli amministratori che hanno la rappresentanza della società possono compiere tutti gli atti che rientrano nell'oggetto sociale, salvo le limitazioni che risultano dalla legge o dall'atto costitutivo (c. 2298).

Le limitazioni al potere di rappresentanza che risultano dall'atto costitutivo o dallo statuto, anche se pubblicate, non sono opponibili ai terzi, salvo che si provi che questi abbiano intenzionalmente agito a danno della società (c. 2487^2)(3).

2384-*bis*. *Atti che eccedono I limiti dell'oggetto sociale*. - L'estraneità all'oggetto sociale degli atti compiuti dagli amministratori in nome della società non può essere opposta ai terzi in buona fede (c. 2487^2)(4).

ANNEX III

PRINCIPLES OF EUROPEAN CONTRACT LAW

Chapter 3 - Authority of agents

Section 1. General provisions

ART. 3:101: SCOPE OF THE CHAPTER

(1) This chapter governs the authority of an agent or other intermediary to bind his principal in relation to a contract with a third party.
(2) This chapter does not govern an agent's authority bestowed by law or to the authority of an agent appointed by a public or judicial authority.
(3) This chapter does not govern the internal relationship between the agent or intermediary and his principal.

ART. 3:102: CATEGORIES OF REPRESENTATION

(1) Where an agent acts in the name of a principal, the rules on direct representation apply (Section 2). It is irrelevant whether the principal's identity is revealed at the time the agent acts or is to be revealed later.
(2) Where an intermediary acts on instructions arid on behalf of, but not in the name of, a principal, or where the third party neither knows nor has reason to know that the intermediary acts as an agent, the rules on indirect representation apply (Section 3).

Section 2: Direct representation

ART. 3:201: EXPRESS, IMPLIED AND APPARENT AUTHORITY

(1) The principal's grant of authority to air agent to act in his name may be express or may be implied from the circumstances.
(2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted.
(3) A principal is treated as having granted authority if his statements or conduct induce the third party reasonably arid in good faith to believe that the agent has been granted authority for the act performed by him.

ART. 3:202: AGENT ACTING IN EXERCISE OF HIS AUTHORITY

Where an agent is acting within his authority as defined by article 3:201, his acts bind the principal and the third party directly. The agent himself is not bound to the third party.

ART. 3:203: UNIDENTIFIED PRINCIPAL

If an agent enters into a contract in the name of a principal whose identity is to be revealed later, but fails to reveal that identity within a reasonable time after a request by the third party, the agent himself is bound by the contract.

ART. 3:204 : AGENT ACTING WITHOUT OR OUTSIDE HIS AUTHORITY

(1) Where a person acting as an agent acts without authority or outside the scope of his authority, his acts are not binding upon the principal and the third party.
(2) Failing ratification by the principal according to article 3:207, the agent is liable to pay the third party such damages as will place the third party in the same position as if the agent had acted with authority. This does not apply if the third party knew or could not have been unaware of the agent's lack of authority.

ART. 3:205 : CONFLICT OF INTERESTS

(1) If a contract concluded by an agent involves the agent in a conflict of interests of which the third party knew or could not have been unaware, the principal may avoid the contract according to the provisions of articles 4.112 to 4.116.
(2) There is presumed to be a conflict of interests where
   (a) the agent also acted as agent for the third party; or
   (b) the contract was with himself in his personal capacity.
(3) However, the principal may not avoid the contract
   (a) if he had consented to, or could riot have been unaware of, the agent's so acting; or
   (b) if the agent had disclosed the conflict of interest to him arid he had riot objected within a reasonable time.

ART. 3:206 : SUBAGENCY

An agent has implied authority to appoint a subagent to carry out tasks which are riot of a personal character arid which it is riot reasonable to expect the agent to carry Out himself. The rules of this chapter apply to the sub- agency; acts of the subagent which are within his arid the agent's authority bind the principal arid the third party directly.

ART. 3:207: RATIFICATION BY PRINCIPAL

(1) Where a person acting as an agent acts without authority or outside his authority, the principal may ratify the agent's acts.
(2) Upon ratification, the agent's acts are considered as having been authorised; without prejudice to the question of the rights of other persons.

ART. 3:208: THIRD PARTY'S RIGHT WITH RESPECT TO CONFIRMATION OF AUTHORITY

Where the statements or conduct of the principal gave the third party reason to believe that an act performed by the agent was authorised, but the third party is in doubt about the authorisation, he may send a written confirmation to the principal or request ratification from him. If the principal does not object or answer the request without delay, the agent's act is treated as having been authorised.

ART. 3:209 : DURATION OF AUTHORITY

(1) An agent's authority continues until the third party knows or ought to know that
   (a) the agent's authority has been brought to an end by the principal, the agent, or both; or
   (b) the acts for which the authority had been granted have been completed, or the time for which it had been granted has expired; or
   (c) the agent has died, become incapacitated or insolvent; or
   (d) the principal has become insolvent.
(2) The third party is taken to know that the agent's authority has been brought to an end under (1) (a) above if this has been communicated or publicised in the same manner in which the authority had originally been communicated or publicised.
(3) However, the agent remains authorised during a reasonable time for the performance of those acts which are necessary to protect the interests of the principal or his successors

Section 3: Indirect representation

ART. 3:301: INTERMEDIARIES NOT ACTING IN THE NAME OF A PRINCIPAL

(1) Where an intermediary acts
   (a) on instructions and on behalf of, but not in the name of, a principal, or
   (b) on instructions from a principal but the third party does not know arid has no reason to know this, the intermediary and the third party are bound to each other.
(2) The principal and the third party become bound to each other only under the conditions set out in articles 3:302 to 3:304.

ART. 3:302 : INTERMEDIARY'S INSOLVENCY OR FUNDAMENTAL NON-PERFORMANCE TO PRINCIPAL

If the intermediary becomes insolvent, or if he commits a fundamental non-performance to the principal, or if prior to the time for performance it is clear that there will be a fundamental non-performance when it becomes due,

(a) on the principal's demand, the intermediary shall communicate the name arid address of the third party to the principal; and

(b) the principal may exercise against the third party the rights acquired on the principal's behalf by the intermediary, subject to any defences which the third party may set up against the intermediary.

ART. 3:303: INTERMEDIARY'S INSOLVENCY OR FUNDAMENTAL NON-PERFORMANCE TO THIRD PARTY

If the intermediary becomes insolvent, or if he commits a fundamental non-performance to the third party, or if prior to the time for performance it is clear that there will be a fundamental non-performance when it becomes due

(a) on the third party's demand, the intermediary shall communicate the name arid address of the principal to the third party; and

(b) the third party may exercise against the principal the rights which the third party has against the intermediary, subject to any defences which the intermediary may set up against the third party and those which the principal may set up against the intermediary.

ART. 3:304 : REQUIREMENT OF NOTICE

The rights under articles 3:302 to 3:303 may be exercised only if notice of intention to exercise them is given to the intermediary and to the third party or principal, respectively. Upon receipt of the notice, the third party or the principal is no longer entitled to make performance to the intermediary.

ANNEX IV

Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol amending the Convention on the Limitation Period in the International Sale of Goods

INTRODUCTORY NOTE

1. The Convention on the Limitation Period in the International Sale of Goods (hereinafter called the 1974 Limitation Convention) was concluded at New York on 14 June 1974. A Protocol to the 1974 Limitation Convention (hereinafter called the 1980 Protocol) was concluded at Vienna on 11 April 1980.

2. The 1974 Limitation Convention and the 1980 Protocol both entered into force on 1 August 1988, in accordance with articles 44/(1) of the 1974 Limitation Convention and IX (1) of the 1980 Protocol.

3. In accordance with paragraph 2 of article XIV of the 1980 Protocol, the text of the 1974 Limitation Convention as amended by the 1980 Protocol has been prepared by the Secretary-General and will be found hereinafter.

4. The present text includes the relevant amendments to the articles of the 1974 Limitation Convention, as provided for by the1980 Protocol. For ease of reference, the text of the original provisions of the 1974 Limitation Convention which have been amended by the 1980 Protocol are reproduced in foot-notes. The present text also incorporates substantive provisions (final clauses) of the 1980 Protocol as required, including editorial additions. The relevant articles of the 1980 Protocol which have been incorporated in the present text of the 1974 Limitation Convention as amended have, for clarity, been assigned *bis* numbers with the indication in parenthesis of the corresponding number of the 1980 Protocol.

CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS AS AMENDED BY THE PROTOCOL AMENDING THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS

PREAMBLE

The States Parties to the present Convention,

Considering that international trade is an important factor in the promotion of friendly relations amongst States,

Believing that the adoption of uniform rules governing the limitation period in the international sale of goods would facilitate the development of world trade,

Have agreed as follows:

Part I. Substantive provisions

SPHERE OF APPLICATION

Article 1

1. This Convention shall determine when claims of a buyer and a seller against each other arising from a contract of international sale of goods or relating to its breach, termination or invalidity can no longer be exercised by reason of the expiration of a period of time. Such a period of time is hereinafter referred to as "the limitation period".

2. This Convention shall not affect a particular time-limit within which one party is required, as a condition for the acquisition or exercise of his claim, to give notice to the other party or perform any act other than the institution of legal proceedings.

3. In this Convention:

(a) "buyer", "seller" and "party" mean persons who buy or sell, or agree to buy or sell, goods, and the successors to and assigns of their rights or obligations under the contract of sale;

(b) "creditor" means a party who asserts a claim, whether or not such a claim is for a sum of money;

(c) "debtor" means a party against whom a creditor asserts a claim;

(d) "breach of contract" means the failure of a party to perform the contract or any performance not in conformity with the contract;

(e) "legal proceedings" includes judicial, arbitral and administrative proceedings;

(f) "person" includes corporation, company, partnership, association or entity, whether private or public, which can sue or be sued;

(g) "writing" includes telegram and telex;

(h) "year" means a year according to the Gregorian calendar.

Article 2

For the purposes of this Convention:

(a) a contract of sale of goods shall be considered international, if at the time of the conclusion of the contract, the buyer and the seller have their places of business in different States;

(b) the fact that the parties have their place of business in different States shall be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract;

(c) where a party to a contract of sale of goods has places of business in more than one State, the place of business shall be that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;

(d) where a party does not have a place of business, reference shall be made to his habitual residence;

(e) neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration.

*Article 3**

1. This Convention shall apply only

(a) if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States; or

(b) if the rules of private international law make the law of a Contracting State applicable to the contract of sale.

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* Text as amended in accordance with article I of the 1980 Protocol. States that make a declaration under article 36 *bis* (article XII of the 1980 Protocol) will be bound by article 3 as originally adopted in the Limitation Convention, 1974. Article 3 as originally adopted reads as follows:

"Article 3

1. This Convention shall apply only if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States.

2. Unless this Convention provides otherwise, it shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law.

3. This Convention shall not apply when the parties have expressly excluded its application."

2. This Convention shall not apply when the parties have expressly excluded its application.

Article 4[**]

This Convention shall not apply to sales:

(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels, hovercraft or aircraft;

(f) of electricity.

Article 5

This Convention shall not apply to claims based upon:

(a) death of, or personal injury to, any person;

(b) nuclear damage caused by the goods sold;

(c) a lien, mortgage or other security interest in property;

(d) a judgement or award made in legal proceedings;

(e) a document on which direct enforcement or execution can be obtained in accordance with the law of the place where such enforcement or execution is sought;

(f) a bill of exchange, cheque or promissory note.

[**] Text of paragraphs *(a)* and *(e)* as amended in accordance with article II of the 1980 Protocol. Paragraphs *(a)* and *(e)* of article 4 as originally adopted in the Limitation Convention, 1974, prior to its amendment under the 1980 Protocol, read as follows:

"*(a)* of goods bought for personal, family or household use;
(e) of ships, vessels, or aircraft;".

Article 6

1. This Convention shall not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labor or other services.

2. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

Article 7

In the interpretation and application of the provisions of this Convention, regard shall be had to its international character and to the need to promote uniformity.

THE DURATION AND COMMENCEMENT OF THE LIMITATION PERIOD

Article 8

The limitation period shall be four years.

Article 9

1. Subject to the provisions of articles 10, 11 and 12 the limitation period shall commence on the date of which the claim accrues.

2. The commencement of the limitation period shall not be postponed by:

(a) a requirement that the party be given a notice as described in paragraph 2 of article 1, or

(b) a provision in an arbitration agreement that no right shall arise until an arbitration award has been made.

Article 10

1. A claim arising from a breach of contract shall accrue on the date on which such breach occurs.

2. A claim arising from a defect or other lack of conformity shall accrue on the date on which the goods are actually handed over to, or their tender is refused by, the buyer.

3. A claim based on fraud committed before or at the time of the conclusion of the contract or during its performance shall accrue on the date on which the fraud was or reasonably could have been discovered.

Article ll

If the seller has given an express undertaking relating to the goods which is stated to have effect for a certain period of time, whether expressed in terms of a specific period of time or otherwise, the limitation period in respect of any claim arising from the undertaking shall commence on the date on which the buyer notifies the seller of the fact on which the claim is based, but not later than on the date of the expiration of the period of the undertaking.

Article 12

1. If, in circumstances provided for by the law applicable to the contract, one party is entitled to declare the contract terminated before the time for performance is due, and exercises this right, the limitation period in respect of a claim based on any such circumstances shall commence on the date on which the declaration is made to the other party. If the contract is not declared to be terminated before performance becomes due, the limitation period shall commence on the date on which performance is due.

2. The limitation period in respect of a claim arising out of a breach by one party of a contract for the delivery of or payment for goods by instalments shall, in relation to each separate instalment, commence on the date on which the particular breach occurs. If, under the law applicable to the contract, one party is entitled to declare the contract terminated by reason of such breach, and exercises this right, the limitation period in respect of all relevant instalments shall commence on the date on which the declaration is made to the other party.

CESSATION AND EXTENSION OF THE LIMITATION PERIOD

Article 13

The limitation period shall cease to run when the creditor performs any act which, under the law of the court where the proceedings are instituted, is recognized as commencing judicial proceedings against the debtor or as asserting his claim in such proceedings already instituted against the debtor, for the purpose of obtaining satisfaction or recognition of his claim.

Article 14

1. Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitral proceedings in the manner provided for in the arbitration agreement or by the law applicable to such proceedings.

2. In the absence of any such provision, arbitral proceedings shall be deemed to commence on the date on which a request that the claim in dispute be referred to arbitration is delivered at the habitual residence or place of business of the other party

or, if he has no such residence or place of business, then at his last known residence or place of business.

Article 15

In any legal proceedings other than those mentioned in articles 13 and 14, including legal proceedings commenced upon the occurrence of:

(a) the death or incapacity of the debtor,

(b) the bankruptcy or any state of insolvency affecting the whole of the property of the debtor, or

(c) the dissolution or liquidation of a corporation, company, partnership, association or entity when it is the debtor, the limitation period shall cease to run when the creditor asserts his claim in such proceedings for the purpose of obtaining satisfaction or recognition of the claim, subject to the law governing the proceedings.

Article 16

For the purposes of articles 13, 14 and 15, any act performed by way of counterclaim shall be deemed to have been performed on the same date as the act performed in relation to the claim against which the counterclaim is raised, provided that both the claim and the counterclaim relate to the same contract or to several contracts concluded in the course of the same transaction.

Article 17

1. Where a claim has been asserted in legal proceedings within the limitation period in accordance with article 13, 14, 15 or 16, but such legal proceedings have ended without a decision binding on the merits of the claim, the limitation period shall be deemed to have continued to run.

2. If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended.

Article 18

1. Where legal proceedings have been commenced against one debtor, the limitation period prescribed in this Convention shall cease to run against any other party jointly and severally liable with the debtor, provided that the creditor informs such party in writing within that period that the proceedings have been commenced.

2. Where legal proceedings have been commenced by a subpurchaser against the buyer, the limitation period prescribed in this Convention shall cease to run in relation

to the buyer's claim over against the seller, if the buyer informs the seller in writing within that period that the proceedings have been commenced.

3. Where the legal proceedings referred to in paragraphs 1 and 2 this article have ended, the limitation period in respect of the claim of the creditor or the buyer against the party jointly and severally liable or against the seller shall be deemed not to have ceased running by virtue of paragraphs/1 and 2 of this article, but the creditor or the buyer shall be entitled to an additional year from the date on which the legal proceedings ended, if at that time the limitation period had expired or had less than one year to run.

Article 19

Where the creditor performs, in the State in which the debtor has his place of business and before the expiration of the limitation period, any act, other than the acts described in articles 13, 14, 15 and 16, which under the law of that State has the effect of recommencing a limitation period, a new limitation period of four years shall commence on the date prescribed by that law.

Article 20

1. Where the debtor, before the expiration of the limitation period, acknowledges in writing his obligation to the creditor, a new limitation period of four years shall commence to run from the date of such acknowledgement.

2. Payment of interest or partial performance of an obligation by the debtor shall have the same effect as an acknowledgement under paragraph (1) of this article if it can reasonably be inferred from such payment or performance that the debtor acknowledges that obligation.

Article 21

Where, as a result of a circumstance which is beyond the control of the creditor and which he could neither avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist.

MODIFICATION OF THE LIMITATION PERIOD BY THE PARTIES

Article 22

1. The limitation period cannot be modified or affected by any declaration or agreement between the parties, except in the cases provided for in paragraph (2) of this article.

2. The debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor. This declaration may be renewed.

3. The provisions of this article shall not affect the validity of a clause in the contract of sale which stipulates that arbitral proceeding shall be commenced within a shorter period of limitation than that prescribed by this Convention, provided that such clause is valid under the law applicable to the contract of sale.

GENERAL LIMIT OF THE LIMITATION PERIOD

Article 23

Notwithstanding the provisions of this Convention, a limitation period shall in any event expire not later than ten years from the date on which it commenced to run under articles 9, 10, 11 and 12 of this Convention.

CONSEQUENCES OF THE EXPIRATION OF THE LIMITATION PERIOD

Article 24

Expiration of the limitation period shall be taken into consideration in any legal proceedings only if invoked by a party to such proceedings.

Article 25

1. Subject to the provisions of paragraph (2) of this article and of article 24, no claim shall be recognized or enforced in any legal proceedings commenced after the expiration of the limitation period.

2. Notwithstanding the expiration of the limitation period, one party may rely on his claim as a defence or for the purpose of set-off against a claim asserted by the other party, provided that in the latter case this may only be done:

(a) if both claims relate to the same contract or to several contracts concluded in the course of the same transaction; or

(b) if the claims could have been set-off at any time before the expiration of the limitation period.

Article 26

Where the debtor performs his obligation after the expiration of the limitation period, he shall not on that ground be entitled in any way to claim restitution even if he did not know at the time when he performed his obligation that the limitation period had expired.

Article 27

The expiration of the limitation period with respect to a principal debt shall have the same effect with respect to an obligation to pay interest on that debt.

CALCULATION OF THE PERIOD

Article 28

1. The limitation period shall be calculated in such a way that it shall expire at the end of the day which corresponds to the date on which the period commenced to run. If there is no such corresponding date, the period shall expire at the end of the last day of the last month of the limitation period.

2. The limitation period shall be calculated by reference to the date of the place where the legal proceedings are instituted.

Article 29

Where the last day of the limitation period falls on an official holiday or other *dies non juridicus* precluding the appropriate legal action in the jurisdiction where the creditor institutes legal proceedings or asserts a claim as envisaged in articles 13, 14 or 15, the limitation period shall be extended so as not to expire until the end of the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a claim could be asserted in that jurisdiction.

INTERNATIONAL EFFECT

Article 30

The acts and circumstances referred to in articles 13 through 19 which have taken place in one Contracting State shall have effect for the purposes of this Convention in another Contracting State, provided that the creditor has taken all reasonable steps to ensure that the debtor is informed of the relevant act or circumstances as soon as possible.

Part II. Implementation

Article 31

1. If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that

this Convention shall extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Secretary-General of the United Nations and shall state expressly the territorial units to which the Convention applies.

3. If a Contracting State described in paragraph (1) of this article makes no declaration at the time of signature, ratification or accession, the Convention shall have effect within all territorial units of that State.

*4. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party to a contract is located in that State, this place of business shall, for the purposes of this Convention, be considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

Article 32

Where in this Convention reference is made to the law of a State in which different systems of law apply, such reference shall be construed to mean the law of the particular legal system concerned.

* New Paragraph 4, added in accordance with article III of the 1980 Protocol.

ANNEX V

UNIDROIT CONVENTION ON INTERNATIONAL FACTORING (*)

THE STATES PARTIES TO THIS CONVENTION,

CONSCIOUS of the fact that international factoring has a significant role to play in the development of international trade,

RECOGNISING therefore the importance of adopting uniform rules to provide a legal framework that will facilitate international factoring, while maintaining a fair balance of interests between the different parties involved in factoring transactions,

HAVE AGREED as follows:

CHAPTER I - SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1

1. - This Convention governs factoring contracts and assignments of receivables as described in this Chapter.

2. - For the purposes of this Convention, "factoring contract" means a contract concluded between one party (the supplier) and another party (the factor) pursuant to which:

(a) the supplier may or will assign to the factor receivables arising from contracts of sale of goods made between the supplier and its customers (debtors) other than those for the sale of goods bought primarily for their personal, family or household use;

(b) the factor is to perform at least two of the following functions:

- finance for the supplier, including loans and advance payments;
- maintenance of accounts (ledgering) relating to the receivables;
- collection of receivables;
- protection against default in payment by debtors;

(c) notice of the assignment of the receivables is to be given to debtors.

3. - In this Convention references to "goods" and "sale of goods" shall include services and the supply of services.

(*) This Convention was adopted at the Diplomatic Conference for the Adoption of the Draft Unidroit Conventions on International Factoring and International Financial Leasing held in Ottawa from 9 to 28 May 1988.

4. - For the purposes of this Convention:

(a) a notice in writing need not be signed but must identify the person by whom or in whose name it is given;

(b) "notice in writing" includes, but is not limited to, telegrams, telex and any other telecommunication capable of being reproduced in tangible form;

(c) a notice in writing is given when it is received by the addressee.

Article 2

1. - This Convention applies whenever the receivables assigned pursuant to a factoring contract arise from a contract of sale of goods between a supplier and a debtor whose places of business are in different States and:

(a) those States and the State in which the factor has its place of business are Contracting States; or

(b) both the contract of sale of goods and the factoring contract are governed by the law of a Contracting State.

2. - A reference in this Convention to a party's place of business shall, if it has more than one place of business, mean the place of business which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of that contract.

Article 3

1. - The application of this Convention may be excluded:

(a) by the parties to the factoring contract; or

(b) by the parties to the contract of sale of goods, as regards receivables arising at or after the time when the factor has been given notice in writing of such exclusion.

2. - Where the application of this Convention is excluded in accordance with the previous paragraph, such exclusion may be made only as regards the Convention as a whole.

Article 4

1. - In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. - Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

CHAPTER II - RIGHTS AND DUTIES OF THE PARTIES

Article 5

As between the parties to the factoring contract:

(a) a provision in the factoring contract for the assignment of existing or future receivables shall not be rendered invalid by the fact that the contract does not specify them individually, if at the time of conclusion of the contract or when they come into existence they can be identified to the contract;

(b) a provision in the factoring contract by which future receivables are assigned operates to transfer the receivables to the factor when they come into existence without the need for any new act of transfer.

Article 6

1. - The assignment of a receivable by the supplier to the factor shall be effective notwithstanding any agreement between the supplier and the debtor prohibiting such assignment.

2. - However, such assignment shall not be effective against the debtor when, at the time of conclusion of the contract of sale of goods, it has its place of business in a Contracting State which has made a declaration under Article 18 of this Convention.

3. - Nothing in paragraph 1 shall affect any obligation of good faith owed by the supplier to the debtor or any liability of the supplier to the debtor in respect of an assignment made in breach of the terms of the contract of sale of goods.

Article 7

A factoring contract may validly provide as between the parties thereto for the transfer, with or without a new act of transfer, of all or any of the supplier's rights deriving from the contract of sale of goods, including the benefit of any provision in the contract of sale of goods reserving to the supplier title to the goods or creating any security interest.

Article 8

1. - The debtor is under a duty to pay the factor if, and only if, the debtor does not have knowledge of any other person's superior right to payment and notice in writing of the assignment:

(a) is given to the debtor by the supplier or by the factor with the supplier's authority;

(b) reasonably identifies the receivables which have been assigned and the factor to whom or for whose account the debtor is
required to make payment; and

(c) relates to receivables arising under a contract of sale of goods made at or before the time the notice is given.

2. - Irrespective of any other ground on which payment by the debtor to the factor discharges the debtor from liability, payment shall be effective for this purpose if made in accordance with the previous paragraph.

Article 9

1. - In a claim by the factor against the debtor for payment of a receivable arising under a contract of sale of goods the debtor may set up against the factor all defences arising under that contract of which the debtor could have availed itself if such claim had been made by the supplier.

2. - The debtor may also assert against the factor any right of set-off in respect of claims existing against the supplier in whose favour the receivable arose and available to the debtor at the time a notice in writing of assignment conforming to Article 8(1) was given to the debtor.

Article 10

1. - Without prejudice to the debtor's rights under Article 9, non-performance or defective or late performance of the contract of sale of goods shall not by itself entitle the debtor to recover a sum paid by the debtor to the factor if the debtor has a right to recover that sum from the supplier.

2. - The debtor who has such a right to recover from the supplier a sum paid to the factor in respect of a receivable shall nevertheless be entitled to recover that sum from the factor to the extent that:

(a) the factor has not discharged an obligation to make payment to the supplier in respect of that receivable; or

(b) the factor made such payment at a time when it knew of the supplier's non-performance or defective or late performance as

regards the goods to which the debtor's payment relates.

CHAPTER III - SUBSEQUENT ASSIGNMENTS

Article 11

1. - Where a receivable is assigned by a supplier to a factor pursuant to a factoring contract governed by this Convention:

(a) the rules set out in Articles 5 to 10 shall, subject to sub-paragraph (b) of this paragraph, apply to any subsequent assignment of the receivable by the factor or by a subsequent assignee;

(b) the provisions of Articles 8 to 10 shall apply as if the subsequent assignee were the factor.

2. - For the purposes of this Convention, notice to the debtor of the subsequent assignment also constitutes notice of the assignment to the factor.

Article 12

This Convention shall not apply to a subsequent assignment which is prohibited by the terms of the factoring contract.

CHAPTER IV - FINAL PROVISIONS

Article 18

A Contracting State may at any time make a declaration in accordance with Article 6(2) that an assignment under Article 6(1) shall not be effective against the debtor when, at the time of conclusion of the contract of sale of goods, it has its place of business in that State.

ANNEX VI

ARTICLE 6:110: STIPULATION IN FAVOUR OF A THIRD PARTY

(1) A third party may require performance of a contractual obligation when his right to do so has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose of the contract or the circumstances of the case. The third party need not be identified at the time the agreement is concluded.
(2) If the third party renounces the right to performance the right is treated as never having accrued to him.
(3) The promisee may by notice to the promisor deprive the third party of the right to performance unless:
    (a) the third party has received notice from the promisee that the right has been made irrevocable; or
    (b) the promisor or the promisee has received notice from the third party that the latter accepts the right.

ANNEX VII

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

(Vienna, 11 April 1980)

Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

ANNEX VIII

ARTICLE 9:401: RIGHT TO REDUCE PRICE

(1) A party who accepts a tender of performance not conforming to the contract may reduce the price. This reduction shall be proportionate to the decrease in the value of the performance at the time this was tendered compared to the value which a conforming tender would have had at that time.
(2) A party who is entitled to reduce the price under the preceding paragraph and who has already paid a sum exceeding the reduced price may recover the excess from the other party.
(3) A party who reduces the price cannot also recover damages for reduction in the value of the performance but remains entitled to damages for any further loss he has suffered so far as these are recoverable under Section 5 of this Chapter.

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