UNIDROIT 2000
Study L – Misc. 22
(English only)

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WORKING GROUP FOR THE PREPARATION OF PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

SUMMARY RECORDS

of

THE MEETING HELD IN CAIRO

FROM 24 TO 27 JANUARY 2000

(Prepared by the Secretariat of UNIDROIT)

Rome, August 2000

1. The third session of the Working Group for the preparation of Part II of the Principles of International Commercial Contracts was held from 24 to 27 January 2000 in Cairo, Egypt. The list of participants is attached as APPENDIX I.

2. Bonell opened the session by welcoming the members of the Working Group (two of whom, Di Majo and Lando, regrettably were unable to attend) as well as the observers Grigera Naón (ICC International Court of Arbitration), Schiavoni (National and International Chamber of Arbitration at Milan), Herrmann (UNCITRAL) and Dessemontet (Swiss Arbitration Association), the latter two participating for the first time. The American Arbitration Association and the Singapore International Arbitration Centre also had expressed their interest in participating in the Group's work but had been unable to send representatives to the current session. He also extended a warm welcome to the Secretary-General of UNIDROIT, Kronke, as well as to the Attorney General of Egypt, El Wahed, member of the UNIDROIT Governing Counsel, who together with El Kholy had made it possible to hold the session in Cairo.

3. Attorney General El Wahed, speaking also on behalf of the Egyptian Minister of Justice, expressed satisfaction at the presence of such an eminent group of experts in international contract law and wished the Working Group a fruitful session.

I. LIMITATION OF ACTIONS BY PRESCRIPTION

4. Schlechtriem, in introducing the draft Chapter on Prescription he had prepared (UNIDROIT 1999, Study L - Doc. 64), stressed that the main problem of drafting provisions on the limitation of actions by prescription was the determination of the right length of the limitation period. He recalled that the Working Group had originally decided to adopt the four-year period of the United Nations Convention on the Limitation Period in the International Sale if Goods (hereinafter the "UN Limitation Convention"), but subsequently, at the meeting in Bozen, opted for another model, the so-called two-tier system, characterised by two periods of limitation, one beginning to run on actual or constructive knowledge of the obligee and a longer period beginning to run on the accrual of the claim or right. He also recalled that the Group had for the time being envisaged four years for the shorter period and ten years for the longer period. The Group was invited to consider as an alternative the draft prepared by Professor Zimmermann for the Lando Commission, which also provided in substance for a two-tier system based, however, on a single period starting to run on the accrual of the claim or right but suspended as long as the obligee does not know or ought to know of its claim. According to Schlechtriem the two approaches led to substantially identical results and invited the Group to opt for one or the other before discussing other questions of detail. His own preference was for the present draft because it corresponded to other international instruments such as the EC Directive on Products Liability. The same could not be said of the rather complicated model proposed by Zimmermann.

5. The Group then proceeded to make an article by article examination of the draft.

Art. 1 (1): Claims or rights of parties arising from a contract governed by these Principles 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 "limitation period".

6. Bonell questioned the wording "claims or rights" which did not correspond to the title of the chapter "limitation of actions".

7. Schlechtriem responded that he intended to include not only claims but also rights because the termination of a contract was a right that should also fall under the same limitation rules. In practice, the different remedies, e.g. the right to avoid a contract, to terminate it or to claim damages should be treated on the same footing. The title of the chapter had been chosen before the contents had been discussed in detail. He therefore proposed to take a final decision on the title of the chapter after discussing the individual provisions.

8. Farnsworth shared Bonell's concern. He explained that in Common Law the word "right" covered everything including claims.

9. El Kholy explained that in the Arab legal systems two kinds of limitation rules can be found. The first one, which also exists in Egyptian law, provides for the extinction of the right itself, while the second, preferred by the majority of Arab legal systems, only provides for the barring of the legal action. In view of possible conflicts with one or the other kind of limitation rule, which might also touch questions of Islamic morals, he favoured a more general and flexible approach reflected in the words "claims and rights".

10. Komarov expressed his concern about the possible impact of the formula "rights and claims" because this could imply a difference between both notions. Therefore, he preferred the use of the term "right" only but in a broad sense including claims within this concept.

11. Schlechtriem pointed out that two issues had been discussed so far: first, the question as to which formula should be preferred and, second, how limitation worked. Concerning the latter, the concerns expressed could be dispelled by the broad formula "can no longer be exercised" contained in Art. 1. With regard to the first issue, Schlechtriem expressed his preference for a broad understanding of the term "rights" which could be explained in the Comments.

12. Furmston asked whether a debtor owing £ 1000 which pays after five years could claim restitution because the limitation period had already expired when it paid its debt. He explained that under English law the debtor could not claim restitution because even after expiration of the limitation period the money was still owed though the claim was no longer enforceable.

13. According to Schlechtriem this issue related basically to the law of restitution whether or not the right had been extinguished or merely barred by the expiration of the limitation period.

14. Uchida asked whether it was appropriate to include the concept of rights in the chapter on limitation, since e.g. with respect to the right to terminate a contract interruption would be inconceivable. He also wondered if Art. 5 was applicable to the right to terminate a contract.

15. Bonell agreed and asked Schlechtriem what he meant by his explicit reference to termination and invalidity in Art. 1 (1) of his draft. In his opinion, there was a contradiction between such a reference and the rule contained in Art. 1 (2).

16. Schlechtriem explained the difference between termination and avoidance per se. The first one was what in German is known as *Gestaltungsrecht*, i.e. a right which has to be exercised by notice within a particular period of time. Consequently, it could be subject to the rules on interruption and suspension. The latter by contrast had a direct effect on the right and therefore could not be governed by the provisions on limitation.

17. Bonell objected that, under the Principles, the right to avoid or terminate must be exercised within a reasonable period of time which was intended to be shorter than three or four years. Therefore, he understood Art. 1 (2) as excluding these special remedies from the scope of the present chapter.

18. Schlechtriem agreed that neither the rules on interruption nor those on suspension should apply to the time periods contained in the Principles. However he had envisaged termination rules in the context of special contracts, which might contain a longer period of time and consequently justified recourse to the general rules of limitation. The present wording of Art. 1 (1) was intended to allow their application as fallback provisions only in these cases.

19. Fontaine wondered if it would be possible to delete the reference to breach, termination or invalidity in Art. 1 (1) in order to avoid doubts as to what had been discussed so far and proposed the following formula: “Claims or rights of parties arising from a contract governed by these Principles can no longer be exercised by reason of the expiration of a period of time”.

20. According to Schlechtriem the Principles ought to provide for limitation periods also for claims relating to invalidity: thus, for instance, if the contract was void and had already been performed, claims for restitution should be barred by limitation periods.

21. Crépeau expressed sympathy for Schlechtriem’s approach in distinguishing between rights as a matter of substantive law and claims as a matter of procedural law. But if this position were to be accepted, the chapter should not only deal with limitation of actions but also with limitation of rights arising from a contract governed by these Principles.

22. El Kholy stressed that Arabic countries would have less difficulty in accepting the limitation rules in the Principles if they dealt with the limitation of claims only. Concerning the reference in Art. 1 (1) to termination, he suggested adding the notion "decision" in order to cover also the termination of a contract by a court. Finally, he wanted to know if the proposed draft would mean that void contracts and avoidable contracts were both subject to the same limitation periods.

23. Bonell suggested that the Working Group focus on the remedies contained in the Principles, disregarding additional remedies possibly provided by domestic law. He also wondered if the use of a more flexible and generic language would not help to overcome many of the difficulties mentioned so far.

24. Schlechtriem agreed and therefore suggested changing the title of the chapter from "limitation of actions by prescription" to "limitation periods". He asked the Working Group for its opinion on whether claims resulting from the avoidance, termination or performance of a contract etc. should also be time-barred.

25. Farnsworth referred first to the discussion about the formula "claims or rights" and repeated that in his view to speak of "rights" alone was sufficient. Referring to the discussion about the reference to the breach, termination or invalidity he expressed his support for Fontaine's proposal to delete this reference. Finally, he expressed dissatisfaction with the formula "can no longer be exercised" because he wondered what this would mean in a case in which someone makes an agreement to pay on demand if the demand was made in five years rather than in four years.

26. Uchida asked Schlechtriem what would be the starting point for restitution claims resulting from termination, avoidance etc. of a contract.

27. Schlechtriem answered that the limitation periods applicable to active claims applied also to restitution claims. They accrued at the same moment when performance was made on a void contract or the contract was avoided. Referring to Farnsworth's statement, he admitted that this issue had still to be decided and pointed out that he intended to cover it in the context of Art. 2 (2) by the supplementary formula in square brackets "or has become due".

28. Baptista pointed out that the distinction between claims and rights was important in the context of restitution. One of the issues relating to restitution was tax problems: if there was no right to restitution, payment would be considered by the tax authorities as a payment without cost with the consequence that payment would be taxable.

29. Finn expressed his concern about the sophisticated language used in Art. 1 (1) and therefore wondered whether some of the difficulties the Group was encountering could be overcome by adopting Fontaine's proposal to simplify the language in the definition itself and provide explanations in the Comments rather than by using language which could cause confusion in different jurisdictions.

30. Schlechtriem agreed with the use of the notion "rights" accompanied by a statement in the Comments that it was intended to include claims, actions etc. He suggested splitting up the first sentence into two sentences to read as follows: "Rights of the parties arising from a contract governed by these Principles can no longer be exercised by reason of the expiration of a period of time. Rights under these provisions include claims for restitution."

31. Bonell proposed that, in the light of the discussion, the title of the chapter be changed to "Limitation Periods". He shared the concerns about using too detailed language in Art. 1 (1) and felt that this opinion was held by a majority.

32. Komarov suggested changing the formula "can no longer be exercised" to "can no longer be enforced in order to exclude natural obligations".

33. Schlechtriem answered that a statement could be added according to which "For the meaning of exercise see Art. 7".

34. Huang wondered what the scope of the chapter really was. The new title gave her the impression of a very broad concept of limitation and wondered if this reflected a trend in international contract law. She also wanted to know the internationally prevailing trend with respect to the length of the limitation period, the causes of interruption and the role of party autonomy in this matter. She explained that under Chinese law parties are free to fulfil the obligation even after the limitation period has expired.

35. Bonell referred to the title of the UN Convention on the Limitation Period in the International Sale of Goods to show that the broad concept criticised by Huang is an internationally accepted concept. Perhaps the term "prescription" could be added in brackets. As to Huang's second question, he suggested that it be deferred to a later stage of the discussion.

36. Referring to Fontaine's proposal Crépeau wondered whether there was a consensus to delete the reference to "breach, invalidity and termination" in Art. 1 (1). He had the impression that Art. 1 (1) of the draft was inspired by Art. 1 of the UN Limitation Convention, but expressed the view that the wording of Art. 1 of the UN Limitation Convention did not square with the corresponding provisions of the Principles. He therefore suggested adopting the wording "relating to its interpretation, content, performance or non-performance".

37. Farnsworth supported Finn's suggestion to take a general approach in the black letter rules supplemented by explanations in the Comments instead of splitting up the phrases as proposed by Schlechtriem.

38. Fontaine agreed with Crépeau that if the references in Art. 1 (1) of the draft were kept, the wording should be adapted to the language used in the Principles. However he preferred to delete any references. He also agreed that the word "enforced" should be used instead of "exercised".

39. Furmston pointed out that Art. 1 (1) was titled "Definitions" but also contained substantive rules. In his view this mixture of two different kinds of provisions was unsatisfactory and consequently felt that Art. 1 (1) should not deal with the effects of limitation.

40. El Kholy favoured the retention of the present text in order to assure that all other kinds of actions would be covered by this chapter.

41. The Group decided to delete the reference to breach, termination or invalidity of the contract in Art. 1 (1) in favour of more generic language, subject to further explanations in the Comments including a specific reference to restitution. Schlechtriem stated that the first paragraph would read as follows: "Rights of parties arising from a contract are subject to limitation". It would be accompanied by Comments defining the notion "rights arising from a contract" in a wide sense encompassing e.g. rights arising from a breach of the contract, claims for damages, claims arising from the termination or invalidity of the contract and restitution claims.

42. Bonell objected that the reference in Art. 1 (1) to rights arising from a contract would not cover the provisions on precontractual liability which were also part of the Principles.

43. Schlechtriem replied that he understood the formula "rights arising from contracts governed by these Principles" as including the rules of the Principles referring to the precontractual behaviour of the parties and the remedies provided for in these rules. He suggested that this could be made clear in the Comments.

44. Bonell pointed out first of all that a formula such as "contracts governed by these Principles" would raise the general question as to the exact scope of application of the Principles set out in the Preamble. Moreover such a reference to contracts governed by the Principles had never been considered necessary with respect to previous chapters because it had been taken for granted that individual provisions of the Principles only applied in the overall context of the Principles as a whole. He wondered whether wording such as "rights arising from a contract or related to its formation" would not be clearer.

45. El Kholy supported this position by pointing out that the formula "rights arising from a contract" would not include the right to avoid a contract because the basis of such a right was the law and not the contract.

46. Kronke suggested a formula similar to arbitration clauses: "under or in connection with a contract".

47. Schlechtriem asked if Kronke's proposal covered also tort claims.

48. Bonell asked Schlechtriem what he understood by tort claims and recalled that although some domestic laws might consider precontractual liability as a form of tortious liability, in the context of the Principles it was of a contractual nature.

49. Crépeau wondered whether the word "parties" used in the formula "rights of the parties" only related to the parties to the contract or also to third parties which might have claims arising from a contract but of an extracontractual nature, e.g. injuries.

50. Farnsworth expressed his opinion that many of the problems raised so far would not arise if the reference to contracts governed by the Principles was deleted. He suggested using the formula "rights of the parties governed by these Principles".

51. Bonell asked whether there was consensus in favour of the formula proposed by Farnsworth.

52. Crépeau, though favouring Farnsworth's proposal, expressed sympathy for the arguments put forward by Bonell that all contracts referred to in the Principles were contracts within the system of the Principles.

53. Farnsworth defended his proposal on the ground that by speaking instead of contracts of all possible rights arising from provisions contained in the Principles, one would avoid sophisticated discussions about their dogmatic qualification, i.e. whether or not a special right could be qualified as a contractual right as had been discussed in the context of precontractual liability.

54. Schlechtriem stated that he considered this an excellent proposal as it also overcame the difficulties related to restitution claims subsequent to a void contract. He wondered whether the provision should speak of "rights of parties governed by these Principles" or of "rights governed by these Principles" in order to include also rights of third parties, e.g. those of beneficiaries.

55. With regard to the provisions on assignment, Kronke agreed that rights of third parties would be included.

56. The Group agreed on the new formula "rights of parties governed by these Principles".

Art. 1 (2): These limitation rules shall not affect a particular time-limit within which one party is required, as a condition for the acquisition or exercise of his claim or right, to give notice to the other party or perform any act other than the institution of legal proceedings.

57. Schlechtriem explained that the underlying intention of Art. 1 (2) was to avoid conflicts with specific cut-off rules contained in other provisions. He wondered whether, in the light of the alteration made in paragraph 1, the provision should be amended as follows: "These limitation rules shall not affect a particular time-limit within which one party is required, as a condi-

tion for the acquisition or exercise of his rights, to give notice to the other party or perform any act other than the institution of legal proceedings".

58. El Kholy expressed his concern about having additional cut-off periods besides limitation periods. They would not only be difficult to distinguish but would also represent an obstacle for the acceptance of the Principles in those Arab legal systems that did conceive of an extinction of rights. Therefore, he preferred one uniform limitation period of four years.

59. Bonell reminded El Kholy that according to Art. 7 of the draft, rights would not be extinguished and expressed his reluctance to revise the cut-off provisions in other chapters, as suggested by El Kholy.

60. Crépeau suggested adopting a period of three weeks as a reasonable period of time in order to avoid possible conflicts with the limitation periods.

Art. 1 (3): In these rules

(a) an "obligee" means a party who asserts or may assert a claim, whether or not such a claim is for a sum of money or any other performance, or who may exercise any other right under a contract;
(b) an "obligor" means a party against whom an obligee asserts or may asssert a claim or a right;
(c) "legal proceedings" includes judicial, arbitral and administrative proceedings;
(d) "person" includes corporation, company, partnership, association or entity, whether private or public, which can sue or can be sued;
(e) "year" means a year according to the Gregorian calendar.

61. Schlechtriem mentioned the problem of joint debtors and suggested adding a note in the Comments explaining that joint debtors are also covered by the term "obligor".

62. Crépeau doubted whether the definition of an obligee was really necessary and asked if it could be deleted.

63. Bonell explained that it had been included as a reminder and was a mere question of drafting which could be settled at the end of the process.

64. El Kholy asked what was meant by "administrative proceedings", i.e. if proceedings before an administrative jurisdiction such as the "Conseil d'Etat" were also covered by this definition.

65. Bonell pointed out that this language had been taken from the UN Limitation Convention and could be given up.

Art. 2 (1): The regular period of limitation is four years. It begins to run from the moment when the obligee knows or ought to know of his claim or right, in particular of the facts on which it may be based.

66. Schlechtriem raised three different issues. First, whether the length of the limitation period of four years which had been taken from the UN Limitation Convention was still appropriate for a two-tier system or whether it should be shortened to two or three years. Secondly, when the shorter limitation period should start to run, and in this respect he referred to para. 2 of Art. 2 where two alternatives could be found, i.e. the limitation period starts to run when the right of the obligee accrues or has become due. Thirdly, whether and to what extend the parties were allowed to modify the periods of limitation proposed in Art. 2. He suggested starting the discussion with the length of the limitation periods.

67. Hartkamp expressed his preference for a short limitation period of two or three years and a long limitation period of five years. This would not only be more appropriate for a two-tier system but would also correspond to the practical needs of international commercial contracts.

68. Bonell wondered what the practical needs of international commerce really were.

69. Crépeau agreed with Hartkamp's proposal to shorten the four-year period to three years and the ten-year period to five years, subject to consultation with commercial experts. Concerning the question as to when the limitation periods should start to run, he pointed out that the formula "the moment when the obligation becomes due" raised the question as to whether the starting point was a moment in the day or the day. The latter was the approach adopted in the UN Limitation Convention, while in Civil Law countries the limitation period starts to run the day following the moment the right or claim accrued. He invited the Group to discuss these three possibilities and expressed his preference for a solution providing for a full day or the following day as the starting point.

70. Date Bah expressed his dissatisfaction with the suggestions made so far concerning the shortening of the limitation periods. He explained that countries like Ghana favour a longer limitation period because in these countries time did not run as fast as in other countries and therefore their citizens run a strong risk of being cut off by short limitation periods.

71. Bonell agreed that this aspect should be taken into account and pointed out that also experts in construction contracts seemed to prefer a longer limitation period.

72. According to Schlechtriem, if the Group decided to reduce the longer limitation period to five years, an escape clause was needed in order to meet the practical needs arising from construction contracts. Experience had shown that most of the defects appear eight or nine years after the construction of a plant or building.

73. Furmston explained that in England a special statute provided for a twelve year limitation period for sealed contracts. Therefore, since virtually all construction contracts are sealed contracts, they are subject to a twelve-year limitation period. He added that most defects appear between the sixth and the twelfth year. However, he was not in favour of taking the needs of construction contracts as a criterion relevant for the decision on the length of limitation periods because this problem could be dealt with in a special provision.

74. Bonell objected that also in connection with other contracts such as software contracts a longer limitation period could turn out to be necessary and reminded the Group of the millennium bug problem. He wondered whether Hartkamp would change his opinion in the light of these arguments.

75. Hartkamp expressed his comprehension for the special problems related to some kinds of contracts and suggested providing particular rules dealing with this issue in the context of special contracts but insisted that at least the short period should be shortened as a four-year period was excessive.

76. According to Kronke one could distinguish between short exchange contracts and long-term contracts and provide for the former a very short limitation period and for the latter a considerably longer limitation period.

77. Finn agreed to shorten the four-year period to three years and expressed his opinion that para. 4 stating the parties' freedom to modify the rule in para. 1, would make it possible to overcome many of the concerns expressed by Hartkamp.

78. Farnsworth first referred to Crépeau's suggestion to include a provision dealing with the exact starting point of the limitation periods and expressed his concern that this would lead to many more detailed questions, e.g. the effect of holidays on the limitation period. As to the length of the periods, in his experience a short limitation period aggravated the question of suspension and interruption. This problem could be avoided if a longer time period were to be adopted. With regard to the setting in which the Principles were used and the rather short periods provided for in domestic laws, he added that a more generous provision on time limits would be advisable.

79. El Kholy suggested including para. 3 of Art. 2 in para. 1. Furthermore he expressed his concern about Art. 2 (1) and Art. 2 (2) which might overlap because a person normally knew or had to know that his/her right or claim accrued. Therefore, it would be difficult to draw a line between these two cases. Moreover it was unclear under the provision who had the burden of proof and what had to be proved.

80. Bonell reminded El Kholy that the Commission on European Contract Law had so far adopted a uniform limitation period accompanied by an escape clause interrupting the limitation period in cases where the party concerned did not know or could not have reasonably

been expected to know the facts giving rise to its claim. Here the burden of proof was clearly up to the party concerned.

81. With reference to the statistics mentioned by Furmston concerning the appearance of defects in construction projects, Schlechtriem referred to a study undertaken by the University of Aachen. According to this study, most defects appeared between eight and twelve years after the completion of construction. Therefore, the ten-year period should be considered as appropriate. As to the question as to who should bear the burden of proof, he expressed the view that it lay upon the party invoking the actual or constructive knowledge of the other party. However, he proposed to add para. 2 as a second sentence to para. 1. Concerning the length of the limitation periods, he suggested reconsidering this issue in the context of para. 4.

82. Bonell wondered whether a consensus could be found on the question as to whether a four or a three-year period should be adopted. He reminded the Group that it had chosen the UN Limitation Convention providing for a four-year period as a guideline, but also mentioned that the Commission on European Contract Law favoured a three-year period.

83. Komarov stated that he was in favour of a shorter time period. This would be a logical consequence of having chosen actual or constructive knowledge as a starting point.

84. Fontaine explained that a shortening could be justified with regard to the ten-year period.

85. Bonell objected that the ten-year period was intended as an exception.

86. Fontaine replied that the ten-year period stressed the fact that the Principles took into account the different situations in many countries as described by Date Bah, but also the needs of different kinds of contracts, e.g. construction contracts. Thus, the ten-year period underlined the universal character of the Principles.

87. Dessemontet reminded the Group of the needs of electronic commerce and directed its attention to the Computer Information Transaction Act adopted in many states of the United States. According to this Act, rights or claims are generally time-barred after four years, but if the party knew or ought to have known of its claim or right but did not exercise it, they were time-barred after one year. He wondered whether the Group could agree on an absolute limitation period of four or five years accompanied by a shorter limitation period based on actual or constructive knowledge.

88. Schlechtriem recalled the compromise character of the four-year period in the UN Limitation Convention. Therefore he could easily accept a three-year period. With respect to the question of diverging local situations raised by Date Bah and Fontaine he expressed the opinion that a flexible interpretation of what the parties knew or ought to have known according to Art. 2 (1) could solve the problem so that the legitimate interests of parties in less developed countries would not be harmed too much by a three-year period.

89. El Kholy expressed his concern about the disproportion between a three or four-year period and a ten-year period in the same provision.

90. Bonell urged the Group to decide on one of the two alternatives which so far had met with the greatest approval, i.e. a three or four-year period, accompanied by an absolute period of ten years or a one or two-year period, accompanied by an absolute period of five years.

91. Huang, also referring to her experience in the banking sector in China and to studies on the dramatic expected development of e-banking within the next five years, expressed her preference for the model suggested by Hartkamp, i.e. a short period of one or two years accompanied by an absolute period of five years. She argued that this model could also be appropriate for construction contracts because the starting point of the shorter period was the moment the party knew or ought to have known about the claim.

92. Uchida missed a provision suspending the short limitation period during negotiations. Therefore, he preferred a more generous time limit than only three years.

93. Schlechtriem underlined that the limitation periods could be modified by the parties according to para. 4. He wondered whether this could induce even those who generally favoured short limitation periods to accept the three/ten-year model.

94. Fontaine felt it was difficult to decide on the limitation periods without knowing the exact starting point of the short limitation period, especially if the meaning of "accrual" and "has become due" are intended to mean different things.

95. Schlechtriem confirmed that he meant two different things by "accrual" and "has become due". He explained that a claim could accrue but that the parties could agree that it becomes due at a later moment, i.e. cases in which the right accrued but became due on demand by the other party.

96. The Group eventually agreed to adopt the three-year period as the short limitation period and the ten-year period as the absolute limitation period.

Art. 2 (2): Unless para. 1 applies, the period of limitation is 10 years. This period of limitation commences at the moment when the claim or right of the obligee accrues [has become due].

97. Crépeau suggested adopting the day after rule concerning the starting point of the limitation period. This would mean that the limitation period of a claim which the party knew or ought to know of on 2 February 2000 would start on 3 February 2000 and end on 1 February 2004.

98. Schlechtriem expressed his concerns provoked by Farnsworth's remarks on the question of holidays and therefore preferred a solution providing for the beginning of the next year as the starting point of the short limitation period. Although this would lead in many cases to an effective limitation period of four years, the application of such a rule would be much easier than that of the solutions presented so far.

99. Farnsworth explained that he had not intended to suggest such a solution by his remark. He preferred the day after rule without mentioning the problem of holidays in the black letter rules. This could be dealt with in the Comments by stating that holidays were not counted.

100. Finn, recalling that the Group was concerned with the creation of general principles, wondered if this question could not be left open by simply saying "the moment the party knows or ought to know of his claim or right".

101. Komarov expressed his satisfaction with the proposal made by Farnsworth but asked whether the relevant day should not be characterised more precisely, e.g. the next working day at the place of the claimant.

102. Bonell felt that this solution went into too much detail and might give rise to additional difficult questions which could not be settled in the Principles.

103. Crépeau reminded the Group of Art. 10 of the UN Limitation Convention which provides for a starting point on the day the claim accrues.

104. Schlechtriem objected that this solution had already been rejected.

105. The Group eventually decided by majority to adopt the day after rule, i.e. that the limitation period starts to run the day after the right or claim accrued.

106. Bonell invited comments on the formula "the claim or right of the obligee accrues [has become due]".

107. Farnsworth pointed out that his and Finn's concern regarding para. 2 was the problem that a party might know of its right without knowing when it accrued, especially if a long term contract was concerned. Therefore para. 1 should be amended to read "when the obligee knows that the right has become due".

108. Furmston expressed his dissatisfaction with the present formula because the test if a party knew or ought to know of its rights would turn out to be very difficult in many cases. Therefore, he suggested referring to the facts on which the relevant right or claim takes place.

109. Farnsworth objected that the facts one had to know were normally contained in the contract and asked where the difference was.

110. Furmston explained his position by referring to a series of cases in which the House of Lords stated that the plaintiff could not be blamed for the fact that it did not know about its legal rights. Therefore, the distinction between the knowledge of the rights or claims and the knowledge of the facts on which the rights arose should be considered as fundamental.

111. Komarov wondered if the problem raised could be overcome by the formula "from the moment the party knows or ought to know of the violation of its claim or right".

112. Finn expressed his opinion that two different matters were discussed. The one was the state of knowledge one was required to have before the limitation period started to run, while Furmston was speaking about a situation in which someone knows of its rights which either might not be exercisable or might not have to be exercised at that time. Farnsworth, on his part, had mentioned a situation in which someone owed a sum of money to be repaid in fifteen years or earlier on certain conditions, e.g. on demand. Finn explained that in such a situation the right was there and could be exercised at any time. This was still a right arising from the contract of which one had knowledge. The formula referring to the facts on which this right arose would remind the claimants that their right was fully activated and had to be exercised.

113. Bonell objected that under the Principles such rights accrued only if and as from the time when the obligor failed to perform.

114. Farnsworth pointed out that the word "accrual" had not been used so far and therefore that para. 1 should have the same wording as para. 2.

115. Bonell stated that there were two different formulas, one suggested by Furmston, the other suggested by Farnsworth to cover the exercise of rights and asked which was preferable.

116. Hartkamp replied that he had no preference.

117. Schlechtriem asked Farnsworth if his concerns could not be met by choosing the formula "has become due" because then, the right becomes due on demand or notice.

118. Farnsworth agreed on condition that the formula would be included in para. 1. He also pointed out that the question raised by Furmston as to the kind of knowledge someone had to have was a separate question. What he wanted to avoid was a situation in which a party, having a right to require payment upon demand after fifteen years was time-barred after three years because para. 1 stated that the limitation period starts when the right accrued, i.e. with the formation of the contract.

119. Fontaine suggested the following wording: "Three years from the day after the day the obligee knows or ought to know the facts on which the right has become due, with the maximum of ten years from the day the right has become due".

120. Crépeau asked Fontaine how he would deal with cases related to validity, such as for instance fraudulent misrepresentation. He illustrated his question by presenting a case in which a fraudulent creditor entered into a contract with a debtor who had no knowledge of the fraud committed by the creditor on the 1st of February. He wanted to know when the limitation period would start to run in such a case.

121. Fontaine replied that there were three years after the moment the debtor knew or ought to know of the fraud and an absolute period of ten years definitively cutting off the debtor's rights arising from the fraud committed by the creditor.

122. Bonell asked if there were objections to the first part of Fontaine's proposal and as no objections were raised the proposal was considered as accepted.

123. As to the second part of Fontaine's proposal, Bonell asked for further comments because the ten-year period constituted an exception and exceptions should be dealt with in separate paragraphs.

124. Fontaine suggested splitting his proposal into two sentences and dealing with the ten-year period in a separate paragraph. It was so decided.

125. Bonell wondered whether there was a consensus in favour of the formula "has become due".

126. Hartkamp asked if the formula "has become due" was intended to relate to claims only and not to rights such as the right to avoid a contract etc.

127. Bonell confirmed the exclusion of such rights by referring to Art. 1 (2).

128. Hartkamp expressed his discomfort with Art. 1 (2) which referred to rights which did not fall under the concept underlying the formula "has become due".

129. Bonell reminded that Art. 1 (2) could be kept for pedagogical reasons.

130. Farnsworth agreed with Hartkamp that the present formula did not seem to apply to a right to avoid a contract. He was not sure if this could be cured in the Comments. He also expressed his dissatisfaction with the use of the word "exercise" in Art. 1 because it would give this chapter a broader scope than those of Common Law statutes on limitation. He explained that he understood the word "exercise" in the sense of "exercisable" but this would lead back to the discussion the Group had already had in connection with Art. 1.

131. Bonell underlined that Art. 1 (2) related not only to avoidance but also to termination and the right to require performance as far as these remedies are outside any court intervention. For those remedies, the use of the verb "to exercise" is quite appropriate. Therefore, the language used in Art. 1 (2) was not only appropriate in the present context but had already

been used in the existing rules, e.g. in Art. 7.3.2: "The right of a party to terminate the contract is exercised by notice to the other party".

132. Hartkamp stated that it was not only confusing for Common Law statutes but also for Civil Law statutes on limitation to deal with such kind of remedies out of courts. To mention these remedies in black letter rules might suggest that the Principles are based on a concept different to what both Common Lawyers and Civil Lawyers are familiar with. Therefore, he preferred to exclude this kind of remedies from the Comments.

133. Schlechtriem stated that the words "has become due" could be replaced by the words "can be exercised". In this context, it would be used in a rather narrower sense than in Art. 1 but would be consistent with this provision.

134. Hartkamp objected that the provisions would be inconsistent either if they referred to rights which had become due thereby excluding remedies other than claims or if these remedies were included in the general rule but excluded from the operative provisions as suggested by Schlechtriem.

135. Bonell wondered whether in the light of the discussion the term "right" should not be replaced by the word "claims". Furthermore he asked if the consensus about the exclusion of the remedies was still valid.

136. Schlechtriem confirmed the latter but at the same time pointed out that there were situations which were not covered by Art. 1 (2) but which should be considered in the context of this provision. As an example, he mentioned the right to terminate the contract provided for in the contract. This was not a remedy in the sense of Art. 1 (2) and would therefore fall under the limitation rules of the present chapter.

137. Bonell objected that there was no specific need to deal with these agreements of the parties because the applicable rule depended on the parties' intention. As far as they agree on termination by court intervention, the limitation rules of the present chapter would be applied whereas in all the other cases, the time period agreed by the parties or the respective rules of the Principles would have to be applied. He suggested dealing with the issues raised so far in the Comments and expressed his reluctance to prolong the discussion about possible modifications of the black letter rules only in order to cover relatively rare cases.

138. Schlechtriem expressed his satisfaction with the formula "has become due" accompanied by an explanatory Comment stating that "has become due" means rights which could be exercised effectively. He wondered however if this would be sufficient with regard to the right to withhold performance (Art. 7.1.3).

139. Bonell closed the discussion and asked Schlechtriem to take the concerns and alternatives mentioned so far into consideration when preparing the next draft in order to provide an appropriate solution.

Art. 2 (3): The limitation period in para. 1 also applies to ancillary claims such as claims for interest, emoluments or costs.

140. Schlechtriem introduced para. 3 and asked if there was agreement on this provision providing for an independent starting point for the limitation of ancillary claims.

141. Bonell recalled that a different approach had been taken in both the Zimmermann draft and the UN Limitation Convention.

142. Finn asked for further explanation of the provision.

143. Schlechtriem replied that claims for interest arose later than claims for the principal. This could lead to situations in which a claim for interest which had arisen during two years and eleven moths would be time-barred after one month if the limitation period of three years related to the principal claim was extended to claims for interest as ancillary claims. In order to avoid such results, he had drafted this provision.

144. Furnston pointed out that he always thought that both the principle and ancillary claims would be extinguished simultaneously.

145. Herrmann agreed.

146. Hartkamp too expressed his preference for the approach chosen in the Zimmermann draft and suggested it be taken even with respect to claims for non-performance so that these claims would also be extinguished simultaneously. He also expressed his dissatisfaction with the use of the formula "ancillary claims such as claims for interest, emoluments or costs".

147. Bonell objected that the problem had already been dealt with in Art. 7.2.2 (e) of the Principles requiring that notice be given within a reasonable time by the party entitled to performance if this party wanted to preserve this claim. Consequently, there was no reason to come back to the issue of non-performance in the present context. With regard to the use of the formula "ancillary claims such as claims for interest, emoluments or costs", he wondered what the reason for the dissatisfaction was and asked for alternatives.

148. Schlechtriem stated that there were three problems. The first was whether all remedies relating to the breach of a contract should be time-barred simultaneously with the original claim for performance. With respect to this question, he was reluctant to adopt the solution provided in the Zimmermann draft because it was not appropriate in cases of restitution claims arising from the breach of a contract. The second was that of ancillary or subsidiary claims such as those for interest and costs. Concerning this question, he could accept the solution provided for in the Zimmermann draft and in the UN Limitation Convention. The third question concerned the meaning of interest, i.e. whether also costs were covered by this formula. He was in

favour of keeping the distinction because costs might be regarded as damages, i.e. as something arising from a cause other than the original debt.

149. Crépeau expressed his sympathy for the suggestion made by Schlechtriem to treat the limitation period for ancillary claims separately from the principal claim.

150. Finn did not agree with the draft because the creditor had three years to claim the principal. Therefore, he saw no reason to privilege the claim for interest.

151. Schlechtriem replied that the question was not what the creditor had done, but that the debtor had not paid yet. Therefore, the creditor might invoke legitimate reasons for claiming interest separately. He wondered what solutions had been chosen by other domestic laws with regard to this issue.

152. Furmston also expressed his sympathy for Schlechtriem's suggestion because he could imagine cases in which such a solution could be justified, e.g. if there was a capital sum attracting monthly interest.

153. Fontaine stated that Schlechtriem's suggestion was agreeable as far as cases relating to a regular interest on a capital sum were concerned but he doubted whether this solution was also appropriate with regard to cases in which the interest was due for a price or for failure. He would not consider the latter an ancillary claim.

154. Schlechtriem wondered if there really was a problem. In the case that there was an interest on a debt that was not yet due the principal could be time-barred and in this case the interest would be time-barred by the same limitation. What remained to be decided was whether, once the principal had become due and the limitation period had commenced to run, the default interest was to be considered a subsidiary or ancillary claim which should also be time-barred by the same limitation period applying to the principal.

155. Bonell stated that the Group should concentrate on the question of default interest.

156. Komarov pointed out that the Russian Civil Code contained in Art. 207 a definition of ancillary claims which he considered as helpful for the discussion because it did not mention default interest. He suggested including a provision explaining what was meant by ancillary claims.

157. Hartkamp stated that there was a similar provision in Art. 312 (Book 3) of the Dutch Civil Code which also did not mention default interest.

158. Bonell agreed with Komarov's suggestion and stated that there should be an explanation of the meaning of "ancillary claims" at least in the Comments.

159. Uchida stated that if the effect of limitation was the extinction of claims, the solution should be the approach chosen by Zimmermann. However, since the Group had adopted the defence model, he preferred the solution presented by Schlechtriem.

160. Schlechtriem asked the Group to decide by vote whether it wanted to adopted his proposal or the one in the Zimmermann draft. The Group decided by majority in favour of Schlechtriem's proposal.

161. Bonell asked why Schlechtriem had not addressed the question of real securities which had been dealt with in the Zimmermann draft (Art. 17:115).

162. Schlechtriem replied that he considered this an issue belonging to the field of secured transactions, and in view of the great variety of solutions adopted by domestic laws he felt that much further comparative analysis would be necessary before including such a provision in the draft.

Art. 2 (4): The parties can modify the periods of limitation in para. 1 but cannot shorten them to less than one year from the time on the obligee knew or ought to have known of his claim.

163. In introducing the provision Schlechtriem asked the Group whether there were general objections to admitting party autonomy and if not, whether the restriction of a limitation period to no less than one year was acceptable.

164. Huang did not agree with this restriction. She objected that the period of one year could not be justified reasonably with regard to other possible restrictions which might also be appropriate. Therefore, the parties should be free to decide on this question.

165. Schlechtriem objected that the lack of such a restriction would lead to disputes arising from general provisions providing for a very short limitation period.

166. Date Bah wondered whether party autonomy could by allowed on the one hand and restricted on the other. Apart from this concern, he agreed with the present solution.

167. Bonell pointed out that there already were provisions in the Principles limiting party autonomy.

168. Farnsworth supported Schlechtriem's solution by stating that also the Uniform Commercial Code contained a provision limiting party autonomy with respect to the limition period of one year.

169. Huang explained that she found the minimum period adopted by Schlechtriem hardly convincing in the light of the various solutions chosen by domestic laws.

170. Schiavoni stated that he considered this provision to be a very sound one because it showed that there were mandatory limits to party autonomy which were of great importance especially in the context of prescription.

171. Bonell asked if there were fundamental objections to the one-year period and there were none. He then raised the question as to whether party autonomy as stated in Art. 2 (4) should also apply to the ten-year period.

172. Hartkamp addressed the interests of creditor and debtor in relation to this question. While the creditor was sufficiently protected by the one-year period, the debtor, who might be the weaker party in the relationship, could be overcome by the creditor by the extension of the limitation period to thirty years or more. Therefore, the NBW, following the French tradition, had never allowed the extension of limitation periods. He suggested taking the same approach also in order to avoid legal uncertainty. As a conclusion, he preferred a solution that did not allow the prolongation of the ten-year period.

173. Fontaine agreed with Hartkamp. He added that to admit party autonomy also with respect to the ten-year period could lead to strange results because if the parties provided for a limitation period shorter than three years the question remained what happens with the ten-year period. If the parties agree on a longer limitation period, it might be doubtful when the limitation period exactly starts, i.e. if it starts with actual or constructive knowledge.

174. Farnsworth reminded the Group that there had been long discussions about the introduction of the two-tier system and stressed that also a different solution could have been adopted. By allowing the parties to shorten the ten-year period, parties were free to override this decision, and bearing in mind the Group's lengthy discussions he was unable to find any arguments against such a possibility. Therefore, the parties should be allowed to shorten the ten-year period to three years.

175. Date Bah referred to the empirical studies concerning hidden defects in the context of construction contracts previously cited by Furmston and Schlechtriem, in order to demonstrate that there might exist a reasonable interest in prolonging the limitation period. Against this background, he favoured allowing party autonomy also with respect to the ten-year period.

176. Bonell asked the Group to decide first whether the parties should be allowed to extend the limitation period beyond ten years. In this context he recalled that there were several domestic laws which provided for even longer periods. Only after having settled this issue should the Group address the other question as to whether the parties should be allowed to shorten the ten-year period.

177. Hartkamp suggested allowing the parties to prolong the limitation period of ten years but not beyond a defined period of time.

178. Schlechtriem referred to his experience during his work for the German Law Reform Commission which was confronted with the same problems and arguments pointed out so far. Thus, he agreed with Hartkamp's proposal and suggested allowing an extension up to fifteen years.

179. Kronke was concerned about future technologies which might require a longer limitation period than fifteen years. Regarding the possible scope of the Principles in future, he wondered if a more flexible approach was not preferable.

180. Bonell replied that the Group was dealing with principles of contract law with the consequence that if there was a strong need for longer limitation periods, the Principles could not prevent the parties from agreeing on such longer limitation periods.

181. Baptista suggested limiting the extension of the limitation period to ten or twenty years.

182. Finn expressed his inclination for Kronke's arguments and therefore suggested opting for a wide ranging party autonomy but to add in the Comments to Art. 3.10 as an example of gross disparity excessive limitation periods.

183. Schlechtriem pointed out that various instruments were available to parties to obtain the effects of a longer limitation period, e.g. warranties. Thus, he saw no need for a longer maximum period than fifteen years. He added that if there was to be a strong need for longer limitation periods in the future, that could be taken into account in a future revision.

184. Bonell objected with respect to Finn's suggestion that Art. 3.10 was never intended as a general clause on unfair terms. Its scope was much more restricted.

185. Huang expressed her concern that a wide-ranging party autonomy would undermine the provisions on limitation contained in the Principles.

186. Bonell closed the discussion and the Group decided by majority to allow the parties to prolong the ten-year period but not beyond fifteen years

187. Bonell then addressed the question as to whether the parties should be allowed to shorten the ten-year period. He pointed out that such a possibility could practically reduce the system provided for in the Principles to a one-tier system with no exceptions.

188. Farnsworth stated that this was exactly the possibility he intended to preserve.

189. Hartkamp asked if Farnsworth intended to let the shortened cut-off period of three years prevail over the shortened short period of one year even if the other party had never known of its claim.

190. Farnsworth replied that this was not his intention. He only wanted to shorten the fallback period to three years with the effect that a claim could be time-barred after three years even if the party had never known of its claim.

191. Schlechtriem stated that the three-year period had been introduced as a basic protection. This would be given up if the parties were allowed to shorten the long limitation period to three years without having received any notice of their claims. If this was allowed, the policy decisions related to the basic protection intended to be given by the three-year period should be reconsidered and the short limitation period shortened. He explained that if a one-year period was provided for in the Principles as the basic protection period and the parties agreed to shorten the ten-year period to two and a half years, the effective limitation period would be three and a half years.

192. Fontaine doubted whether this suggestion was still in line with the concept of a cut-off period.

193. Bonell reminded the Group that they were drafting general principles of contract law. Therefore, he suggested adopting a solution allowing the parties to shorten the three-year period to at least one year and to prolong the ten-year period to not more than fifteen years.

194. Farnsworth asked if this would mean that the parties were not allowed to shorten the ten-year period to three years. Bonell confirmed this conclusion. Farnsworth pointed out that there could be a reasonable interest of the parties to avoid a rather complicated rule based on actual or constructive knowledge.

195. Schlechtriem proposed to allow the parties to shorten also the ten-year period but to introduce a four-year restriction instead of a three-year restriction which could not be altered by the parties. He pointed out that this approach was in line with the UN Limitation Convention which provided for a four year period running out independently of the creditor's actual or constructive knowledge.

196. Bonell suggested the inclusion of a new article dealing with this issue containing a first sentence or paragraph in line with the present Art. 2 (4) and a second sentence or paragraph stating that the ten-year period might be prolonged to fifteen years or shortened, but not to less than four years.

197. Hartkamp agreed with this suggestion but asked for a statement clarifying that the four-year period always prevails.

198. Farnsworth suggested giving up the day after rule in the light of the recent decisions because if the parties were allowed to prolong or to shorten the limitation period there was no need to complicate the provisions more than necessary by repeating the day after rule in each paragraph.

199. Hartkamp stated that it was not necessary to repeat the day after rule in the following provisions because they all referred to para. 2.

200. The Group decided to adopt Bonell's suggestion and to provide for a separate article containing two paragraphs dealing with the discussed issues.

201. Dessemontet missed a provision similar to Art. 22 (2) of the UN Limitation Convention, stating that "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". He asked if and how this problem should be dealt with. He wondered especially how the idea of a renewal corresponded with the mandatory character of the fifteen-year period.

202. Bonell replied that this issue should be discussed in the context of the provisions on acknowledgement. At least, there should be a statement in the Comments dealing with the renewal of limitation periods.

203. Fontaine doubted if renewal was really close to acknowledgement.

204. Schlechtriem was reluctant to deal with the question of renewal in the Principles. He feared that this might lead to the circumvention of the limitation periods. He pointed out that if there was a need to construe the effect of a renewal in an individual case, courts had sufficient possibilities of achieving it by applying general rules. Thus, there was not even the need to deal with the question of renewal in the Principles.

205. Bonell asked Schlechtriem to give some thought to this issue in the context of Art. 2 (4) although it might also be discussed in connection with Art. 4.

206. Crépeau referred to the Civil Code of Québec and pointed out that this issue touched the general question as to whether parties should be allowed to renounce on future rights and expressed his reluctance to create such a possibility.

Art. 3: The limitation periods under Article 2 can be suspended or interrupted. A "suspension" of the limitation period means that during a suspension the limitation period ceases to run for the time of the existence of the event causing suspension, while "interruption" causes the limitation period to begin again at the time stated in the special provisions on interruption.

207. Schlechtriem presented the provision as a general definition of interruption and suspension using the wording agreed by the Group in Bozen. Therefore, he suggested postponing discussions about the exact wording of this provision to the end of the drafting process.

208. Bonell agreed that the provision should be kept for the moment although he doubted whether it was really needed in view of the fact that no such provision could be found elsewhere in the Principles.

209. Schlechtriem replied that if the definition was considered meaningless the formula "interruption by acknowledgement" could be added to the title of Art. 4.

Art. 4 (1): Where the obligor, before the expiration of the limitation period, acknowledges his obligation to the obligee, a new limitation period shall commence to run from the date of such acknowledgement.

210. Schlechtriem introduced the provision by explaining that it was based on the decisions taken in Bozen and that it was in conformity with the UN Limitation Convention, the Zimmermann draft and several domestic laws. He pointed out that the Group had also agreed to recognise that acknowledgement may be expressed by conduct.

211. Bonell suggested discussing the paragraphs separately and asked for comments on para. 1.

212. Crépeau stated that para. 1 speaks of a new limitation period without specifying which limitation period is meant. He referred to Art. 2903 of the Civil Code of Québec stating that "Following interruption prescription begins to run again for the same period".

213. Bonell replied that this provision was necessary because the Civil Code of Québec provides for different limitation periods with regard to different claims. The Principles however had a unitary approach in this respect. Therefore, such a provision was superfluous.

214. Schlechtriem agreed that only the three-year period could restart as a new limitation period because the creditor knows of its claim by virtue of the acknowledgement.

215. Farnsworth expressed his preference for an explanation on this matter in the Comments because confusion might arise in connection with Art. 2 (4) whether the period provided for in the Principles or that agreed by the parties was to be applied.

216. Bonell stated that there was a consensus in substance that only the period as it was valid before the acknowledgement should start to run again, i.e. if the parties had agreed on a shorter period than that provided for in the Principles, only the period agreed by the parties would start to run again.

217. Finn pointed out that there might be difficulties in distinguishing between an acknowledgement leading to a new limitation period and the renewal of the underlying contract.

218. Schlechtriem replied that there were means of distinguishing both situations. He also pointed out that in the end it would be the court's task to determine which limitation period was to be applied.

219. Bonell was concerned that this discussion was too detailed and asked the Group to concentrate on the main issues of the provision. It was decided to leave it to the Rapporteur to decide whether the problem of specification concerning the limitation period in para. 1 should be addressed in the black letter rules or in the Comments.

220. Farnsworth pointed out that Art. 3.2 of the Principles contained no restrictions concerning a promise and he was concerned that, with regard to the relationship between an acknowledgement and a promise, a party could circumvent Art. 4 (1) by invoking Art. 3.2 of the Principles. He thought it advisable to address this issue in the Comments.

221. Schlechtriem replied that this was a matter of interpreting the agreement between the parties.

222. Farnsworth explained that he referred to the implicit restriction contained in the formula of Art. 4 (1) "before the expiration of the limitation period" whereas there was no restriction in Art. 3.2 of the Principles.

223. Schlechtriem stated that there was no possibility for the parties to acknowledge a limitation period that had already run out. In such a situation, only a new obligation could be created by an agreement between the parties. He repeated that the distinction between a promise and an acknowledgement was a question of interpretation, i.e. whether the parties wanted to create a new obligation or whether they wanted to acknowledge an obligation which was already time-barred. If the latter was the case, such an acknowledgement would be void.

224. Farnsworth doubted whether such sharp distinctions were known in all Common Law countries and asked for an explanation in the Comments with respect to this matter. Schlechtriem agreed and stated that he had already thought of it.

Art. 4 (2): The obligor can acknowledge expressly or by conduct. Express acknowledgement can be orally or in writing. Acknowledgement by conduct can be done by part-performance, payment of interest, by providing of adequate security or in any other manner.

225. Bonell wondered whether para. 2 was really necessary because it repeated only the well-established principle that there are no requirements as to the form of an agreement. He added that the examples given for an acknowledgement by conduct were not exclusive and

therefore, he rather preferred to mention these examples in the Comments than to put them into the black letter rules.

226. Fontaine expressed his fear that, although the list was not exhaustive, the examples given might lead to further discussions. He explained that a question frequently discussed in the context of partial performance was the extent of performance.

227. Schlechtriem suggested two possibilities to resolve the problems discussed so far. The first was to delete para. 2 from the black letter rules. As an alternative, he proposed to leave the first sentence of para. 2 in the black letter rules and to delete the second sentence.

228. Herrmann pointed out that partial performance must not necessarily lead to the assumption of acknowledgement.

229. Komarov stated that para. 2 should be kept in the black letter rules for pedagogical reasons because the discussion had shown that there were various opinions on this matter.

230. Crépeau expressed his sympathy with Komarov's suggestion but rather preferred to extend Art. 1.2 of the Principles to unilateral acts such as acknowledgements than to keep Art. 4 (2) of the present draft as a special provision.

231. Bonell stated that Komarov was right to point out that the fact that acknowledgement can be either express or by conduct did not represent a general principle. Therefore, he was in favour of keeping the first sentence of para. 2. However, he reiterated his proposal to delete the examples mentioned in the second sentence and to put them into the Comments.

232. Schlechtriem preferred retaining the black letter rule even if it repeated already existing principles because acknowledgements were of great practical importance and were frequently disputed.

233. Kronke stated that with regard to the lack of a general principle as it had been discussed in context with the provisions on offer and acceptance contained in the CISG, the Group should eventually come back to the question if a general principle could not be construed on the basis of specific provisions contained in the Principles which are related to each other.

234. Farnsworth referred to the question raised by Finn and asked what the solution of a case would be in which a sum of £1000 was owed and the acknowledgement was for £500 with respect to the limitation period, i.e. if the new limitation period only restarts with respect to the acknowledged sum. He also wanted to know what effect a conditioned acknowledgement would have.

235. Schlechtriem answered with regard to the first question that the new limitation period would only start to run with respect to the acknowledged sum of money. As to the second

question, he would tend to treat a conditioned acknowledgement according to the rules developed in connection with a counter-offer made subsequent to an offer.

236. The Group decided to keep the first sentence of para. 2 and to delete the second on the understanding that its content should be included in the Comments.

Art. 5 (1): The limitation period shall cease to run from the moment on, when the obligee commences legal proceedings against the obligor with the aim of obtaining satisfaction or of asserting his claim. The exact date of the commencement of judicial proceedings is determined according to the law of the court where the proceeding are instituted.

237. Schlechtriem explained that three questions were addressed in Art. 5. The first was what effect judicial proceedings have on the limitation of actions. This was a suspension. The second question was what kind of proceedings should lead to a suspension. With regard to this topic, he stated that there were objections to his formula which was considered too narrow. He suggested discussing this point in the context of Art. 1 (1). The last problem was the determination of the exact starting point of the suspension.

238. Bonell asked if Art. 13 of the UN Limitation Convention addressed the issues raised so far sufficiently. He wondered whether the language of Art. 13 with its reference to proceedings which were recognised as such under the law according to which the proceedings were instituted was not preferable. Also the beginning and the effects of judicial proceedings were addressed in more straightforward language than that used by Schlechtriem which could cause some uncertainty.

239. Crépeau asked if it had already been decided what effect the commencement of judicial proceedings would have, i.e. if it would lead to a suspension or an interruption. He wondered if it was not preferable to provide for the latter effect.

240. Schlechtriem explained that the interruption of prescription by commencing legal proceedings would privilege the creditor of the claim because he would be in a position to preserve its claims by the mere commencement of legal proceedings. He considered the consequences as being too harsh for the debtor.

241. Hartkamp stated that he could hardly imagine a stronger reason for interruption than legal proceedings, subject to acknowledgement. From a dogmatic point of view, he preferred to provide interruption as an effect of court action. However, he recognised the practical need to avoid the abuse of this effect mentioned by Schlechtriem. Therefore, he suggested providing for interruption as the general rule and that this rule should also be applied if the claim is rejected. However, if the claim is rejected because of lack of jurisdiction of the court, the claim-

ant should be given a brief period of time in which to file its claim before the proper court. This would also be in line with Art. 316 NBW.

242. Furmston stated that a situation could arise in which a claimant filed its claim within the limitation period but discovered later, after the limitation period had expired, that the claim had not been formulated correctly. He asked if Schlechtriem had also taken into account such a situation.

243. Schlechtriem replied that he considered the issue of a later amendment of a claim as belonging to the applicable procedural law.

244. Farnsworth thought that the Principles should not enter into such detail as the amendment of claims. The issues should be left to the otherwise applicable local or arbitral rules.

245. Jauffret-Spinosi pointed out that the commencement of legal proceedings was considered a reason for interruption by French law. She explained that the creditor, by asking for performance of the obligation, clearly indicated its interest in the obligation due. Consequently, the commencement of legal proceedings could not have any other effect than that of interruption. Therefore, she preferred Hartkamp's solution.

246. Uchida stated that the mere commencement of legal proceedings could only be considered a reason for suspension whereas a final court decision might lead to an interruption.

247. Schlechtriem expressed his opinion that informal proceedings such as collection proceedings should not have the harsh effects of an interruption. This would privilege the creditor excessively.

248. Hartkamp confirmed that also informal proceedings should have the effect of an interruption but some further conditions should be provided in order to prevent the debtor from abusing informal proceedings.

249. Bonell pointed out that Hartkamp was referring to the seriousness of a claim as a criterion for obtaining the effect of interruption and asked for a definition. He also expressed his concern about such a structural deviation from the UN Limitation Convention which could lead to further problems. Hartkamp replied that the Zimmermann draft had not been discussed yet by the Commission on European Contract Law and that the UN Limitation Convention had been ratified by only a few States. Therefore the Group should not stick too strongly to its solutions.

250. Schiavoni asked for a practical reason in favour of adopting the suspension of the limitation period. If this solution were to be adopted, legal proceedings would be treated differently from acknowledgement.

251. Schlechtriem replied that the difference was justified by the fact that acknowledgement was an act of the debtor whereas suspension was caused by an act of the creditor. The solution provided for with regard to acknowledgement was justified by the interest voluntarily expressed by the debtor.

252. Finn expressed his sympathy for Uchida's statement considering the institution of legal proceedings as a reason for suspension.

253. Crépeau pointed out that there was another means of preventing the creditor from starting abusive legal proceedings by granting interest from the day of the commencement of legal proceedings and not from the day of judgement. He also recalled that Art. 2894 of the Civil Code of Québec provided for several limitations with respect to interruption, i.e. interruption does not occur if the application is dismissed, if the claim is discontinued or if nothing happens over a period of three years.

254. With respect to arbitration, Dessemontet expressed his concern that if the mere appointment of the arbitrator was sufficient for interruption, this could lead to abuse. Moreover, he suggested making provision for a grace period in cases where a party has filed its claim before the wrong court in order to allow this party to bring its claim before the proper court.

255. Schlechtriem warned the Group against elevating the question of suspension vs interruption to a question of faith. However, he feared that vague concepts such as the seriousness of a claim in the context of an interruption solution would lead to further difficulties such as the definition of seriousness. He felt the Group should strive for simple and predictable provisions on limitation.

256. Hartkamp replied that a lack of seriousness could be presumed in cases in which the claim was withdrawn within six months; in other words there should not be a test of seriousness. Again, he reminded the Group that prescription was a sanction for the creditor's passivity. The institution of legal proceedings however was a sign of activity. Nothing more could be asked from the creditor. Therefore, an interruption by the commencement of legal proceedings was logical and preferable.

257. Furmston pointed out that the distinction between suspension and interruption was completely unknown to Common Lawyers. Therefore, both concepts, suspension and interruption, would need further explanation in Common Law countries. With regard to the practical consequences of both concepts, he pointed out that if the claimant was successful, he would not have another possibility to claim it again and if he was unsuccessful the principle of *res judicata* would prevent him from starting another action. Practical differences between both concepts could only arise if the claimant had already started an action when starting a second action but there were several rules dealing with this issue. There were negligible practical differences between both concepts; however he preferred the suspension solution which would be more easily understood by Common Lawyers.

258. Bonell expressed his surprise to hear that Common Lawyers would have some difficulty with the concept of interruption and asked for further comments from members representing Common Law systems.

259. Farnsworth confirmed that the interruption concept would be hardly understood in the United States.

260. Baptista suggested focusing less on the concepts of suspension or interruption in general and more on the practical consequences. The decisive question was whether the limitation period should really start running again as a new limitation period.

261. Fontaine agreed that the Group should focus on the practical impact of both concepts. However, he felt that the discontinuation of a claim was particularly important as in this context the problem of abusive legal proceedings instituted by the claimant only in order to gain time arose. There were two possibilities of preventing such abuse. The first would be to adopt the suspension solution with the consequence that the claimant would only have the time left from the limitation period that had already commenced. The second solution would be the one proposed by Hartkamp, i.e. to provide exceptions to the principle of interruption in cases to be defined.

262. Bonell wondered who should define these exceptions.

263. Kronke proposed to base the decision to be taken on the practical results, i.e. buying some more time or allowing the restart of the full limitation period because he feared that the definitions of the suspension model on the one hand and the interruption model on the other could vary too widely.

264. Crépeau expressed his dissatisfaction with this proposal. He considered the distinction between both concepts as formulated by Kronke too simple because even if interruption was the effect, it could not occur if the case was discontinued or if the case was preempted. Therefore, it was not just a question of choosing between buying time and time running all over again with regard to the limitation period. The decision was to be taken between interruption with exception causes and suspension.

265. Komarov felt that there were no substantial differences with regard to the practical effects of the two concepts. In his opinion, the only difference was the fact that the interruption concept would require the drafting of further rules This could be avoided by adopting the suspension concept. Therefore, he considered the suspension concept as more elegant and preferable.

266. Schlechtriem explained his reasons for preferring the suspension solution. The first argument in favour of this concept was the decision to take the UN Limitation Convention as a guideline which provided for the suspension model: this Convention as well as the Zimmermann draft adopted the suspension solution. The second argument was that it was easier to

institute judicial proceedings in some countries than in others, with the consequence that this could lead to abuses. He warned that the interruption model would give the various national laws too much influence by their rules on the commencement of legal proceedings. As to the practical consequences, he pointed out that in cases where the principal claim is dismissed the question would arise as to whether the counterclaim is interrupted or suspended. The argument he considered as being the most serious was the need for exception causes when a claim is raised only to interrupt the limitation period. He considered drafting such a provision a very difficult task. Again he referred to the situation in which the defendant raises a counterclaim and the principal claim is dismissed. Years later, the parties would be faced with the need to determine whether the counterclaim was serious or whether it had been raised only to interrupt the limitation period. As a fourth argument, he pointed out that the suspension model would motivate the claimant to accelerate the legal proceedings. For all these reasons, he preferred the suspension model.

267. Crépeau suggested adopting the formula contained in the UN Limitation Convention if the suspension model was accepted in order to facilitate its understanding and acceptance in Common Law countries. Bonell approved this proposal.

268. The Group decided by majority to adopt the suspension solution as a basic approach.

Article 5 (2): Where the parties have agreed to submit to arbitration, para. 1 applies accordingly; the exact date of commencement of the arbitral proceedings is determined by the applicable rules of arbitration.

Article 5 (3): In the absence of regulations for an arbitral proceeding or provisions determining the exact date of the commencement of a judicial or arbitral proceeding, proceedings shall be deemed to commence on the date on which a request that the claim in dispute should be adjudicated 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.

269. Bonell noted that Art. 5 (2) and (3) in substance corresponded to Art. 14 (1) and (2) of the UN Limitation Convention and asked Schlechtriem why he had not used the same language.

270. Farnsworth wondered whether the word "accordingly" in Art. 5 (2) should not be replaced by the word "in consequence". Schlechtriem replied that it was meant in the sense of "mutatis mutandis". Herrmann suggested replacing it by the formula "the same effects apply".

271. With regard to para. 3 Kronke asked if there were really legal systems where the date of the commencement of legal proceedings was not ascertainable.

272. Schlechtriem explained that he intended para. 3 as a fallback provision.

273. Herrmann asked if the same effects would be given to the initiation of conciliation or mediation. He stated that he was fully aware of the difficulties which might arise from such a solution, especially those relating to a definition of conciliation proceedings. That could be overcome by defining it in a more generic way as a structured process with the assistance of a third and independent person to assist in the settlement of the dispute. The other objection which might be raised was that the parties will agree on a suspension if it is considered a problem. In this context, he wondered if the party autonomy discussed previously in the context of the present draft would also cover this kind of situations. However, although there might be difficulties, he stressed that a statement in the Principles on this subject would be generally welcomed.

274. Bonell agreed that further thought should be given to this subject which might play an important role in practice.

275. Komarov supported Herrmann's proposal and suggested considering the possible legal effects of alternative dispute resolution methods. He agreed that even if these methods did not play at present an important role, their importance would increase in the future.

276. Schlechtriem stated that the first topic to be addressed was the necessity of a provision dealing with an agreement on suspension. He expressed his sympathy for such a possibility but stated that he was uncertain as to whether such a rule should be put in the black letter rules or in the Comments on the provision dealing with party autonomy, stating that regardless of the limits on extension and shortening of the limitation period, the parties are free to suspend during conciliation or renegotiation procedures. The second issue to be decided was the definition of the exact beginning of such procedures. In view of the great differences among the various models of mediation, he wondered whether instead of defining the beginning of such proceedings in the draft it would not be preferable to refer to the applicable arbitration rules.

277. Herrmann preferred the first solution.

278. Bonell asked whether both conciliation and mediation were under discussion.

279. Herrmann, although recognising the difference between the two, suggested discussing them together as, for the purposes of the present draft, both were the same. He cited Art. 135 of the Swiss Code of Obligations, referring to the claimant's pursuit of interest or claim by starting conciliation and concluded that if a national law considered such a short formula as appropriate, it was also appropriate for the Principles.

280. Dessemontet confirmed that Art. 135 of the Swiss Code of Obligation allowed the interruption of limitation on account of "conciliation", but it referred to the concept of obligatory conciliation before a magistrate as introduced by the *Code Napoléon*. However, this

concept could also be extended to alternative dispute resolution. He saw no need to differentiate between the various types of alternative dispute resolution.

281. Kronke supported Dessemontet's proposal to choose more general language. However, it should be made clear that mere informal proceedings such as pre-mediation or pre-conciliation hearings should be excluded because they are not structured and lack the assistance of an advisor or any other third party. In general however, although supporting the proposal to deal with alternative dispute resolution in the Principles, he was concerned about possible interactions with arbitration rules and therefore suggested a profound analysis of arbitration and conciliation rules before taking decisions on this matter.

282. Finn was reluctant to deal with alternative dispute resolution for the reasons Kronke had given. He considered the provision on party autonomy as sufficient with regard not only to alternative dispute resolution but also with regard to any other kind of negotiations. He concluded that such an extension of party autonomy by a note in the Comments would not only be sufficient but also more comprehensive as it would not focus on alternative dispute resolution and therefore avoid problems of definition.

283. Bonell recalled that the Group, at its last session, had decided not to deal with the effects of negotiations on limitation in view of the difficulties relating to this issue.

284. Grigera Naón expressed his impression that the decisive points had not been discussed so far. He stressed that alternative dispute resolution as well as conciliation were very vague terms, and therefore wondered if it was really appropriate to provide for automatic suspension and expressed his preference for the solution chosen by Finn.

285. Herrmann reported that experts on this matter consulted by UNCITRAL considered the mere reference to party autonomy as insufficient. Furthermore, he felt that to limit party autonomy to the effect of suspension was hardly convincing and asked why parties should not be allowed to agree also to interrupt or extend the period. He pointed out that a rule dealing with this kind of dispute resolution in the Principles would have an important effect on public opinion and repeated that the difficulty of definition could be overcome by referring to a structured dispute resolution process assisted by a third party.

286. Farnsworth agreed with the opinion expressed by Finn and Grigera Naón. He suggested that the Comments should state that parties, when agreeing on alternative dispute resolution methods, should also address the problem of the effects of such proceedings on the limitation period.

287. Schlechtriem supported the statements of Finn and Farnsworth. He argued that the discussion had shown the great variety of ADR. This could lead to the question as to whether already a renegotiation clause contained in a contract could be qualified as a kind of alternative dispute resolution with the effect that the limitation period would be suspended. Furthermore, it was very difficult to determine the exact beginning and end of such proceedings. As a conclu-

sion he preferred to leave these questions to the parties when agreeing on a particular form of ADR.

288. Kronke stated that he was tempted to depart from the rule that law should not teach by telling the parties in the black letter rules that if they have provided for the settlement of their dispute by a structured process with the assistance of a third person, this could have the effect of a suspension. Examples of what should be covered by this rule could be given in the Comments. Thereby, the attraction of the black letter rule could be increased. In this context, he asked Huang to report the Chinese experiences with mandatory conciliation and especially its consequences on limitations.

289. Huang stressed the variety of alternative dispute resolution mechanisms. Conciliation and mediation had very different meanings in different countries. Also in China, there were different kinds of mediation and conciliation. Many of them were part of arbitration proceedings or even court proceedings, e.g. proceedings before the People's Court. Therefore, she was reluctant to adopt a black letter rule on these dispute settlement mechanisms and supported the position expressed by Farnsworth and Finn.

290. Uchida reported that alternative dispute settlement was also very popular in Japan. He stated that he could not see any differences between arbitration and alternative dispute resolution with regard to the seriousness of the proceedings. He pointed out that if a distinction were to be made between formal and informal proceedings, parties would always be obliged to initiate formal proceedings. In the framework of international trade however, a more flexible and generous approach should be promoted. As a conclusion, he preferred to extend suspension also to alternative dispute resolution mechanisms.

291. Bonell reminded the Group of the growing importance of alternative dispute resolution mechanisms and stressed their difference with regard to the mere exchange of complaints by e-mail, fax or any other means. Their procedural structure as well as the participation of a third party would permit them to be distinguished from informal hearings. Parties could be expected to embark on such proceedings with the same seriousness as arbitration proceedings which could also mean very different things under different legal systems. Therefore he pleaded for a more courageous approach allowing the qualification of alternative dispute resolution mechanisms as legal proceedings with the consequence that these proceedings would constitute a basis for suspension.

292. Farnsworth suggested asking Schlechtriem to draft a black letter rule in brackets with the assistance of Kronke dealing with alternative dispute resolution mechanisms. Thereby, the Group could be provided with further information on this matter constituting a valid basis for a decision on this subject at the Group's next session.

293. Schlechtriem expressed his reluctance to draft a provision putting arbitration, mediation and conciliation on an equal footing. He suggested either adding to Art. 5 (2) after arbitration the words "or any other comparable alternative dispute resolution" or adding a paragraph to

the provision on modification of periods of limitation stating that parties can agree on a suspension, in particular in the context of alternative dispute resolution or renegotiation.

294. The Group decided to ask Schlechtriem to draft a black letter rule and to submit the text to Kronke, to the observers representing the Arbitration Centers as well as to Herrmann in order to prepare a final draft to be submitted to the Group at its next session. Schlechtriem accepted but asked Herrmann and Kronke to send him preliminary drafts on this topic.

Art. 6 (1): Where, as a result of circumstances which are beyond the control of the obligee and which he could neither avoid nor overcome, the obligee has been prevented from pursuing his claim or right by commencing judicial or arbitral proceedings, the limitation period is suspended until the relevant circumstances have ceased to exist, and extended further for another year in addition to the normal period of limitation suspended by these circumstances.

295. Schlechtriem explained that the essential points of this provision were based on the UN Limitation Convention and on the Zimmermann draft. A new idea he had taken from the Zimmermann draft was the additional time period after the disappearance of the impediment granted to the creditor to permit it to decide the further measures to be taken. The intention behind this idea was to avoid a situation in which the creditor is obliged to take a decision in an unreasonably short time. He had chosen a period of one year whereas Zimmermann had adopted a period of six months. The Group should decide which solution was preferable.

296. Herrmann wanted to know if the additional time period would also be granted when an impediment arises in the middle of the limitation period.

297. Schlechtriem replied that it was very difficult to determine the end of an impediment. Therefore, he had drafted a clear-cut solution.

298. Herrmann objected that this problem would have to be faced anyway.

299. Finn pointed out that the present provision referred to a "normal period of limitation" whereas the foregoing provisions referred to a "regular limitation period" and suggested choosing a corresponding wording in the present provision in order to avoid misunderstandings.

300. Hartkamp reported that Art. 320 of the Dutch Civil Code provides for a prolongation instead of a suspension in cases of the kind under discussion. This would also cover the problem mentioned by Herrmann.

301. Herrmann added that this approach had also been adopted in the UN Limitation Convention.

302. Bonell wondered if a cross-reference to Art. 7.1.7 of the Principles was not preferable because the wording of the present provision only partly corresponded to the wording of Art. 7.1.7.

303. Farnsworth expressed his concern that even a rather short impediment would lead to a prolongation of the limitation period for one year. In order to avoid such a consequence, he suggested adopting the formula used in Art. 21 of the UN Limitation Convention.

304. Schlechtriem agreed.

Art. 6 (2): Para. (1) also applies to cases where the claim or right of the obligee could not be pursued because of incapacity or death of the obligee. The suspension ceases when a representative for the incapacitated or deceased party or its estate has been appointed or a successor inherited his position; the additional one-year period under para. (1) applies respectively.

Art. 6 (3): Para. (1) and (2) apply respectively in cases of death or incapacity of the obligor from the time the obligee is effectively prevented from pursuing his claim.

305. Date Bah pointed out that the word "incapacity" had a double meaning, i.e. it could be understood in a legal sense as well as in a physical sense. Therefore, he asked for clarification. Schlechtriem replied that para. (2) referred to mental incapacity. Physical incapacity was dealt with in para. (1). Bonell asked, whether this should not be expressly stated in the black letter rules. Schlechtriem answered that he considered the Comments the appropriate place for such explanations. Para. (2) and (3) were approved.

Art. 6 (4): In case of bankruptcy of the obligor, the dissolution or liquidation of a corporation, company, partnership, association or entity when it is the obligor, the running of the limitation period shall be suspended when the obligee has asserted his claim in such proceedings for the purpose of obtaining satisfaction or recognition of the claim, subject to the law governing the proceedings; the suspension ends with a final decision or award in these proceedings.

306. Bonell stated that this provision had been taken literally from Art. 15 (c) of the UN Limitation Convention.

307. Farnsworth pointed out that the assertion of a claim in bankruptcy proceedings was like the assertion of a counterclaim in judicial proceedings. Therefore, he suggested explaining why a separate provision on bankruptcy was considered necessary with regard to Art. 5 (1) in order to avoid inconsistencies between both provisions.

308. Schlechtriem replied that the deletion of the formula "assertion of a claim" in Art. 5 must also be taken into account with respect to the present provision.

309. Crépeau suggested extending the rule laid down in Art. 6 (4) to the cases dealt with in Art. 5 (4) if the claim has been rejected on preliminary grounds. The idea behind this proposal was that facing lack of time due to rejection is very similar to facing lack of time due to unforeseen circumstances and incapacity. Therefore in the interest of consistency an extension of the limitation period should also be provided in the cases contemplated in Art. 5 (4) whenever legal proceedings take place close to the end of the limitation period. He referred to Art. 17 (2) of the UN Limitation Convention which provides for the same solution.

310. Farnsworth was against the extension of the one-year period provided for in Art. 6 to Art. 5 (4) as suggested. He was concerned that this extension might lead to the assertion of a frivolous claim leading to an additional period of one year according to Art. 6. Therefore, he suggested adding a formula preventing such an abuse.

311. Schlechtriem too was against the suggestion of extending Art. 6 to Art. 5 (4). He shared Farnsworth's opinion that the situations addressed in Art. 5 and Art. 6 were completely different. The situation addressed in Art. 5 was that of a creditor starting legal proceedings and thereby causing suspension. From his point of view, it was doubtful whether an additional period of time for consideration needed to be granted.

312. Crépeau argued that, if it was only the problem of frivolous claims Farnsworth was concerned about, he was right, but the solution he suggested would still be useful in many cases.

313. Dessemontet reported that under Swiss law the claimant only had 60 days in which to file the claim before the proper court in cases of lack of jurisdiction. Therefore, a solution could be to shorten the one-year period.

314. Herrmann agreed that shortening the length of the additional period provided in Art. 6 could be a compromise.

315. Finn was completely reluctant to provide for an additional time period in cases of lack of jurisdiction. He pointed out that the next problem to be settled would be that of a claimant who repeatedly claims before the wrong court. Schlechtriem shared this opinion.

316. The Group decided by majority not to extend the time period provided for in Art. 6 to Art. 5 (4).

Art. 7 (1): The expiration of a period of limitation entitles the obligor to refuse performance.

317. Schlechtriem stated that Art. 7 dealt with the essential question as to whether the limitation of actions by prescription led to an extinction of the right or claim or whether it was a means of defence. He had opted for the defence model and excluded questions relating to restitution claims which were subject to national laws.

318. Bonell reminded the Group of the statements made by El Kholy who had stressed the importance of this issue for the future acceptance of the Principles in Arab countries.

319. Herrmann pointed out that Art. 24 of the UN Limitation Convention also adopts the defence model but that according to Art. 36 States which ratify the Convention may make a reservation in this respect.

320. Finn asked whether the notion "performance" covered also claims for damages.

321. Schlechtriem confirmed, conceding that he might have been influenced by German legal writings which consider the payment of a claim for damages as a performance.

322. Fontaine agreed that performance had a specific meaning in the context of the Principles. Therefore, he doubted whether the notion of "performance" was appropriate in this context. Schlechtriem asked for guidance by native speakers.

323. Herrmann suggested deleting Art. 7.

324. Bonell referred to the issue of restitution claims, recalling that this was a question normally relating to the law of unjust enrichment and asked whether there was a consensus to exclude this issue.

325. Herrmann stated that this issue had been dealt with in Art. 26 of the UN Limitation Convention. According to this provision claims for restitution were excluded after the debtor had paid his obligation although it had already been time-barred at the time of performance. Bonell stated that a similar provision could also be found in the Zimmermann draft.

326. Komarov expressed his preference for the present draft. However, he missed a general rule stating that limitation has to be declared in order to reach the effect of a defence because domestic laws differed on this point. Art. 24 of the UN Limitation Convention was much clearer on this point. Thereby, also the problem related to the definition of performance could be solved.

327. Fontaine objected that the formula used in the UN Limitation Convention did not solve the problem of the loss of a claim or a right. Herrmann confirmed that the UN Limitation Convention did not deal with this issue expressly. However the result was reached by Art. 24 read together with the formula in Art. 25: "... no claim shall be recognised or enforced in any legal proceedings commenced after the expiration of the limitation period".

328. Farnsworth favoured a provision dealing with restitution claims. Taking into account that under the Principles a promise was enforceable without consideration, a payment made subsequent to a promise to pay a time-barred claim would be enforceable, it should also be stated in the Principles that a payment of a claim already time-barred without a foregoing promise excluded claims for restitution.

329. Fontaine agreed. He considered this a very important issue with regard to limitation. As to the language of the present Art. 7, Fontaine repeated his concerns and suggested adding to the wording of Art. 24 of the UN Limitation Convention a phrase clarifying that only the loss of a claim was addressed and not the loss of a right. Bonell suggested adding a phrase to Art. 7 stating that expiration of the limitation may not be declared on the court's own motion.

330. Dessemontet pointed out that Art. 25 (2) of the UN Limitation Convention, by stating that "Notwithstanding the expiration of the limitation period, a party may rely on his claim...", made it clear that the right itself still existed.

331. Crépeau proposed a formula stating that the expiration of a period of limitation precluded any further claim on the issue. By saying that only the claim is precluded, the right would not be touched.

332. Schlechtriem summarised the discussion so far as having focused on three issues: whether the concept of extinction of the right or defence should be adopted; how the limitation could be invoked; and restitution claims. Having in mind his own work in this field, he expressed his reluctance to deal with restitution claims in the present chapter.

333. Bonell stated that with respect to the first issue there seemed to be a consensus in favour of the defence model. With regard to the second issue, he asked whether the language adopted should be implicit or explicit. He felt that explicit language would be more appropriate at the international level and therefore suggested adding an additional sentence. Schlechtriem agreed to add the wording used in Art. 25 of the UN Limitation Convention. With respect to restitution claims, Bonell recalled Schlechtriem's outstanding expertise on this field and asked him to explain further his view.

334. Schlechtriem stated that he could draft an additional provision excluding restitution but announced that he intended to explain in the Comments that the rule had to be applied restrictively with the consequence that restitution claims for fraud would not be excluded even if the creditor's claim had been time-barred before the payment.

335. Bonell stated that this seemed to be an ideal result. Fontaine agreed and asked if the issue of restitution claims for fraud could not be addressed in the black letter rules. Schlechtriem replied that he had thought about this possibility, too, but revealed that he had other exceptions in mind such as undue influence, coercion etc. which would be too numerous all to be addressed in the black letter rules.

336. Herrmann wondered if it was really necessary to mention fraud because he considered it an implied restriction even if it was not mentioned explicitly. Therefore, he asked for further explanations of the other exceptions.

337. Schlechtriem explained that some domestic laws considered the threat to sue a kind of coercion. One could imagine situations in which a debtor would be anxious not to loose its reputation on account of legal proceedings, with the consequence that it would pay although not obliged to do so. Schlechtriem explained that he was reluctant to neglect these solutions.

338. Farnsworth proposed to choose a formula in the black letter rules stating that the expiration of the limitation period itself did not prevent further claims for restitution and to explain in the Comments under which conditions further restitution claims were excluded.

339. Uchida supported Dessemontet's proposal to consider Art. 25 (2) first part of the UN Limitation Convention ("Notwithstanding the expiration of the limitation period, one party may rely on his claim as a defence ..."). Dessemontet argued that it was an old and basic principle coming from Roman law. Therefore, it should be included in the present draft.

340. Bonell wondered whether this was not the purpose of Art. 7 of the present draft. According to Herrmann it stated exactly the opposite. Bonell agreed. Schlechtriem stated that he had omitted this because set-off had not yet been dealt with and there were other defences relying on a right already prescribed such as the right of retention or to withhold. With regard to set-off, it had to be decided whether it worked *ipso iure* or by declaration. The same problems arose with respect to the other rights mentioned. As long as there were no substantial rules on these matters he was reluctant to draft rules on their effect on limitation. Therefore, he suggested dealing with these questions later.

341. Bonell raised the question of the effect of negotiations on limitation. Schlechtriem replied that this was related to the problem of alternative dispute resolution mechanisms and therefore, the negotiation problem should also be settled along the lines chosen for the alternative dispute resolution problem.

342. Concerning the effect of judgements on limitation, Schlechtriem was reluctant to deal with this issue because there were various solutions in the different domestic laws. Therefore, it would be preferable to leave this topic to the *lex fori*.

343. Bonell pointed out that there was a rule dealing with this issue in the Zimmermann draft. However, he agreed that a possible interference with procedural law should be avoided.

344. Schlechtriem wondered whether an adjudicated claim in Common Law countries constituted a new claim. Furmston replied that this characterised the legal situation under English law as he understood it. The original claim merged in the judgement with the consequence that a new limitation period started to run. Grigera Naón reported that the same situation could be found in Argentina.

345. Bonell asked if there was a consensus not to touch this issue. Hartkamp expressed his concern that further rules were needed if this issue were to be addressed in the Principles. Therefore it should be left to the domestic procedural law. This approach was adopted by the Group.

II. ASSIGNMENT OF RIGHTS

346. In introducing his draft (UNIDROIT 1999, Study L - Doc. 65) Fontaine briefly recalled the reasons for focusing on the assignment of rights and pointed out that, in preparing his draft, he had taken into account various international instruments such as, e.g. the UNIDROIT Convention on International Factoring, the UNCITRAL Draft Convention on Assignment in Receivables Financing and to a lesser extent the Benelux draft Convention of 1975 which had never been ratified and the draft Chapter on Assignment of Claims prepared by Sir Roy Goode for the Lando Commission.

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Art. 1.1: "Assignment of a right" means the transfer by agreement from one person ("assignor") to another person ("assignee") of the assignor's right to payment of a monetary sum from a third person ("the debtor").

347. Fontaine stated that due to the difficulties of approach and terminology, he felt it useful to provide some introductory definitions. The proposed definition only covered transfers by agreement, thus leaving aside legal assignments as well as assignments without participation of the assignee. It was also limited to transfers of rights to payment of monetary sums. On the other hand it was not restricted to transfers of contractual rights.

348. Bonell solicited comments as to the proposed limitation to the transfer of rights to payment.

349. Schlechtriem doubted whether this approach was useful with regard to possible ancillary rights which were frequently assigned. As an example, he mentioned remedies for the non-conformity of goods which were assigned with the right to claim.

350. Date Bah agreed that the concept suggested by Fontaine was too narrow.

351. Grigera Naón supported the opinions already expressed and reported that an assignment is often used as a means of creating a security interest. These assignments are not limited to rights to payment but also to ancillary claims as described by Schlechtriem. Therefore, he suggested extending the scope of the present chapter to all assignable rights having a pecuniary value.

352. Hartkamp added that the broadening of the scope of the rules laid down in the present draft would not lead to essential changes.

353. Farnsworth agreed with the idea of broadening the scope of the chapter.

354. Herrmann argued that a wider concept could justify the work of UNIDROIT in this field with regard to the activities undertaken by UNCITRAL in the field of receivables and monetary obligations.

355. Finn asked which limits should be drawn if the broadening of the scope of application was agreed. In particular he wanted to know if non-contractual rights would also be included.

356. Hartkamp reported that the same discussion had arisen in the Commission on European Contract law with regard to tort claims. The Rapporteur had been reluctant to include also tort claims because their assignment could be considered under English law a violation of public policy. As a consequence the scope of application of Art. 12.101 (2) of the Goode draft was limited to rights to payment or other performances under an existing or future contract.

357. Farnsworth reported that the assignability of tort claims differs from one state to another in the U.S.A., notably with regard to malpractice claims. However, he wondered if this issue was not rather more closely related to Art. 1.3 (1) of the draft than to Art. 1.1. Furthermore, he pointed out that Common Law countries have difficulties accepting the assignment of future rights because it was doubted if these rights were already ripe enough to be transferred. Therefore, a future contract was generally not considered to be assignable. Although mentioned in Art. 1.3 (3), he had the impression that this problem had not been taken into account sufficiently and stressed the importance of its solution for Common Lawyers.

358. Komarov asked if also claims based on a final judgement or a final award were included. This was confirmed.

359. Schlechtriem expressed his surprise as to the restrictions contained in the European Principles because they would lead to difficulties in cases in which the contract was void and restituitionary claims were raised. These claims should be assignable as well.

360. Finn suggested deleting the rest of the sentence contained in Art. 1.1 following the word "right" because further requirements as to the right were contained in Art. 1.3 (1).

361. Fontaine stated that the definition also served to define the debtor who was to come into the definition and therefore also rights against third parties should be mentioned, especially with regard to the institution of "droit de créance".

362. Schiavoni pointed out that the assignment of rights in Civil Law systems was based on the assumption that the consent of the debtor was not required because the identity of the assignee was irrelevant for the debtor, while the situation was different with respect to assignment of contracts where the consent of the other party to the contract was always required.

363. Fontaine agreed and invoked Art. 1.3 in order to demonstrate that these limits had already been taken into account.

364. Bonell referred to Grigera Naón's proposal and asked if further qualification was needed.

365. Fontaine stated that he was convinced by the opinions expressed so far. He suggested a formula close to the European Principles such as "right to payment or any other performance from a third person".

366. Farnsworth stated that he would prefer the formula "transfer by agreement of the assignor's right against a third person". From his point of view, this formula would be sufficient.

367. Schlechtriem was concerned about the formula "right against a third person" as suggested by Farnsworth because also the protection rights contained in the law of property gave a right against third persons. Also the use of the notion "debtor" would have to be reconsidered if the scope of the chapter was widened.

368. Bonell expressed his sympathy for the formula chosen in the Goode draft "rights to payment or other performance" because it would avoid the difficulties mentioned so far.

369. Crépeau asked if it was necessary to add performance because without the word "performance" any other kind of rights could be assigned. He also doubted whether it was necessary to refer to a "right against a third party" because which right was assignable was specified in further provisions.

370. Bonell expressed his concern with regard to property rights which would also be covered if Crépeau's proposal were to be adopted. Crépeau explained that he preferred relatively generic language in order to cover various kinds of rights.

371. Hartkamp stated that an option was not a right to performance in the strict sense but should be an assignable right. This revealed that not only rights to performance should be addressed.

372. Farnsworth thought that this question could be left to the Rapporteur. As to the language chosen by Goode, it might lead to the question as to what the payment or performance was related to. It could imply that only payment or performance relating to a contract was covered. Therefore, more generic language was preferable.

373. Huang considered the formula referring to a right to payment as too narrow. She preferred a broader approach.

374. Bonell stated that there seemed to be a general consensus about the performance formula and asked Fontaine to redraft the provision taking into account the formula chosen by Goode.

375. Finn pointed out that a future right under these provisions could be assigned by agreement which was contractual, i.e. the right could be assigned by a present contract even if it came into existence at a later time. This meant that the assignment would become effective only at that later time. He supposed that this effect could also be reached under Anglo-American law. With regard to the requirement of consideration under Anglo-American law which had been abandoned under the Principles, an agreement under the Principles would probably be regarded as an equivalent to an assignment for value and therefore, it would be treated as an agreement to assign. Consequently, the practical effects would be the same under Anglo-American law.

376. Grigera Naón stated that there were also continental laws which made the effectiveness of an assignment conditional on the existence of the future right.

377. Bonell stated that there was a general agreement on the content of Art. 1.1.

Art. 1.2: This Section does not apply to assignments:

(a) made by the delivery of a negotiable instrument, with any necessary endorsement;

(b) made as part of the change in the ownership or the legal status of a business.

378. Fontaine explained that assignments in the context of a change in ownership or in the legal status of a business were very often subject to specific rules dealing with the transfer of

all rights or with the protection of employees. Therefore, it would be too ambitious to provide for rules dealing with these issues in the Principles.

379. Bonell asked for definitions with respect to the notions "change in ownership", "change in business" and particularly "business". He also pointed out that the question might arise as to whether these provisions covered the demise of physical persons.

380. Fontaine replied that he also intended to exclude these cases from the scope of the present chapter because they were normally dealt with in special rules and suggested formulating a respective provision.

381. Schlechtriem was reluctant to exclude assignments in the framework of business transfers because there were two kinds of assignments which should be distinguished. The first were legal assignments connected with the transfer of a business which could not be dealt with in the Principles. But there were also rights to performance which needed to be assigned together with the business in order to fulfil the expectations of the buyer. As a second point, he stated that the wording of *lit*. (a) should be changed so as to read "[…] made by the transfer of a negotiable instrument by endorsement". The reason was that there might be a situation in which a right embodied in a negotiable instrument might be transferred by ordinary assignment. Even in such cases the handing over of the document was needed, but this was different from the usual transfer of the rights by endorsement. What was addressed in the present provision was the transfer of the rights in the negotiable instrument by the transfer of the negotiable instrument by endorsement.

382. Bonell asked if this was correct with regard to bearer negotiable instruments which were negotiable by mere transfer of the document. Schlechtriem suggested broadening the present provision so as to read "[…] made by the transfer of a negotiable instrument". Thereby, bearer instruments would be covered as well. In the Comments, it should be explained that cases in which the right embodied in a negotiable instrument is transferred by an ordinary assignment under the applicable law, were not excluded from the present chapter. Bonell agreed.

383. Dessemontet objected that in practice, very often only the black letter rules are known to the parties. Especially in Third-World countries, the Comments were not available.

384. Baptista stated that he did not see the necessity of dealing with bearer instruments in the Principles because the physical transfer of these instruments was sufficient. No further rules were needed. As to the rule contained in *lit*. (b), he approved the present approach because the transfer of a business frequently involved the assignment of a bundle of rights whereas the present chapter dealt with the assignment of a single right.

385. In reply to Baptista's first remark Bonell recalled that the intention was precisely to include these instruments in Art. 1.2 (a).

386. Huang asked for further explanations concerning the meaning of the notion "change in ownership", i.e. the kind of ownership addressed in the provision. She explained that there was a large number of joint ventures and joint-stock companies which frequently provided for the possibility of assigning one party's contractual rights to the other party. She wanted to know if these assignments were also covered by the present provision.

387. Fontaine agreed that the provision taken from the UNCITRAL Draft Convention on Receivables Financing could be more precise. However, it spoke about the ownership of a business and therefore addressed a global operation. An assignment in the framework of joint-venture signified the transfer of the ownership of a business from one party to another. Therefore, it would be covered by this provision as well. However, he also preferred a clearer wording.

388. Bonell asked Herrmann to explain the background of the corresponding Art. 4 *lit.* (c) of the UNCITRAL Draft Convention on Receivables Financing.

389. Herrmann referred first of all to the statement made by Schlechtriem and reported that the issues relating to blank endorsement had been discussed by the UNCITRAL Working Group as well. However, it had been decided to exclude them from the scope of the Draft Convention because they were so rare that there was no need to deal with them in an international instrument. As to the assignments related to the change of ownership of the entire business, he understood Art. 4 *lit*. (c) in the sense that only the assignments involved in the change of ownership were excluded, while individual assignments which were only economically related to the change of ownership were not excluded.

390. Crépeau stated that there was a difference between Art. 1.2 (a) and the earlier discussions on this provision as reported at page 3 of Study L - Doc. 65. Although it had then been decided to exclude negotiable instruments from the scope of the chapter, Art. 1.2 (a) excluded only a specific kind of negotiable instrument.

391. According to Schlechtriem this effect could be reached by adopting the formula he had suggested before. By saying "rights transferred by a negotiable instrument", the question how this transfer was to be affected could be left open. Remaining modes of assignment beside the transfer of a negotiable instrument could be addressed in the Comments or even left open.

392. Herrmann agreed to the remarks made by Schlechtriem with regard to the transfer but preferred further explanations in the Comments in order to avoid misunderstandings which might arise from the use of the term "transfer". In the Geneva Uniform Laws on Negotiable Instruments the terms "transfer by mere delivery" or "transfer by endorsement" were used.

393. Furmston wondered if the formula "by negotiation" would not suffice. Bonell agreed, stating that this was also the approach chosen in the Goode draft. It was agreed to ask the Rapporteur to reconsider Art. 1.2 (a) in the light of the Goode draft and it was decided to postpone the discussion on *lit*. (b) to a later session.

Art. 1.3 (1): Any right to payment of a monetary sum from a debtor may be fully or partially assigned, unless the right has a personal character or the assignment is prohibited by the applicable law.

394. Date Bah asked what the reference to the prohibition by the applicable law meant. He explained that under English law, partial assignment was unknown and wondered if such restrictions were also covered by para. 1 or if only provisions being part of public policy were referred to.

395. Fontaine replied that he did not intend to refer only to provisions of public policy but also to mandatory rules.

396. Kronke stated that there were many limits as to the assignability of rights although those limits became less important, e.g. in Germany, where claims against municipalities in the past were not usually assignable but now are. Also the United Kingdom was very strict on this point and he supposed that it was this kind of rule that Date Bah was referring to.

397. Herrmann firstly pointed out that there was a tendency towards a more liberal attitude with regard to assignability. However the danger of possible conflicts of the Principles with domestic laws was still rather high compared with the UNCITRAL Draft Convention on Receivables Financing which was intended to become a binding instrument overruling contradicting provisions of domestic law. Keeping in mind that mandatory provisions of domestic law would prevail anyway, it was doubtful whether it was necessary to include here a specific reference to possible prohibitions provided by the applicable law, all the more so since the Principles are intended to encourage development towards wider assignability. He concluded by suggesting that the Group think about the objectives of this chapter before adopting this provision.

398. Furmston stated that this provision only repeated something obvious. Consequently, there was no need to include it.

399. Schlechtriem explained that the law applicable to the assignment is the law applicable to the obligation. But the parties agreeing on an assignment governed by the Principles were the assignor and the assignee whereas the debtor was excluded. Very often the rules on assignability of claims were intended to protect the debtor. If the creditor concluded a contract with another person assigning under the Principles, the debtor could lose its protection under the law applicable to the obligation.

400. Herrmann agreed with Furmston's statement. He explained that if the Principles were to be applied as the law governing the contract, a reference to the applicable law would run counter to this intention. He pointed out that the Principles themselves included limitations to

assignability which might also have the effect that an assignment allowed by a domestic law would be prohibited under the Principles.

401. According to Kronke it was important to know which law applied to the assignment. It could be the law governing the right to be assigned or the law governing the assignment. The question as to the applicable law depended on the relevant rules of private international law. He also felt that the rules dealing with assignability were always mandatory rules and this kind of rules was sufficiently addressed by Art. 1.4 of the Principles. Consequently, it did not need to be addressed again.

402. Bonell agreed and asked if this was not sufficient.

403. Fontaine replied that this question had been discussed in Bozen and that there had been voices arguing in the same direction but others had preferred an express statement in the present chapter. Personally, he shared the opinion that Art. 1.4 was sufficient to cover the issues relating to assignability.

404. Farnsworth reported that there were several restrictions to assignability in the United States, such as malpractice claims in all the states or tort claims e.g. in New Jersey. Therefore, he was reluctant to delete entirely the reference to prohibitions provided for by the applicable law. However, he was also reluctant to adopt the present draft provision. With regard to the statement made by Date Bah, he preferred to restrict the reference to prohibitions of public policy nature rather than to refer generally to those of mandatory rules. Furthermore, he suggested dealing with this issue in a separate subsection.

405. Grigera Naón invoked Art. 1.4 of the Principles in order to demonstrate that the issues raised by Farnsworth were satisfactorily settled by this provision.

406. Finn explained that from the perspective of a Common Lawyer, only certain rights were assignable whereas others were not. Therefore a right had to be an assignable right.

407. Furmston stated that there was a whole set of different rules on assignment under English law. First there were rules on particular rights which could not be assigned, such as the right to sue for personal injuries. Second there were rules intended to protect the debtor which were based on the general principle that the debtor's situation should not be worsened by an assignment. Finally, there were rules which did not fall under either of these categories but which still restricted the assignability of rights, such as the rule that future rights cannot be assigned but it can only be contracted to assign them. The present formula covered only the first category of rights, maybe also the second, but probably not the third. Therefore, a more elaborate provision was needed. At least the rights of a personal character should be dealt with separately.

408. El Kholy wondered if the problems raised so far could be overcome by the following formula: "Any right to payment of a monetary sum from a debtor may be fully or partially assigned unless the assignment is ruled out by the nature of the right or by law".

409. Bonell was concerned that the mere reference to assignments prohibited by law would imply a contrast between the law on the one hand and the Principles on the other.

410. Finn suggested the following wording for Art. 1.2 : "This Section does not apply to rights not assignable by the applicable law". Thereby also the limitations under Anglo-American law could still be applied.

411. Bonell objected that the Section would lose much of its value if this proposal were to be adopted.

412. Fontaine still wanted to hear from a Common Lawyer as to why Art. 1.4 was insufficient.

413. Farnsworth was reluctant to elevate the question of mandatory rules to a question of faith with regard to many matters contained in the Principles which were considered mandatory rules by many domestic laws. There were many mandatory rules of domestic law which were not included in the Principles, e.g. the rule on consideration. However, assignment was closely related to third party problems and he doubted whether the prohibitions on assignability were covered by Art. 1.4 which he considered as being one of the less reliable provisions of the Principles.

414. Bonell objected that Art. 1.4 of the Principles referred only to such mandatory provisions as were applicable under the rules of private international law. He admitted that if the Principles were applied as mere contractual provisions, there would be no room left for the application of many provisions contained in the Principles but he stressed their importance with regard to arbitration proceedings where these rules might be applied provided that the conflicting domestic rules were not considered to be internationally mandatory rules.

415. Farnsworth replied that even if the Principles had this wide scope of application, mandatory rules such as the restriction on assignability of malpractice claims had to be observed.

416. Bonell stated that in other countries the same restrictions may be provided for without being a part of public policy. Therefore, he still thought that Art. 1.4 was sufficient.

417. El Kholy suggested deleting Art. 1.3 (1) entirely since it said nothing and too much at the same time. Nothing because if there was a rule belonging to public policy, this rule would be applied regardless of the Principles. Furthermore, assignability was not an appropriate subject for Art. 1.3 (1).

418. Grigera Naón pointed out that if the part relating to prohibitions by domestic laws was deleted, the remaining parts of Art. 1.3 (1) on partial assignments could be added to the definition of Art. 1.1. He agreed that Art. 1.4 was sufficient to cover restrictions of domestic laws with regard to assignability.

419. Crépeau suggested adding an explicit reference to Art. 1.4 of the Principles to Art. 1.3 (1).

420. Bonell stated that the logical consequence of this proposal would be the insertion of Art. 1.3 (1) into Art. 1.2 of the draft and to harmonise its language with Art. 1.4. However, if the reference to the relevant rules of private international law were abandoned, as suggested, the difference in the wording with respect to Art. 1.4 would imply also differences in substance which might lead to further problems.

421. Crépeau suggested formulating the reference to Art. 1.4 as follows: "Assignments are prohibited under the terms of Art. 1.4".

422. Kronke agreed in principle but asked the Group to consider also the fact that there were many other provisions in the Principles where such a reference could have been included. It would hardly be justifiable to include the reference to Art. 1.4 also with regard to those other instances. He warned that this approach might lead to confusion. Bonell agreed entirely.

423. Farnsworth supported the idea of inserting Art. 1.3 (1) in Art. 1.2. Thereby, the difficulties with the fact that this was the only provision to contain a reference to another provision of the Principles could be avoided because this provision clearly was an exclusionary provision.

424. Schlechtriem preferred to clarify Art. 1.3 (1) last phrase "prohibited by the applicable law" by explaining that the reference was meant to be made to "the law applicable to the right or the obligation".

425. Kronke favoured Finn's suggestion to add to Art. 1.2 the words: "The Section does not apply to rights not assignable by the applicable law". He considered this proposal to be the most elegant one.

426. According to Bonell if this suggestion were to be accepted the Principles would renounce their aim to replace to a certain extent domestic mandatory rules. Moreover, the arguments put forward in favour of this approach could also be made with respect to the rules on limitation.

427. Kronke did not agree because the basic principle of party autonomy would ensure the application of the Principles if the parties agreed on their application as the law governing their contract. Bonell stated that at least the wording of Art. 1.4 should be adopted.

428. Schlechtriem preferred leaving this issue in Art. 1.3 as otherwise there would be several provisions dealing with the assignability of a right.

429. Fontaine still preferred not to address this problem in the present draft and to leave it to Art. 1.4.

430. Bonell pointed out that the addition to Art. 1.2 of a reference to the prohibitions provided for by the applicable law could unduly restrict the scope of the whole Section since some domestic laws might prohibit bulk assignments, others assignments of future rights, etc.

431. Farnsworth objected that also a mere reference to Art. 1.4 would lead to the application of all restrictions on assignment. Therefore he suggested limiting the reference to Art. 1.4 to certain kinds of mandatory rules, e.g. bulk assignments, assignment of future rights, etc.

432. Bonell stated that under Art. 1.4 domestic mandatory rules were applicable only on certain conditions.

433. Date Bah agreed with Farnsworth and stated that there were two categories of mandatory rules. The first restricted some forms of otherwise assignable rights such as those prohibiting partial assignments. These were not the kind of prohibitions Farnsworth was talking about. If the Principles were to adopt similar rules, they should be placed elsewhere in the Section. In this way they would remain effective in situations in which the Principles are the applicable law. As to national mandatory rules, a distinction should be made between mere mandatory rules and those which are part of public policy. Only the latter should be applicable even where the Principles are the otherwise applicable law.

434. El Kholy supported the suggestion to exclude in Art. 1.2 from the scope of this Section non-assignable rights by their personal character or by law.

435. Bonell objected that several specific problems had to be faced, e.g. assignments of future rights and bulk assignments. He could not see the difference between those restrictions and the prohibition of the assignment of tort claims. He objected that the question of tort claims might be considered differently by various domestic laws. Therefore, he was reluctant to have a special provision dealing with tort claims only .

436. Furmston gave as an example the case where an assignor resident in New Jersey had a malpractice claim against a lawyer in New Jersey and purported to assign this claim to an Italian resident in Rome under a contract subject to the Principles providing for arbitration in Switzerland: it was questionable whether the Italian assignee would be able to collect the sum due.

437. Bonell replied that he did not believe that the Italian assignee would be able to collect the sum if the New Jersey lawyer proved that the prohibition to assign malpractice claims was

part of public policy in New Jersey and had to be applied even at international level regardless of the otherwise applicable law. He added that such a result would already follow from Art. 1.4. On the other hand he insisted that different domestic laws might provide for different kinds and degrees of prohibitions so that it would be unjustified to address only one specific example. He preferred either not to mention the problem of possible restrictions under the applicable law at all or to provide for a general reference to Art. 1.4.

438. Furmston pointed out that the Principles dealt with one contract only whereas in his example there were two contracts, only one of which was governed by the Principles.

439. Schlechtriem asked Farnsworth and Furmston if in a case dealing with a malpractice claim which had arisen in Germany under German law and which had been assigned to a resident in New Jersey, the assignment would be considered valid or if the law of New Jersey prevailed over the applicable German law.

440. According to Farnsworth in general the liberal attitude of German law would prevail, provided that there was a strong policy in favour of the application of German law. He wondered why it was not possible to agree on the application of "super mandatory rules" if this notion was known under Civil Law and Common Law systems.

441. Bonell, while entirely agreeing in substance with Farnsworth, asked again why some prohibitions provided for in some jurisdictions should be specifically mentioned even if the same prohibitions were not foreseen in other jurisdictions or with less intensity. A possible solution could be a reference to Art. 1.4 in the Comments to Art. 1.3 (1) accompanied by some of the specific prohibitions discussed so far. As to the proposal to limit the scope of the present chapter on assignments permitted by the applicable law, he feared that this could render the entire Section ineffective. He suggested postponing the discussion on the last part of Art. 1.3 (1) to a later stage.

442. Uchida was concerned that partial assignment would cause considerable costs for the debtor. Therefore, he preferred a provision requiring the debtor's consent.

443. Farnsworth stated that he was also reluctant to adopt a general permission without any further requirements with regard to partial assignments. He stated that there were several situations imaginable, especially with respect to the performance of non-monetary obligations, where the partial assignment could turn out to be excessively burdensome for the debtor. However, he wondered if a rather vague criterion such as excessively burdensome consequences for the debtor would turn out to be inappropriate in the framework of the Principles. Therefore, he considered the proposal to require the debtor's consent to be a good idea.

444. Schlechtriem pointed out that the danger possibly caused by partial assignments could be reduced by allowing the parties to agree on the non-assignability of a right but that this solution was excluded by para. 2. He stated that such a possibility had also been granted by German law until ratification of the UNIDROIT Convention on International Factoring.

445. Finn stated that under Australian law a part of a debt could not be assigned at law but that it could under Equity. As a consequence, the assignee could not sue for part of a debt. The only party that could sue was the original creditor who could recover on behalf of the assignee. The problems caused by fragmentation have been eliminated by fictitiously making the assignment of a part of a debt only operate between assignor and assignee. As far as third parties were concerned, the assignor had been the party to whom performance had been rendered for practical reasons. This might have a significance that went beyond this question. The previous debate had amply shown that the problem was the distinction between the relationship of assignor to assignee on the one hand and that of assignee to debtor on the other. As the example of Equity shows, it was easy to establish a system allowing a transaction to be effective between assignor and assignee with the consequence that the benefit belongs to the assignee, but only the assignor can take steps against the debtor. Applied to the cases previously discussed concerning rights which are not assignable under the applicable law, the assignor and the assignee could agree on the assignment of a right which is not enforceable but which the assignor would be able to enforce.

446. Bonell doubted whether this mechanism could be transferred on an international level.

447. Hartkamp recalled a discussion of these issues within the Lando Commission which led to the adoption of Art. 12.103 on partial assignment ("*(1) Claims to payment of money may be assigned in part. (2) Claims other than to payment of money may be assigned in part only where the debtor is entitled under the contract to separate payment for that part. (3) The assignor is liable to the debtor for any increased costs which the debtor incurs by reason of a partial assignment. (4) Where the debtor's exposure to separate proceedings by the assignor and one or more assignees would cause him prejudice not adequately compensated by a payment under the preceding paragraph he may apply to the court for an order requiring all claimants to be joined in a single proceeding.*") and of Art. 12.203 on preservation of rights against the assignee ("*An assignment has effect as between the assignor and assignee, and entitles the assignee to whatever the assignee receives from the debtor, even if it is ineffective against the debtor under Article 12.301 or 12.302.*").

448. Bonell stressed the importance of the issues dealt with in the cited articles and expressed his preference for a separate article to deal with them. As to the content, he pointed out the distinction made between monetary and non-monetary claims in the Goode draft.

449. Fontaine asked if there was a consensus about the inclusion of provisions on partial assignment in the Principles.

450. Dessemontet pointed out the importance of partial assignments in the copyright industry, publishing industry and media industry.

451. El Kholy stated that this matter should be left to the agreement of the parties and no further provisions as to compensation etc. were needed.

452. Farnsworth agreed that there should be provisions on partial assignments but doubted if it was sufficient to leave it completely to the parties as suggested by El Kholy.

453. Schlechtriem agreed with regard to the construction industry where partial assignments were rather common even without express provisions.

454. Uchida agreed that partial assignments should generally be admissible but only in the case that the debtor expresses its consent or if the assignor remains the party to which performance has to be rendered.

455. Crépeau proposed leaving this issue to the party autonomy subject to Art. 3.10 on gross disparity. El Kholy supported this suggestion.

456. Schlechtriem suggested allowing partial assignment within the limits of Art. 1.7 of the Principles which could also cover the problem mentioned by Farnsworth. Furthermore he considered it necessary to deal with the issue of additional costs for the debtor caused by a partial assignment. One solution could be to allow partial assignments generally within the limits of Art. 1.7 but to give the debtor a claim for additional costs.

457. Farnsworth considered the distinction between monetary and non-monetary claims as an approach worth considering. As to the application of the principle of good faith to partial assignments, the fact that it might lead to a breach of the duty of good faith did not strike him as making the assignment invalid but simply giving a right to damages against the responsible party. He agreed to allow partial assignments with regard to claims for payment but was concerned about allowing the parties to split up other obligations than those to pay money.

458. Schlechtriem on the contrary was, for practical reasons, in favour of allowing partial assignments even of claims other than those for payments. As an example he mentioned the assignment of the seller's right against the owner of a warehouse where the goods were stored, to the buyer of these goods. Bonell asked if he was referring to a situation where the contract provided for a partial assignment. Schlechtriem replied that this should not to be a condition because the seller may have been thinking of only one buyer when it stored the goods in the warehouse and later a situation arose in which it was unable to sell all the goods to a single buyer.

459. Bonell stated that there seemed to be agreement on allowing partial assignments subject to a liability for additional costs.

460. Fontaine suggested adopting the concept of divisibility of claims as provided for in the Goode draft and giving the debtor a claim for additional costs. There should be a provision corresponding to Art. 6.1.3 (2) of the Principles giving the obligor a claim for additional costs caused by partial performance of the obligee.

461. Uchida expressed his dissatisfaction with the liability approach he considered not very helpful because the assignor wanted to know the conditions on which partial assignment was allowed. If the liability approach were to be adopted, the assignor would not be sure if he was obliged to pay damages or not. Furthermore, the debtor would have the burden of claiming damages.

462. Bonell objected that the question discussed was not that of damages but of additional costs. The assignor would also know where he stood if he was generally allowed to make a partial assignment of his right to performance. He was also in favour of adopting the liability approach which had the advantage of conforming with other provisions of the Principles.

463. Farnsworth expressed his sympathy for Uchida's point of view since in practice the liability approach would be chimerical in most cases.

464. Crépeau reported that the same discussion had arisen during the revision endeavours in Québec. The solution finally adopted was to base the possibility of partial assignments on the principle of party autonomy but to provide for certain limits. One of those limits was the rule that a partial assignment could not render the obligation more onerous for the debtor.

465. Kronke pointed out that no sanction was provided for in the case of a violation of the rules mentioned by Crépeau. Crépeau replied that the general rules on remedies were applicable.

466. Dessemontet stated that the question discussed arose not only in the context of partial assignments but also in that of total assignments which too might render the obligation more onerous for the debtor, e.g. if it had to be performed at another place. In such cases, the assignor was fully responsible for the consequences.

467. Crépeau added that the relevant provision in the Civil Code of Québec did not make any distinction between partial and total assignments either.

468. Also according to Herrmann the problem of the protection of the debtor arose not only in the context of partial assignments but also with regard to total assignments.

469. Uchida explained that he was concerned about cases in which a claim is split up into ten parts and each of them assigned separately. This would inevitably lead to additional costs for the debtor and he considered it unfair that the debtor should only have the possibility of claiming damages against the assignor.

470. Farnsworth expressed his sympathy for rendering the assignment invalid if the assignment renders the obligation more onerous. He pointed out that the Goode draft had partially chosen the same approach by stating that if the mere reimbursement of additional costs could not satisfy the debtor, the assignment was practically invalid. From his point of view, the first step, giving the debtor a claim for additional costs was not very practical and

efficient. Therefore, he preferred a simple rule stating that an assignment would be ineffective if it rendered the obligation more onerous.

471. Bonell stated that this proposal would go in the same direction as Art. 17 of the UNCITRAL Draft Convention on Receivables Financing: *"(1) Except as otherwise provided in this Convention, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract. (2) A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not: (a) change the currency of the payment specified in the original contract, or (b) change the State specified in the original contract, in which payment is to be made, to a State other than that in which the debtor is located. "*

472. Schlechtriem wondered whether it would not be simpler to add a new paragraph to Art. 1.8. He suggested a formula stating that the debtor is bound to perform the assigned obligation only if the expenses incurred by total or partial assignment would be borne by the assignor or if securities for those expenses were granted. He was reluctant to invalidate the assignment as this would go too far.

473. Dessemontet agreed with Schlechtriem and pointed out that such a defence could also be set-off with regard to the additional costs

474. Fontaine replied that a set-off could only be raised as a defence if there was a claim.

475. Farnsworth pointed out that the consequence of Schlechtriem's proposal was a splitting up of the costs among several assignees if there were several partial assignments and asked if such a solution was practical.

476. Schlechtriem admitted that he had left this question open. As to the rule according to which the debtor is entitled to additional costs caused by the assignment, he considered it an expression of the basic principle underlying also other provisions that the debtor's situation should not be worsened by an assignment. The question as to who had to bear the costs was only a technical question.

477. El Kholy stated that he was reluctant to include a provision for the protection of the debtor. This should be left to the individual debtor who could protect himself by a special provision in the contract.

478. Crépeau asked if there was agreement on the general principle that the situation of the debtor should not be worsened. Agreement on this principle would make it possible to take further decisions.

479. Kronke pointed out that solutions providing for compensation of a debtor by granting damages or the possibility of set-off could turn out to be inappropriate in cases dealing with

shareholder agreements or voting agreements. He wondered if Art. 12.103 of the Goode draft, taking the idea of compensation as a starting point, did not contain a useful solution.

480. Grigera Naón tended to support the point of view expressed by El Kholy. He pointed out that the right to assign was the right to dispose on an asset that belonged to the assignor. Any restriction limiting this clear principle should be considered carefully. As to the content of the term "increased costs" he pointed out that there were various possible costs which could not be borne by the assignor, with the consequence that a clearer definition of this term was needed but was difficult to formulate. Furthermore, he asked if it was really a general principle not to change substantially the obligations of the obligor. As to Art. 17 of the UNCITRAL Draft Convention on Receivables Financing, by stating that neither the place of payment nor the other contents of the obligation could be changed it basically laid down the principle that the obligation has to be assigned as it had been before. Therefore, he doubted whether such a provision was really needed.

481. Bonell objected that whenever, according to the general rules, the debtor had to pay at the place of the creditor, if the assignee was situated in a place other than that of the assignor, the assignment would necessarily change the place of performance. Grigera Naón replied that under the law he was acquainted with, unless otherwise provided in the contract, the place of payment was the place of the debtor. Consequently, the place of payment would not be changed by an assignment.

482. Fontaine pointed out that there were provisions in the Principles dealing with this issue. As to the statement made by Schlechtriem, he admitted he was impressed by the reference to a general principle prohibiting the worsening of the debtor's situation by an assignment. However, this general principle was not contained in the present draft. Thus, it did not derive automatically from the present text that additional costs had to be borne by the obligor. He was in favour of adopting this solution and expressed his sympathy for the Goode draft which was based on the concept of divisibility. But he could also imagine a solution along the lines of Art. 17 of the UNCITRAL Draft Convention on Receivables Financing which would require the inclusion of the general principle of debtor-protection. But even then, he still saw the need for a provision dealing with additional costs caused by partial assignments.

483. Schlechtriem stated that historically debtor-protection was related to the prerequisites of assignment. In the past the debtor was protected by the very fact that assignment without the debtor's consent was not possible. Also today, debtor-protection rules were the price for having made assignment possible by mere agreement between assignor and assignee.

484. Bonell agreed with Schlechtriem and stated that there seemed to be agreement on adopting debtor-protection rules. The next question was which solution should be adopted. One approach was to invalidate an assignment whenever it rendered the obligation more burdensome for the debtor. The other approach was the more cautious solution provided for in the Goode draft.

485. Schlechtriem suggested that a decision be taken to choose one of the two alternatives: either to restrict partial assignments in Art. 1.3 (1) or to have a defence concept built into Art. 1.8.

486. Bonell was concerned about the fact that Art. 1.8 dealt only with defences against the assignee whereas the assignor as responsible party would be left out. Therefore he preferred a separate article based on the two alternatives, i.e. whenever the obligation becomes more burdensome the assignment was invalid or to provide for a wide-ranging party autonomy accompanied by a provision enabling the debtor to recover additional costs.

487. Farnsworth agreed and asked to take into account Dessemontet's remark on the parallels between total and partial assignments with regard to additional costs. Therefore, he suggested providing for a separate provision on assignable rights dealing with this issue.

488. El Kholy stated that Art. 1.3 (2) was not consistent with the idea of protecting the debtor because it obliged the debtor to pay on the assigned right.

489. Bonell objected that an absolute protection of the debtor was not intended. The aim was to reach a balance of interests between the assignor and the debtor.

490. Fontaine was asked to prepare two alternative draft provisions dealing with debtor-protection. One of the alternatives should render the assignment invalid in cases in which the obligation becomes more onerous by the assignment, while the other should be based on a wide-ranging party autonomy accompanied by a provision enabling the debtor to recover additional costs.

491. Fontaine referred to the restriction of assignments by virtue of the personal character of some rights and stated that this restriction was known under many laws although different formulas were used, e.g. in Art. 12.302 of the Principles of European Contract Law. He admitted that the formula chosen in his draft was very short and asked if the Group considered this adequate

492. Crépeau criticised the suggested formula as being too vague. He preferred a formula such as "strictly personal character". This would restrict the concept behind the formula a bit more on personal elementary rights such as pension or salary rights.

493. Bonell stated that a similar problem had been discussed in the context of Art. 7.2.2 of the Principles speaking of performance which is "of an exclusively personal character". He suggested adopting the same language.

494. Herrmann reported that some domestic laws understood rights of a personal character as including personal elementary rights such as pension rights, etc. However, in some countries, these rights might be assigned as well. Therefore, it should be made clear whether or not also these rights are covered by the present provision.

495. Bonell felt that these rights fall in the category of "assignments prohibited by the applicable law" as indicated in para. 1 last sentence. Fontaine was of the same opinion. He stated that he understood under personal rights a credit line opened by a bank for one of its customers or an insurance policy for personal liability.

496. Dessemontet asked if the issue of the assignability of an accessory right should not be dealt with in Art. 1.3 (1) because he considered this issue a question of assignability. Fontaine agreed and suggested coming back to this point when discussing Art. 1.9.

497. Finn asked why this question was not dealt with in the context of Art. 1.4 of the Principles. He explained that under Anglo-Australian law, the issue of personal rights was considered as being a subject of mandatory law.

498. Fontaine expressed his astonishment about the qualification of this issue as a subject of mandatory law because the topic addressed by the provision on rights of a personal character were limitations resulting from the individual contractual relationship between both parties. Finn explained that there was no such kind of restriction in his domestic law.

499. Bonell pointed out that this was the reason why some members, especially El Kholy, had suggested during the discussion on Art. 1.3 (1) inserting a mere reference to assignments prohibited by law.

500. Herrmann reported that the same problem had been raised in the UNCITRAL Working Group. There were certain rules rendering certain kinds of rights unassignable or prohibiting certain modes of assignment which might or might not be regarded as rules of public policy. Some of them were dealt with in the UNCITRAL Draft Convention on Receivables Financing whereas others had been left out in order to overcome these obstacles. The aim was to change the existing law.

501. Bonell objected that this approach was appropriate with regard to the elaboration of a binding instrument, while the Principles were not a binding instrument.

502. Herrmann stated that he was fully aware of the different legal nature of the Principles but insisted that since the Principles were intended also to be applied as the proper law of the contract in lieu of domestic law, the situation was the same with regard to that of the UNCITRAL Draft Convention on Receivables Financing. Consequently, clear provisions had to be formulated, e.g. if bulk assignments were allowed or not.

Art. 1.3 (2): Assignment of a right is effective notwithstanding any agreement between the assignor and the debtor limiting or prohibiting such assignment, without prejudice to the assignor's liability towards the debtor for breach of contract.

503. Fontaine stated that prohibitory clauses between obligee and obligor with regard to assignments were quite frequent and their purpose was to protect the debtor's interests in not having its creditor changed. However there was now an increasing tendency to restrict the effect of such clauses due to the growing awareness of the importance of assignments as a means of financing. From the assignee's perspective it was extremely difficult to have to worry about the existence of a clause prohibiting assignments. Due to the different weights given to the conflicting interests of the parties involved, various kinds of provisions could be found in the different legal systems. As an example, he cited the Benelux Convention stating that an assignment was possible unless there was a non-assignment clause. But there were also provisions recognising the validity of non-assignment clauses whenever the assignee had or ought to have known of such an agreement.

504. Farnsworth stated that the arguments against the effectiveness of such clauses would be strong in cases concerning mere monetary obligations. However, by the extension of the scope of the present chapter caused by the new definition contained in Art. 1.1, many other kinds of obligations would be affected by this chapter and he was in favour of allowing the parties to restrict the assignability of such other kinds of claims and rights. Such a distinction could be found in Anglo-American law.

505. Komarov stated that the same rule as in Art. 1.3 (2) could be found in the Russian Civil Code but restricted to the assignment of receivables financing. He recalled that the innovative approach taken in the UNIDROIT Convention on International Factoring had not been acceptable to a number of States which had therefore insisted on a reservation clause. Bearing this in mind, he doubted whether such an approach adopted in the Principles also with regard to non-monetary claims would be welcomed.

506. Schlechtriem stated that if Farnsworth's suggestion were to be adopted, the reference to rights to payment which had been deleted from Art. 1.1 could be inserted in the present provision. With regard to the situation as to when an exclusion of assignability should be allowed, he was unsure what kind of cases were covered by such an exclusion.

507. Bonell asked whether there were systems which denied effectiveness vis-à-vis the asssignee of non-assignment clauses also with respect to non-monetary obligations.

508. Farnsworth reported that there were some distinctions between different kinds of obligations under Anglo-American law with regard to contracts for the sale of goods but he stated that he considered these distinctions not to be very useful.

509. Furmston expressed his uncertainty about the policy reason behind Art. 1.3 (2) given that in general the Principles were intended to grant widest recognition to the autonomy of the parties. He could see no justification for restricting party autonomy even with regard to monetary obligations. In his legal contractual system, prohibitions of assignments were quite common, especially in construction contracts where the problem of set-off was of great importance. On the other hand he saw no difficulty in obliging the creditor to convince the debtor to

renounce the non-assignment clause if the creditor needed an assignment as a means of financing.

510. Grigera Naón stated that the present draft was fully compatible with Argentine law with regard to monetary as well as to non-monetary obligations. The philosophy behind this approach was the idea that the assigned right was part of the assignor's assets. If there was a breach of contract between the assignor and the debtor, the assignor was liable for damages vis-à-vis the debtor but maintained the right to assign. He pointed out that there were several ways of coping with problems arising from assignments rendering an obligation more onerous. With respect to the statements made by Furmston and Farnsworth, he reported two cases decided by the ICC Arbitration Court, one dealing with the issue of a non-assignability clause concerning a non-monetary obligation contained in a contract governed by the law of the State of Maryland, the other case governed by English law also concerning a non-monetary obligation. In both cases, the arbitrators had decided to enforce the non-assignability clause rendering the assignment invalid. The basis of this decision was the application of domestic law, i.e. the law of Maryland and English law.

511. Hartkamp reported that under Dutch law non-assignment clauses were effective with regard to all kinds of obligations unless the assignee was in good faith and had not known or ought not to have known of the clause. Thus under Dutch law there was a strong policy in favour of the effectiveness of a non-assignment clause. He was therefore reluctant to extend the present rule also to non-monetary obligations and preferred to restrict the scope of the present rule to assignments of future rights to payment under factoring contracts. With respect to all other kinds of contracts, he shared the concerns expressed by Farnsworth and Furmston and suggested adopting the Dutch approach based on the good faith of the assignee.

512. Herrmann warned against considering only the relationship between debtor and creditor. Also a macroeconomic point of view had to be taken into account. From this point of view, the suggested provision would reduce the costs of credit which would not only help the creditor but also the debtor. Regarding the individual relationship, he agreed with Grigera Naón that the debtor would be sufficiently protected by the liability rule.

513. Baptista reported that there was a general principle under Brasilian law protecting the good faith assignee. If there was a non-assignment clause in the contract between assignor and debtor, the assignee had to be in good faith in order to be able to collect the owed obligation. However, there were several formal requirements to be observed concerning the assignment that the assignee could practically never be in good faith.

514. Huang stated that only rather strong economic and legal arguments could justify the present provision from a Chinese point of view because the Chinese legislator had recently accepted party autonomy also with regard to non-assignment clauses. Therefore, the present provision would meet with incomprehension in China.

515. Kronke explained that different domestic laws had adopted different solutions for the same situations. The solution eventually adopted in the Principles should be the result of weighing the different interests involved. If the intention was to reduce the costs of credit, which was one of the major objectives of the Draft UNIDROIT Convention on International Security Interests, this would involve a policy decision against the wide-ranging effectiveness of non-assignment clauses.

516. Schlechtriem added that the party autonomy between assignor and debtor would be protected by claims for damages if the assignor had assigned a claim despite a non-assignability clause.

517. Furmston recalled that under English law assignments had been an important means of financing construction contracts in the past when it was common for construction companies to assign their contracts to banks. This practice had been abandoned because it did not work. At present such transactions were financed by the customer paying monthly for the work done so far. The result was an interaction between the result achieved and the way in which the transactions were financed. As a conclusion, he considered a system admitting non-assignment clauses as useful. On the other hand he recalled that clauses could be found in construction contracts entitling the other party to terminate the contract in the case of an assignment. This could be another possibility for the Working Group to consider because he felt that the mere right to claim damages was hardly sufficient.

518. Bonell summarised the statements made so far by stating that there was a majority in favour of adopting the present draft provision only with respect to the assignment of monetary obligations. He asked the Rapporteur whether he agreed to such an approach.

519. Fontaine asked whether the effectiveness of the assignment with respect to monetary obligations should depend on the good faith of the assignee or its actual or constructive knowledge of the non-assignability clause as provided for in Dutch law.

520. Kronke objected that the reference to the good faith of the assignee would lead to the consequence that whenever one party to the original contract was a party coming from a Common Law jurisdiction and the debtor was a government or a municipality, the assignee would always be in bad faith because it was widely known that the English government, municipalities, public entities etc. without exception provide for non-assignment clauses in their contracts. That would have to be taken into account if a wide-ranging exception such as the good faith of the assignee were to be adopted.

521. Bonell wondered if the good faith of the assignee consisted in its lacking actual or constructive knowledge of the non-assignability clause. With respect to the statement made by Kronke, he doubted if really everybody in international business circles knew of this practice. He suggested keeping the present rule as far as monetary obligations were concerned accompanied by a separate provision containing exceptions

522. Farnsworth objected that if the obligor insisted on a provision prohibiting assignment and the person who was to become the assignor, perhaps being advised by Furmston, accepted such a clause on the assumption that it could be put into the contract in such a way that it could be concealed from any assignee, the obligor would be greatly surprised to see how easy it was for the assignor to overcome the effects of such a clause under the Principles. In such a case, Farnsworth considered the mere right to sue the assignor as being too burdensome for the obligor. Therefore, he was concerned that the proposed rule, even if supplemented by restrictions referring to the good faith of the assignee or its actual or constructive knowledge could encourage behaviour aimed at concealing the non-assignment clause. At least, this problem should be addressed in the Comments.

523. Dessemontet asked if it was really possible to draft a contract concealing the non-assignment clause. He pointed out that banks normally asked for a copy of the contract before accepting an assignment. If they did not it would be fair to let them bear the risk of their own behaviour because they ought to have asked for a copy of it. Therefore, he could not see the problem Farnsworth was concerned about.

524. Farnsworth replied that this seemed to be an additional reason to reject the exception because there would never be a case in which someone ought not to have known. He himself however assumed that there were such cases and asked for further explanations in the Comments.

525. Grigera Naón, referring to Farnsworth's comments, stated that the non-assignment clause should prevail regardless of the good faith of the assignee with respect to an arbitration clause assigned with the contract: this because one party may have accepted arbitration only with respect to the other party but not with respect to the assignee.

526. Fontaine asked if the present rule should be kept with regard to monetary claims as it was or if the restriction based on actual or constructive knowledge should be added. He personally preferred to keep the present rule without such restrictions. It was agreed to adopt the provision with respect to monetary obligations without any further restrictions. As far as non-monetary obligations were concerned, it was agreed to give non-assignment clauses effect unless the assignee had no actual or constructive knowledge of the non-assignment clause, i.e. was in good faith.

527. Schlechtriem stated that he preferred a clear provision including monetary and non-monetary obligations and restricting the debtor to a claim for damages against the assignor. He pointed out that the Group was working in the framework of international contracts which should avoid sophisticated distinctions rendering the application of the rules on an international level more difficult. Therefore, the rule as contained in the present draft should also be applied to non-monetary claims. He asked for a vote on this proposal.

528. Bonell asked if there was further support for Schlechtriem's proposal.

529. Hartkamp pointed out that international transactions were always carried out with the help of documents, especially the contract itself in which a non-assignment clause was spelled out if the parties had agreed on such a clause. Consequently, the assignee could never be in good faith if a non-assignment clause was agreed and a restriction based on the good faith of the assignee would be useless. Therefore, he suggested giving up this restriction with respect to non-monetary claims.

530. Bonell, recalling the strong tendency in favour of an escape clause, suggested putting the escape clause in brackets in the next draft and to discuss the subject again at a later stage.

Art. 1.3 (3): Assignment of a future or conditional right operates the transfer when the right comes into existence or the condition is fulfilled.

531. Fontaine reminded the Group of the previous discussions on the assignment of future rights in general. Most of the objections had been based on the question as to how these rights could be determined. He pointed out that there was a general tendency towards a more liberal approach by considering the determinability of rights when they come into existence as sufficient and thereby enabling the assignment of future rights. This was also the basis of the present draft.

532. Bonell asked if the proposed rule should also be extended to the assignment of non-monetary obligations.

533. Fontaine replied that perhaps future and conditional rights were not on the same level and asked for guidance by the Group.

534. Farnsworth had strong reservations about this provision. To explain his position, he stated that first of all a provision defining the legal effects of an assignment was needed. He pointed out that there were important differences between the assignment of a future and a conditioned right. If a construction contract provided that the builder was to be paid each month and the builder attempted to assign the right to payment at the beginning of the work, that was a conditioned right. Such an assignment was a present transfer of rights, not a transfer operating in the future. Conditional rights were the subject of a present transfer of rights. The distinction between conditional and future rights was that in the first case the contract already existed whereas in the second no contract existed. In the latter case therefore a present transfer of the right was impossible. The present draft mixed together two different ideas. The first idea was that a right was assignable even if it was conditional. The other idea, which should be the subject of a separate provision, was that if a right was a future right it was not assignable but that an attempt to assign it had this effect.

535. Fontaine doubted whether the rights arising from an already existing construction contract were really conditional rights. From the position of Belgian and French law, future

rights were not only those arising from future contracts but could also arise from an existing contract. He felt that it was very difficult to draft a provision which could satisfy all the different concepts underlying the various legal systems represented in the Working Group.

536. Farnsworth replied that the situation he had mentioned in his example was that of progressive payments, i.e. payments due on condition that progress in work has been certified by an architect or so. He could not imagine a clearer case of conditional rights. Furthermore, he doubted that there really was a conceptual difference. From his point of view, there was a difference between a future right understood as a right to be paid in a year from now and a future right to be paid on the basis of a contract which might be concluded in the future or not. Yet the assignment of the first kind of rights he had mentioned - called future rights in Art. 1.3 (3) - did not fall within the scope of the present provision as it was a present assignment.

537. Grigera Naón stated that the Argentinean Civil Code expressly allowed in Arts. 1.446 and 1.448 the assignment of future rights as well as that of conditional rights. He pointed out, that the assignment of future rights was a very important means of financing. With regard to the wording of Art. 1.3 (3) he assumed that it was concerned only with the relationship between the assignor and the assignee. Should the Working Group admit the possibility of assignments of future and conditional rights, he suggested the adoption of a rule according to which the transfer operated when the agreement between assignor and assignee comes into existence. The advantage of his proposal would be the protection of the assignee if the assignor becomes insolvent during the intermediary period between the agreement to assign and the moment when the right comes into existence. Bonell asked if Grigera Naón saw any difficulties in allowing assignments of rights to future performance, different from payment of a sum of money, e.g. of the right to future goods. Grigera Naón replied that there was a distinction between assignments of monetary and non-monetary obligations.

538. Schlechtriem stated that three different issues had been discussed so far: conceptual differences; the exact time when the assignment should become effective; and whether there should be a restriction on assignability depending on the nature of the future rights.

539. Herrmann drew attention to Art. 8 (2) and Art. 9 of the UNCITRAL Draft Convention on Receivables Financing which state, respectively: "*Unless otherwise agreed, an assignment of one or more future receivables is effective at the time of the conclusion of the original contract without a new act of transfer being required to assign each receivable*" and "*An existing receivable is transferred, and a future receivable is deemed to be transferred, at the time of the conclusion of the contract of assignment, unless the assignor and the assignee have specified a later time*". The first or the two provisions determined the time of effectiveness after assignment while the second answered the conceptual problem.

540. Finn stated that he had difficulties in following the discussion because Australian law was based on the assumption that an assignment was a contract. Under Australian law there

were no difficulties in assigning future property. The assignment operated in fact, as Art. 1.3 suggested, the moment the future property came into existence. No differences between monetary or non-monetary rights were made. The moment the right came into existence a constructive trust was imposed and the right was automatically transferred. As far as a conditional right was concerned, it might be a present right or a future right, depending on the facts that made the right become an actual right. As an example he mentioned a contract granting a right to interest which might give rise to payment of interest each year. If one assigned now the right to interest in the year 2002, the right was conditional upon that year beginning to run. Because future and conditional rights were supported by contracts, both kinds of rights were assignable. Against this background, he could not see where the problem was. Although some details were more complicated, the practical result was that of the rule contained in the present draft. He agreed with Farnsworth that a conditional right might be a present right or a future right. However, this qualification did not matter because the right would come into existence when the conditions are fulfilled with the consequence that it already might be a present right. Beyond that, the transfer of a future right under English law operated at the moment the right came into existence by virtue of the constructive trust mechanism. Until that moment, there was an agreement to assign. As to Schlechtriem's third issue, he expressed his opinion that this was a question of the certainty of contract.

541. Baptista reported two cases in order to demonstrate the danger of this approach. The first one concerned a contract between an American and a Chinese company according to which the American party was obliged to build a hotel in China. Part of the payment consisted in granting the American company the right to rent rooms in the hotel. These future rights to rent had been assigned to different tour operators and airlines. These rights were conditional upon having passengers and were future rights as well. Faced with this case, lawyers from different countries came to the conclusion that the assignment of such rights was effective. The second case concerned an assignment of the right to a catch of fish, still to be taken off the coast of France the following year. The assignee would be entitled to the fish caught or would be compensated if it failed to catch any fish. Baptista was concerned about this wide-ranging assignability and suggested introducing some restrictions.

542. Crépeau wondered whether by stating that the transfer of a conditional right operated when the conditions were fulfilled, retroactivity would be ruled out.

543. Fontaine stated that the present formula was neutral with regard to this matter because there were no general rules on conditions.

544. El Kholy stated that the lack of a general chapter on conditions would be an argument in favour of just admitting the assignment of future and conditional rights without defining the time when the transfer operated. It would be more useful to state simply the general principle that future and conditional rights were assignable.

545. Bonell stated that there seemed to be a consensus to include a rule on the time when the transfer of future and conditional rights would operate.

546. Farnsworth stated that he had no difficulties with adopting the present provision except the inclusion of a conditional right. From his point of view, the provision was incorrect with regard to conditional rights and referred to the statement made by Grigera Naón stressing the significance of insolvency which might lead to the necessity of having an early time when the assignment would be considered as being perfected. In his opinion the assignment of the right to payment by a seller before the goods were delivered was the assignment of a conditional right. The same was true in the context of construction contracts with respect to the assignment of the right to payment which depended on the actual construction of a building. According to Art 1.3 (3) the transfer operated in all these cases at the latest possible moment. This could only be accepted as far as future rights were concerned while conditional rights should be assignable immediately. He explained that he understood Art. 1.8 on defences in the sense that if the condition did not occur, there was still a defence. But the transfer had taken place at the earlier time.

547. Bonell suggested separating the two issues and concentrating on future rights. Fontaine agreed but stressed that there were great conceptual differences between his and Farnsworths's understanding of conditional rights. Therefore, he wondered if it would not be useful to avoid the ambiguous wording contained in the present text.

548. Schlechtriem suggested explaining in the Comments that both understandings of conditional rights, i.e. that of the Common Law systems and that of the Civil Law systems, were covered by Art. 1.3 (3) because the practical results were the same. Bonell objected that this was apparently not the case.

549. Finn stated that a distinction he was accustomed to was that of present and future rights. Present rights also included conditional rights but also a future right might be a conditional right. From his point of view, a conditional right could be a future right which came into existence on the occurrence of a particular contingency. The other kind of conditional rights Farnsworth was referring to were existing rights. The language used in the draft provision leads to the result that the transfer would occur when the conditions on which the right would come into existence were fulfilled. This was appropriate in relation to conditional rights that come into existence in the future, but not in relation to conditional rights that are present rights.

550. Furmston stated that he had no problems with allowing the assignability of future and conditional rights. The problem was to determine the time of effectiveness of the assignment. Therefore, the terms future and conditional rights had to be defined. Especially the term condition was the most notoriously ambiguous in the Common Law of contracts because it meant different things within the Common Law. He confirmed the distinction between two kinds of conditional rights and agreed that it would cause difficulties if both were dealt with in the same provision.

551. Dessemontet asked Fontaine if Art. 1.3 (3) was to be understood in the sense that the right remains part of the assignor's assets until the conditions required for the right to come into existence are fulfilled. He would have great difficulty in accepting such a result which would mean that the assigned rights would fall under the insolvency regime if the assignor became insolvent in the period between assignment and the time the transfer becomes effective. He wondered whether it was not preferable to provide, as Swiss law did, for the time of the agreement as the decisive moment.

552. Summing up, Bonell pointed out that two basic approaches had emerged so far. On the one hand, in view of the differences between the various legal systems, to restrict the provision in the Principles to a mere statement that conditional and future rights are assignable. On the other hand, to address in the Principles also the question as to the time transfer becomes effective. Personally, he preferred the latter, more ambitious approach. But again, two solutions were conceivable. The first was to provide for the moment the right came into existence as the decisive moment; the other was for this purpose to refer to the time of the agreement, as provided for in the UNCITRAL Draft Convention on Receivables Financing.

553. Fontaine pointed out that since there were fundamental misunderstandings with respect to the meaning of the term “conditional” between Common Lawyers and Civil Lawyers, this notion should not be included in the black letter rules of the Principles. For Common Lawyers, it seemed to be acceptable to avoid using the term conditional if some examples based on the statements made by Farnsworth and Finn were given in the Comments. Also for Civil Lawyers it seemed to be acceptable to renounce a provision dealing with conditional rights in the black letter rules. Even in domestic codification, there were few, if any, examples of provisions dealing with conditional rights. However, some explanations could be given in the Comments. As to future rights, the crucial question was whether the time the transfer became effective should be addressed or not, and if so, whether it should be the moment of the assignment or that of the coming into existence of the right. He considered the latter solution a more logical one though it had consequences in cases of insolvency. However, he wondered whether the Group was not going too far by trying to interfere with insolvency law. Apart from this, some of the issues raised in this context would have to be faced in the context of the effects of assignments under the Principles against third parties. Even if the present draft rule were to be adopted, domestic insolvency law would still apply. The last point to decide was whether a separate provision about the effects of assignments between assignor and assignee should be included as Farnsworth had suggested. Its content would be that the right is transferred from the assignor’s assets to the assignee’s assets. He had not included such a provision before because it seemed to be obvious but it might be useful to have an explicit rule on this matter even though the problem of the effects on third parties came up again.

554. Bonell recommended to close the discussion on conditional rights and to follow the suggestion made by Fontaine, i.e. not to deal with this issue in the black letter rules but to address it in the Comments. With regard to future rights, he asked Herrmann if the UNCITRAL

Working Group had considered the possible impact of Art. 9 of the UNCITRAL Draft Convention on Receivables Financing on bankruptcy law.

555. Herrmann replied that this was the primary consideration and that if the Group retained the solution provided for in Art. 1.3 (3) of the present draft, the absolute contrary of the, from Fontaine's point of view "illogical", approach chosen in the UNCITRAL Draft Convention on Receivables Financing, would be adopted. He explained that the retroactive approach had not been adopted by the UNCITRAL Draft Convention on Receivables Financing, not for reasons of logic, but for reasons of economic needs. From a financing point of view, it was unacceptable to provide for the later moment, thereby risking interference with bankruptcy laws. He added that Fontaine's statement that insolvency law sufficiently dealt with this issue was hardly acceptable because normally insolvency laws referred to the law of assignment with regard to the time of the effectiveness of assignments.

556. Finn stated that there were three possibilities. The first was that the transfer takes effect when the right comes into existence as provided for in the present draft. This approach would be unacceptable in a Common Law country because it presupposed that the right belonged to the assignor, with the consequent interference with bankruptcy law. The second possible solution was that the assigned right belongs to the assignee the moment the right comes into existence. In this case, the right would never be the property of the assignor and this would be in conformity with the Common Law position resulting from the constructive trust. The third possibility was to deem it to go back to the time of the agreement. Both the last two approaches were acceptable in Common Law jurisdictions. Only the first approach, contained in the present draft, would be unacceptable to them.

557. Herrmann stated that he could see no difference between the last two possibilities mentioned by Finn.

558. Jauffret-Spinosi recalled that also with respect to the sale of future goods it was often difficult to know when the goods come into existence. In France, there was a constant case law which referred to the moment when the buyer knew that the goods existed.

559. The determination of the moment an assignment of a future right becomes effective was put to the vote. At stake were the moment of assignment and the moment the right comes into existence. Six members of the Group decided in favour of the first alternative and six in favour of the second. Faced with this impasse the Rapporteur was asked to prepare two drafts based on the respective alternatives in order to allow a second vote on this issue at a later stage

560. According to Hartkamp it should be borne in mind that future rights might derive from existing contracts or from contracts still to be concluded. With regard to the latter it was necessary to add the determinability of the right as a further requirement to be satisfied as otherwise it would be possible to assign all future rights one could acquire in a lifetime. He proposed to draft a provision to prevent such a possibility.

561. Bonell, who shared Hartkamp's view, wondered whether the Comments were not the most appropriate place for such a restriction. Hartkamp replied that it should be expressed in the black letter rules; otherwise the rules would imply a wide-ranging assignability of future rights.

562. Grigera Naón supported Hartkamp's opinion. A right might be assigned as a security and it was a common feature of security rights that the collateral was somehow identifiable. This matter should be dealt with in the black letter rules, all the more so since the Comments may not be available everywhere in the world.

563. Komarov reported that the Russian legislator had also provided for an explicit rule on this matter in Art. 826 (1) of the Russian Civil Code with respect to monetary claims: "*Monetary claims that are subject to assignment must be defined in the contract of the client with the assignee in such a manner that will allow the identification of an existing claim at the time of making of the contract and a future claim not later than at the time when it arises*".

564. Fontaine reported that a similar rule could be found in Art. 12.102 (2) of the Goode draft: *"Future claims arising under an existing or future contract may be assigned if at the time when they come into existence, or at such other time as the parties agree, they can be identified as claims to which the assignment relates"*.

565. He suggested taking this provision together with the respective provision of the Russian Civil Code as a source of inspiration.

566. Bonell reminded the Group that the question as to whether the transfer of a right should be defined still had to be decided.

567. Fontaine recalled that the idea had been brought up by Farnsworth. He agreed that it might be useful to state that the effect of an assignment was that the right passed from the assets of the assignor to the assets of the assignee. However, such a provision would also affect third parties.

568. According to Bonell the only appropriate place for such a provision was Art. 1.1. Yet this would leave open the question of the effects on third parties. He wondered therefore whether it would not be preferable not to have such a provision but to include an explanation in the Comments.

569. Farnsworth pointed out that it might be useful for the reader to know what the effects of a transfer of rights were before turning to the chapter on the transfer of duties. The meaning of the transfer was different in the two situations. He explained that under Anglo-American law the transfer of a right was like throwing and catching of a ball from one person to another, while the transfer of a duty was more like passing a disease as the duty remained with the per-

son who had transferred it but also went to the other one. Having these difference in mind there should be an explanation at least in the Comments. This should be left to the Rapporteur.

Art. 1.3 (4): A bulk of rights may be assigned without individual specification provided such rights can be identified at the time of the assignment or when they come into existence.

570. Fontaine stressed the great economic significance of the assignment of a bulk of rights. This had been the reason why several international conventions had included provisions on it. The present draft was based on Art.8 of the UNCITRAL Draft Convention on Receivables Financing and Art. 5 of the UNIDROIT Convention on International Factoring.

571. Furmston expressed his dissatisfaction with the English expression "bulk of rights" which was not very elegant. He preferred the formula "bundle of rights".

572. Uchida asked, with respect to the identification of the assigned rights, what information had to be given in order to allow the identification. This could be addressed in the Comments.

573. Baptista replied that as much information should be given as the assignee needs to know what it would receive.

574. Schlechtriem added that this included the type of contracts to be concluded in the future by the assignor.

575. Komarov was also concerned about terminology as it would be difficult to translate the term "bulk of rights" into Russian. Therefore, he supported Furmston's proposal to replace "bulk of rights" by "bundle of rights", subject to further explanation as to the meaning of this term.

576. Hartkamp wondered whether the present provision was needed at all because it seemed to him that it was sufficient to say that future rights were assignable. It did not matter if these rights were assigned separately or together with other rights. Komarov agreed. He recalled that the Goode draft did not contain any specific provision on the assignment of a bulk of rights.

577. Schlechtriem supported this view and suggested explaining in the Comments that existing and future rights could be assigned together.

578. Bonell objected that under Italian law, although future rights have always been assignable, only after the recent adoption of an express provision to this effect can a bulk of rights now be assigned. Therefore, he did not agree that the possibility of assigning a bulk of rights could be inferred from the possibility of assigning future rights.

579. El Kholy suggested using the formula "group of unidentified rights provided such rights can be identified at the time of assignment".

580. Bonell wondered whether the issue should be further discussed as there seemed to be a consensus in favour of the assignment of a bulk of rights and the exact formula was a mere question of language.

581. Fontaine replied that this question was not a mere question of language because some members considered it as unnecessary to include a provision on this matter. Personally, he thought it was necessary to have an explicit provision on the assignment of a bulk of rights because of its great economic importance. In many business circles, the assignment was understood as the assignment of a bulk of rights.

582. Kronke pointed out that UNCITRAL and UNIDROIT were more and more confronted with the wish to develop innovative solutions instead of just harmonising differences between domestic laws, i.e. to educate and to further law reforms. He stated that this was also the reason why the UNCITRAL Draft Convention on Receivables Financing addressed the question of bulk assignments because not all legal systems admitted the assignment of a bulk of rights. He pointed out that also the UNIDROIT Principles Working Group had already decided in favour of trying to educate through the Principles on several occasions. Therefore, also this issue should be addressed in the black letter rules.

583. Dessemontet supported this approach. He pointed out that in Switzerland, it had taken over 100 years for the Supreme Court to admit in principle the assignment of a bulk of rights. Bearing in mind the long time it had taken to achieve this result even in a country where in practice banks frequently deal with bundles of rights, the issue of the assignment of a bulk of rights should be addressed in the black letter rules.

584. Hartkamp expressed his surprise to hear these statements because he could not see the difference between the assignment of a bulk of rights and the assignment of a number of future rights. In both cases, notice had to be given to any specific debtor.

585. Fontaine agreed that it was possible to apply the Principles without an explicit provision on the assignment of a bulk of rights but, faced with the reluctant attitude of some domestic laws towards such kinds of assignments, it was useful to include a provision on it. Furthermore, it was such an important problem for many business circles that an important possibility would be missed if a respective provision was not included in the Principles.

586. Bonell stated that there was obviously no dissent in substance. As far as the question was concerned as to the inclusion of an explicit provision, he reminded the Group that in similar situations it had been decided to provide for an explicit provision. This approach should also be followed in this context.

Art. 1.3 (5): A right may be assigned as security [for indebtedness or other obligation].

587. Fontaine stated that the rule contained in Art. 1.3 (5) might be considered as not entirely satisfactory because it was very short on an important issue. However, the more details were addressed, the more difficulties had to be faced. He asked for comments.

588. According to Schlechtriem the provision was superfluous. Legal rules stating that something might be done or not did not make sense to him. The present provision could only be kept for educational reasons.

589. Bonell wondered whether the text of Art. 1.1 could not be expanded in order to mention some of the *causae* of the assignment and/or to explain in the Comments why businessmen make such assignments (i.e. for security reasons, for financing etc.). This would allow the deletion of para. 5.

590. Herrmann agreed but pointed out that it was useful to have a provision defining the scope of the chapter as some legal systems distinguish between simple assignments and assignments for security reasons. Thus the UNCITRAL Draft Convention on Receivables Financing expressly states that it covers assignments for security reasons.

591. Dessemontet referred to Art. 12.101 (1) of the Goode draft stating: *"This chapter applies to the transfer, pledge or charge by agreement ("assignment") of rights to payment or other performance ("claims") under an existing or future contract."* In his view if para. 5 was not kept, a reference to a pledge should be included in Art. 1.1.

592. Grigera Naón pointed out that the meaning of pledge was not always the same under different legal systems. Moreover not all legal systems accepted the idea of a transfer of property to create a security interest. He agreed with Herrmann that the issue be addressed in the black letter rules but instead of mentioning "pledge" he preferred the broader formula "transfer for security purposes". A pledge would mean only possessory rights whereas he wanted to include also the transfer of title for security purposes.

593. El Kholy suggested adopting the following formula: "The assignment of a right as a security results in a pledge of the assigned right." Thereby, it would be stated that an assignment could be made for security purposes and that the assigned right was pledged.

594. Finn agreed with Grigera Naón that the issue of assignments as a means of security should be addressed in the black letter rules for educational reasons. With regard to the different solutions of domestic laws, it should be made clear that all these possibilities were covered by the Principles.

595. Bonell stated that there seemed to be a majority in favour of providing for an explicit rule on assignments as security and suggested taking this as the basis for further discussion.

596. Kronke was reluctant to use technical terms such as pledge. He reported that when the German Civil Code came into force the courts were forced to invent additional means of security because pledge as a means of security provided for in the code turned out to be absolutely insufficient. Also the Draft Convention on Security Interests in Mobile Equipment spoke of security interests in a very broad sense, thereby avoiding any technical specification that might lead to unnecessary doubts with regard to specific means of security. In his view the use of the term "pledge" in the Goode draft would cause confusion and be met with extreme resistance in Germany because it would be considered a step back to the legal situation of a hundred years ago.

597. El Kholy stated that he would not insist on the term pledge but that it was important to address the question as to what, in the case of assignment for security reasons, the position of the assignee precisely would be, e.g. whether it would be entitled to sell the right or not. He doubted if this was intended.

598. Schlechtriem stated that El Kholy obviously intended to restrict the assignment of a security in its effects. This could be discussed and decided. However, he was reluctant to introduce an assignment with restricted effects because the Principles dealt with assignments in an abstract way. He pointed out that the idea of assignments with restricted effects had been provoked by the decision to address this function of assignments as security in the black letter rules. Therefore he insisted on striking out para. 5.

599. Fontaine explained that if this function of assignments should be addressed, it should be addressed in the context of Art. 1.1 either in the Comments by stating that transfers by security were included or by including a statement to this effect in the black letter rules as provided for in the Goode draft.

600. It was decided to include a statement on assignments for security purposes in Art. 1.1 subject to further consideration of this matter.

Art. 1.4: The right is assigned by mere agreement between assignor and assignee.

601. Fontaine stated that this provision expressed a widely accepted although not universal principle. Some legal systems such as the Swiss Code of Obligations require a written form. Others make a distinction between the underlying agreement and the assignment contract. He pointed out that the proposed provision intended to deal only with the assignment contract itself.

602. El Kholy assumed that this provision applied to the relationship between assignor and assignee only and stressed the importance of pointing out this restriction because otherwise it could be inferred from Art. 1.7 that the assignment had no effect until the debtor was notified.

Furthermore, he was concerned about domestic laws providing for special requirements as to form: in such cases he wondered what the merit of the present provision was.

603. Fontaine agreed on El Kholy's first point and stated that the clarification El Kholy requested with respect to Art. 1.7 would be made in the Comments. As to El Kholy's second observation, he pointed out that there might be situations where the Principles are applied as the applicable law with the consequence that formal requirements imposed by domestic law would only be applied within the scope and under the conditions set out in Art. 1.4. In such situations, the present provision would be useful.

604. El Kholy did not agree because the present rule constituted an already accepted general principle which needed no further confirmation.

605. Bonell doubted if the latter statement could be accepted because in the past there had been several legal systems which required the consent of the debtor.

606. Fontaine agreed with Bonell, although at present the principle of assignment by agreement was accepted almost everywhere.

607. Crépeau pointed out that two issues should be addressed. First the validity of the assignment agreement between assignor and assignee and second the intervention or non-intervention of the debtor. Arts 1.4 and 1.6 of the present draft did not expressly mention the necessity of a notice to, or at least awareness of, the debtor of the assignment in order for it to be effective vis-à-vis the latter. Therefore, he suggested adding a second paragraph to Art. 1.4 stating that "The assignment is effective upon notice to or awareness of the debtor". A further possibility would be to deal with this issue in a paragraph preceding Art. 1.6 stating that the assignment is effective by notice to the debtor or by its awareness or acknowledgement of it. The idea behind this suggestion was to indicate clearly that a notice should be given or awareness or acknowledgement should be proved before indicating who was obliged to give notice to the debtor.

608. Bonell replied that this could already be taken implicitly from Art. 1.7.

609. Fontaine agreed with Bonell and explained that Arts 1.4 and 1.5 were intended to deal with the relationship between assignor and assignee, whereas Arts 1.6 and 1.7 dealt with the situation of the debtor. The obligation to give notice could be understood from these provisions. If no notice was given, the situation of the debtor changed according to Art. 1.7.

610. Crépeau pointed to the commentary to Art. 1.4 stating that the provision implied that assignment of a right takes place without the debtor's agreement, subject to the notice requirements provided in Art. 1.6. Art. 1.6 however was not so clear as it states that either the assignor or the assignee might give notice to the debtor. The basic rule that there should be a notice or an acknowledgement was not sufficiently explicit.

611. Fontaine disagreed that acknowledgement by the debtor is a requirement.

612. Bonell asked if Crépeau was addressing a matter of substance or one of mere presentation.

613. Crépeau replied that he considered this a matter of presentation. Business persons might not be aware of the difference between the validity and the effectiveness of a juridical situation.

614. Herrmann felt that this question could also be one of substance if Crépeau's statements were to be taken literally. Crépeau seemed to require a notice or any other kind of knowledge of the debtor for the effectiveness of the assignment. However, this was not the intention of the present draft. The underlying idea of the draft was not to introduce notice as a strict requirement but to take a more flexible approach, i.e. to provide, in the absence of the debtor's knowledge, not for the ineffectiveness of the assignment as such but only for certain consequences with respect to the discharge of the debtor as described in Art. 1.7. In other words, there was no obligation to give notice.

615. El Kholy suggested adding the words "without prejudice" in Art. 1.4 in order to clarify that only the relationship between assignor and assignee was addressed in this provision. Another possibility would be to use the formula "The assigned right is transferred to the assignee by mere agreement between assignor and assignee". A third possibility would be to state simply "subject to Art. 1.7".

616. Bonell felt that such additional clarification could be made in the Comments.

617. Dessemontet asked Crépeau if by effectiveness he meant the effectiveness between assignor and assignee or the effectiveness vis-à-vis the debtor.

618. Crépeau explained that in his view the effectiveness concerned the debtor's situation. He referred to a provision of the Civil Code of Québec stating that the assignment might be set up against the debtor and the third person as soon as the debtor has acquiesced in it. This meant that the effectiveness of the assignment vis-à-vis the debtor required either a notice to the debtor or the fact that the debtor was aware that its original creditor had changed.

619. Bonell stated that the Italian Civil Code had used language similar to that suggested by Crépeau and pointed out that this had led to the assumption of an implied restriction of the effectiveness of an assignment even with regard to the relationship between assignor and assignee. Therefore, he preferred the approach chosen by Fontaine.

620. Schiavoni expressed his confusion about Art. 1.3 (5), stating that a right may be assigned as a security, and Art. 1.4, stating that a right is assigned by mere agreement between assignor and assignee. He explained that in cases of a right being assigned as a security, sometimes also a document had to be given to the assignee. If a pledge was concerned, i.e. one

party was in possession of a pledge, a right could be assigned as a security in pledge by handing over the document relating to the obligation. He asked whether an assignment for security purposes was an assignment in a technical sense.

621. Fontaine confirmed. However he admitted that an assignment for security purposes had different implications than a full transfer and he had not thought of the situations referred to by Schiavoni when drafting the provision.

622. Schiavoni was concerned about the formula "by mere agreement" with respect to those kinds of securities which had further requirements.

623. Crépeau stated that Fontaine had addressed the issue in his commentary. However he felt that this was not an issue to be addressed only in the Comments. It had been agreed that the effectiveness of the assignment could be made dependent upon serving notice or upon awareness, but Art. 1.7 dealt with notice only. Bonell stated that awareness was mentioned in brackets and therefore still had to be discussed. Crépeau preferred a formula clarifying that either a notice or awareness was required.

624. Schlechtriem stated that he understood the assignment to be effected by the mere agreement between assignor and assignee without notice. The lack of notice had consequences only with respect to the discharge of the debtor. However he found Fontaine's statement in the last sentence of his commentary "subject to notice requirements" misleading.

625. Fontaine admitted that this formula was ambiguous in the light of the foregoing discussion. He agreed that it should be made clear that only a reference to the discharge of the debtor was intended.

626. Farnsworth drew attention to para. 4 of Fontaine's commentary on Art. 1.4 stating that the Group would have to discuss the Common Law distinction between a commitment to assign in the future and a present assignment. He wondered whether such a distinction was unknown to Civil Law systems. In any case, he felt that Art. 1.4 should make it clear that it was concerned only with an agreement of present transfer and not with a commitment to assign in the future.

627. Fontaine wondered whether he had correctly understood Farnsworth's statement. He thought that the issue had already been discussed in the context of the provision on assignment of future rights where Farnsworth himself had pointed out that an assignment of future rights was a mere agreement to assign until the right came into existence. On the basis of the principle of consensualism however, the right was assigned the moment the parties agreed to do so.

628. According to Bonell also Civil Law systems make a distinction between an agreement to assign a right at present, an agreement to assign a right in the future, and an agreement to assign a future right.

629. Farnsworth explained that he just wondered whether the statement that a right was transferred from one person to another now equalled the statement that a right was transferred from one person to another at a future time or on the basis of an option.

630. Fontaine agreed with regard to the option which would be assigned the moment the option was fulfilled. But if there was a contract, it could not be considered as a mere promise to conclude a contract.

631. Farnsworth stated that according to Art. 1.1 assignment was a transfer and not a contract.

632. Furmston reported that under Common Law, assignment was considered as being positioned on the borderline between the law of contract and the law of property which might give rise to confusion. As an example he mentioned a contract with a publisher to write a book the following year. If the contract contained a provision for the assignment of the copyright to the publisher, the assignment of the copyright would be valid but would not operate until the book came into existence. Thus there was a difference between a contract to assign and the actual assignment.

633. Schlechtriem guessed that a different meaning given to the term contract might be the reason for the actual discussion. He explained that obviously, the meaning of the notion contract under Anglo-American law was a contract creating obligations whereas Civil Lawyers used this term in a more general sense including also agreements obliging the parties to effect the transfer of the obligation.

634. Farnsworth stated he was not dissatisfied with the present draft but that he saw in this context a problem with Art. 1.2 of the Principles providing for the freedom of form with respect to contracts.

635. Finn suggested the following formula: "The assignment is effectual between assignor and assignee by mere agreement". Bonell agreed and proposed the inclusion of an additional formula stating that the consent of the debtor was not required.

636. Fontaine summarised the discussion by stating that Arts 1.1 and 1.4 of his draft touched on aspects of property law. According to Farnsworth, Art. 1.4 should state that no formal requirements for an assignment were needed. Furthermore it should state explicitly that no consent by the debtor was necessary.

637. Bonell was against repeating in the present context a principle, i.e. that of no formal requirements, that had already been laid down in the Principles in general terms. Also in the context of agency, it had been considered unnecessary to reiterate the general principle of no formal requirements.

638. Farnsworth felt that these difficulties could be overcome by modifying Art. 1.2 of the Principles as follows: "Nothing in these Principles requires a contract or transfer ...". Since Common Lawyers at least clearly distinguish between a contract and an assignment, Art. 1.2 missed the mark. If formalities were required, they would prevail if a judge or an arbitrator from a Common Law country had to decide a case concerning assignments. Therefore, 1.2 needed to be modified in order to settle the problems raised.

639. Schlechtriem agreed that Art. 1.2 should be modified so as to make it clear that neither contracts nor agreements, thereby including assignments, needed to be in writing.

640. Bonell asked what the difference was between a contract and an assignment. Schlechtriem replied that there was no difference for Civil Lawyers but for there was for Common Lawyers, given the particular meaning of contract in Common Law systems. Bonell objected that the Principles should not reflect national particularities.

641. Farnsworth pointed out that there were several kinds of formalities other than writing requirements which might become important in the context of assignments.

642. Bonell was more concerned about the reference to transfer of property because the Principles had not dealt so far with questions relating to the transfer of property.

643. Finn confirmed that an assignment was a contract, a contract without consideration, but a contract within the meaning of contract in the Principles.

644. Schlechtriem asked Farnsworth if it would be acceptable to explain in the Comments that the term "contract" was used in the continental sense. The Group expressed strong reluctance to adopt this approach.

645. Farnsworth explained that his starting point had been the assumption that Art. 1.4 dealt only with the formalities of assignment. If Art. 1.2 of the Principles applied to transfers as well as to contracts, he would be satisfied.

646. Fontaine stated that from a Civilian point of view, an assignment needed an agreement as a basis. For the conclusion of a contract no form was required, and in the case of assignments no consent by the debtor was needed. There was also the problem of unilateral assignments, i.e. assignments by the unilateral act of the assignor without the consent of the assignee. He suggested discussing also this point.

647. Furmston confirmed that since it was possible to assign a right unilaterally, the concept of a contract as a basis for an assignment was not a proper approach. Therefore, he agreed to embark on a discussion of unilateral assignments.

648. Bonell asked if it was not too late to embark on this subject because he considered it a matter which should have been discussed in the context of Art. 1.1 of the draft.

649. Finn suggested formulating Art. 1.4 as follows: "An assignment requires an agreement between assignor and assignee. It does not require the consent of the obligor and no formal requirements are necessary." Thereby all important issues raised in the context of this provision were addressed. As to unilateral assignments, he feared that a discussion on it would be profitless because Common Lawyers would be talking in terms of the law of property. This would mean that a party could assign voluntarily and unilaterally a present right, whereas a future right could only be assigned for value because it was future property. He preferred to focus first of all on generally acceptable issues before discussing aspects of property law which were frequently considered in entirely different terms from one system to another.

650. Farnsworth too wondered whether the issue of unilateral assignments should be discussed since one might have the impression that it had been settled in the context of Art. 1.1. The only remaining question was that of consent by the debtor which could be addressed in a second paragraph of Art. 1.4 as he had proposed before.

651. Fontaine admitted that Art. 1.4 of his draft could be considered unnecessary because the necessity of an agreement could already be inferred from Art. 1.1. Likewise statements on no formal requirements could also be considered superfluous as such a principle could be inferred from Art. 1.2 of the Principles. Nevertheless, he preferred having an explicit provision on formal requirements in view of the fact that several legal systems provided for such requirements. It should also be stated explicitly that no consent by the debtor was needed. He added that this was also the introduction for the provisions on notice and discharge.

652. Furmston wondered why Art. 1.4 did not expressly state that the consent of the debtor was unnecessary if this was the main idea behind the provision.

653. Schlechtriem pointed out that an explicit provision to this effect could be misunderstood in the sense that, on the contrary, a notice to the debtor was required since this had not been expressly excluded. He preferred to leave this issue out. Questions of formality however could be addressed.

654. Dessemontet preferred a provision explicitly stating that no consent of the debtor was needed, but in this case also notice requirements would have to be explicitly excluded. He added that Art. 1.4 was important for countries such as Switzerland where assignments did not operate automatically by the mere conclusion of the contract.

655. Crépeau suggested overcoming the difficulties raised by adopting the wording: "The right is assigned by mere agreement between assignor and assignee without the consent of the debtor". Thus the substantive tri-partite relationship would be taken into account. If necessary one could add "... but subject to the notice requirements provided for in these Principles".

656. Date Bah pointed out that if Art. 1.1 was a provision defining the scope of the present chapter, the consequence with respect to unilateral assignments would be that this kind of as-

signment would still be applicable under the rules of national laws, i.e. they would not really be excluded with respect to the Principles.

657. Fontaine stated that the subject of this chapter was only those assignments which met the description in Art. 1.1. Bonell suggested introducing the present chapter by using the formula: "This chapter governs ...". Fontaine agreed.

658. Schlechtriem suggested including a note in the Comments stating that unilateral assignments as far as they are allowed by domestic laws would not be excluded by the Principles.

659. Bonell expressed his dissatisfaction with the present wording of Art. 1.1 because it gave the impression of claiming to give a definition of assignments for all purposes. This however, was too ambitious for a non-binding instrument like the Principles. Therefore, he preferred a formula such as "for the purposes of this chapter". Schlechtriem agreed. This solution was accepted by the Group.

660. Fontaine asked if the consent of the debtor and formal requirements should be dealt with in a specific provision.

661. Bonell suggested adopting explicit language in order to accommodate those who had stated that there were differences in substance. He also favoured addressing the issue of the consent of the debtor in a second paragraph. As to the concerns expressed by Schlechtriem, he wondered whether this could not be taken care of in the Comments. Schlechtriem denied.

662. Finn asked Schlechtriem if his concerns could be overcome by stating: "The assignment requires the agreement of the assignor and the assignee but not that of the debtor". This would indicate that only a bi-partite agreement was intended.

663. Schlechtriem stated that it should be made clear in the context of Art. 1.6 that a notice was not necessary to render the assignment effective vis-à-vis the debtor.

664. Grigera Naón shared the concern expressed by Schlechtriem and suggested modifying the present formula as follows: "without consent or knowledge of the debtor".

665. It was agreed to leave this question to the Rapporteur who agreed to provide for an explicit rule in the black letter rules with respect to the consent of the debtor or to include an explicit explanation in the Comments.

Art 1.5 (1): Unless otherwise agreed, the assignor warrants to the assignee that at the time of the conclusion of their agreement:
(a) the assignor is entitled to assign the right;

(b) the assignor has not previously assigned the right to another assignee; and
(c) the debtor does not and will not have any defences or rights to set-off.

Art. 1.5 (2): Unless otherwise agreed between the assignor and the assignee, the assignor does not warrant that the debtor has, or will have the financial ability to pay.

666. Fontaine explained that this provision dealt with so-called warranties. There was a problem of terminology. The term "warranties" had been taken from the Goode draft, which however had recently replaced it with the term "undertakings by the assignor". The UNCITRAL Draft Convention on Receivables Financing speaks of "representations".

667. Schlechtriem referred to a proposal already made in Bozen to distinguish between warranties arising from the underlying contract and the assignment itself. As a second point, he asked if a warranty for the existence of the right should not be included.

668. Dessemontet reported that Art. 171 (1) of the Swiss Code of Obligations provided for a warranty of the existence of the assigned right. However, future rights were not covered by this provision because it was difficult to guarantee the existence of a future right. He wondered whether this was the reason why this warranty was not addressed in the present draft.

669. Schlechtriem stated that the warranty in such cases referred to the fact that the right would come into existence at the defined time. He felt that such a provision was indispensable.

670. Furmston objected that he could not see how someone could be entitled to assign a right that did not exist.

671. Herrmann replied that he could warrant that he had not assigned it to another person before.

672. Farnsworth wondered whether there was a difference in substance behind the use of the formula "unless otherwise agreed between the assignor and the assignee" in para. 2 compared with the shorter formula used in para.1 "unless otherwise agreed".

673. Fontaine pointed out that there was no substantial difference. In his view both formulas could be deleted without difficulty in the light of Art. 1.5 of the Principles.

674. Summing up Bonell stated that there seemed to be agreement on deleting the reference to party autonomy because Art. 1.5 of the Principles dealt with this possibility sufficiently.

675. Crépeau was inclined to provide for a warranty of the financial ability of the debtor only with regard to the time of assignment whereas a warranty of the financial ability of the debtor after the time of assignment should be the subject of an express statement in the agree-

ment between assignor and assignee. Indeed the assignor did not normally have the means to assure the future solvency of the debtor.

676. Fontaine stated that this was a question of policy to be decided. There were several solutions in various domestic laws.

677. Bonell reported that Art. 1267 of the Italian Civil Code excluded a warranty for the solvency of the debtor unless otherwise agreed.

678. Fontaine pointed out that Art. 1695 of the French Civil Code stated that if a warranty of the solvency was given by the assignor, this warranty only related to the actual solvency at the time of assignment, unless expressly stated otherwise by the same assignor. It was also a reasonable approach because no one could warrant something to occur in the future.

679. According to Furmston express warranties were likely to be frequent because the price the assignee has to pay would reflect the solvency of the debtor. What mattered however was not the present solvency of the debtor but its solvency at the time of performance.

680. Grigera Naón reported that under Argentine law there was no warranty of the assignor unless otherwise agreed between the parties. With respect to the warranty for the debtor's solvency, this was also the approach taken by the draft and he agreed with it.

681. Uchida also expressed his satisfaction with the present text.

682. Finn asked whether the reference to the entitlement of the assignor reflected a prohibition of assignments according to Art. 1.3 or whether something else was intended. His second question related to the warranty of the existence of the right in cases of future rights.

683. Uchida wondered whether Art. 1.5 (1) (a) and (b) were really needed because the agreement to assign contained already the promise to assign the right from the assignor to the assignee. However, he was in favour of keeping Art. 1.5 (c) because this provision might become relevant in cases concerning junk bonds.

684. Schlechtriem replied to Herrmann's statement equalising previously assigned rights and non-existent rights. A non-existent right could be the consequence of a void contract or of actual payment. He thought the Group should discuss whether or not to include a provision clarifying that also non-existent rights were covered, since he understood the reference to the entitlement of the assignor as contained in the present draft in the sense that it presupposed the existence of a right. However the crucial point was the question of future rights. It should be made clear that the warranty takes effect at the moment the right comes into existence.

685. Herrmann stated that he fully agreed with Schlechtriem concerning the distinction between previously assigned rights and non-existent rights.

686. Dessemontet stressed the importance of both *lit*. (a) and *lit*. (b) in Art. 1.5 (1).

687. Furmston agreed with Schlechtriem that there could be cases in which the moment of the assignment was not identical with the moment the transfer operated. Therefore, he was in favour of addressing this issue in the Principles.

688. Huang stated that from her point of view, *lit*. (a) and *lit*. (b) said the same thing because an assignor would not be entitled to assign a previously assigned right. With regard to *lit*. (c), she was more concerned about its practical applicability. She wondered how an assignor could guarantee that there would be no defences in future. In general, she was not convinced by the underlying approach to consider a party's right to sue as a basis for damage claims.

689. Bonell expressed sympathy with Huang's first remark. As to her second, he pointed out that the warranty referred to the existence of defences and not to their exercise. No one could be prevented from exercising his/her rights. This was not a subject of the warranty.

690. With respect to the relationship between *lit*. (a) and *lit*. (b), Furmston pointed out that if the second assignee was the first to gave notice to the debtor, the first assignee would suffer the loss. Therefore, both provisions should be kept.

691. Fontaine agreed that there should be a warranty of the existence of the right which he did not consider as being covered by *lit*. (a). He admitted that the issue dealt with in *lit*. (b) had already been covered by *lit*. (a). However, *lit*. (b) addressed such an important issue that it should be kept as a separate provision. *Lit*. (c) was also important because it constituted a basis for contractual claims by the assignee in cases where the assignee could not profit from the right, a situation comparable to warranties for defects of the goods. As to the time the warranty operated, the time of the agreement should be relevant to already existing rights, i.e. *lit*. (b) and *lit*. (c). With respect to *lit*. (a), it should also be stated that for warranties concerning future rights, the time the right comes into existence is relevant to the warranty.

692. Schlechtriem was concerned that the time the right comes into existence might be uncertain. He added that Huang's concerns had not yet been completely met. He picked up the analogy to warranties for defects and gave an example based on the sale of goods. If a third party claimed a right with respect to the goods sold, the prevailing opinion was that, even if these rights claimed by the other party on the sold goods did not exist, it was the seller's duty to defend the buyer against such claims. Consequently, the question was who had to prove that the defence raised by the debtor did not exist. This was a matter of the scope of the warranty. If the assignor warranted that no defences might be raised, he had to determine whether or not the defences were valid.

693. Bonell admitted that he might have misunderstood Huang when he referred only to the question as to whether the warranty related to the possible exercise of non-existent defences. Schlechtriem replied that the question of frivolous claims was exactly the corresponding question discussed in context of the CISG. The borderline between frivolous claims and uncertain rights was quite uncertain.

694. Dessemontet pointed out that the interaction between Art. 1.5 (1) (c) and Art. 1.8 referring to defences the debtor could set up until it received the notice of assignment would inevitably lead to an intermediary period between the assignment and the time the notice was received in which new defences could arise. This was the reason why Art. 1.5 (1) (c) refers not only to existing defences but also to future defences.

695. Fontaine suggested adding a new *lit.* (a) to Art. 1.5 (1) referring to the time the right existed which was the moment when the assignment would take effect. This new *lit*. (a) would be followed by the present *lit*. (a) as new *lit*.(b); the present *lit*. (b) would become *lit*. (c) and the present *lit*. (c) would become *lit*. (d).

696. Schlechtriem stated that it had to be made clear what the consequences of breach of warranty were. It was clear that a breach of warranty would lead to the obligation to pay damages. He stressed that it was the setting up of a defence that made the assigned right worthless and that this matter should be further addressed.

697. Finn asked what the practical difference was. He wanted to know what the damages would be if the debtor did not set up a defence. He preferred to leave it as it was as it did not seem to be reasonable to warrant another person's possible future conduct.

698. Schlechtriem asked whether a person who buys a right and, before paying the price, becomes aware that the debtor might have a defence is entitled to withhold payment or not.

699. According to Farnsworth the buyer is entitled to refuse performance.

700. Bonell asked whether the term "warranties" which had never been used in the Principles would really imply damages as the only possible sanction. He was especially concerned that a breach of warranty could be understood as a basis for other remedies, e.g. termination.

701. Schlechtriem agreed that also other remedies than damages were possible. Therefore, it should be made clear what the sanctions in case of breach are.

702. Fontaine stated that this led back to the question of terminology. In this context, the term "warranty" was dangerous because it had several meanings. Therefore, he was reluctant to adopt not only this term but also the term "representation" used in the UNCITRAL Draft Convention on Receivables Financing. He suggested adopting the term "undertaking" used in the Goode draft.

703. Finn reiterated his question concerning the relationship between the notion of entitlement to assign and that of prohibition on assignment.

704. Furmston answered that if the prohibition on assignment was effective, the assignor was not entitled to assign but if this prohibition was ineffective, the assignor was entitled to assign.

705. Schlechtriem proposed to ask Dessemontet what he considered to be an appropriate remedy in the case of a breach of an undertaking. He thought the Group should decide whether, in addition to damages, further sanctions should be provided for.

706. Dessemontet replied that under Swiss Law assignment was a bilateral agreement. Therefore, also the remedy of termination for non-performance was available.

707. Bonell stated that the consequence of this approach would be that the remedies provided for in the Principles for a breach of contract were also applicable with respect to a breach of the undertakings in the present context.

Art. 1.6: Unless otherwise agreed between them, the assignor or the assignee or both may give the debtor notice of the assignment.

708. Fontaine explained that Art. 1.6 should be read together with paragraphs 1 and 2 of Art. 1.7. Art. 1.6 should be seen as the starting point. As to the meaning of notice, he referred to Art. 1.9 of the Principles. He pointed out that the issue of silent assignments had not been addressed in the context of this provision. It would be better to discuss it in the context of Art. 1.7.

709. Bonell suggested discussing Arts 1.6 and 1.7 (1) and (2) together.

Art. 1.7 (1): Until receiving notice of the assignment, the debtor is discharged by paying the assignor [unless the assignee proves that the debtor was aware of the assignment].

Art. 1.7 (2): After receiving such notice, the debtor is discharged only by paying the assignee.

710. Fontaine pointed out that he was in favour of the text in square brackets in para. 1. The rule could also be that debtor is discharged only upon receipt of a notice. However, such an automatism would not be appropriate with regard to cases in which the debtor had not received a notice but knew of the assignment.

711. Schlechtriem reported that according to § 407 of the German Civil Code whatever the debtor undertakes vis-à-vis the assignor with a view to extinguishing its obligation (e.g. pay-

ment, settlement, etc.) is effective vis-à-vis the assignee if the debtor was unaware of the assignment. He wondered if such other possibilities were also covered by para. 1.

712. According to Bonell this was the case. However he suggested including an explanation in the Comments to the effect that "paying" was to be understood in a broad sense.

713. Schlechtriem disagreed with this proposal since the term "payment" did not normally encompass other ways of extinguishing a debt such as release or settlement.

714. Bonell felt that this was only a matter of terminology and doubted whether an appropriate term for all modes of extinguishing an obligation could be found.

715. Crépeau stressed that the essence of the provision was that the debtor was discharged of his obligation towards the assignor. He wondered if this statement would not suffice to meet the concerns expressed by Schlechtriem.

716. Schlechtriem disagreed. The assignment had operated with the consequence that the assignor was no longer the creditor. The new creditor was the assignee and the point was whether, and if so, what effects activities undertaken by the debtor vis-à-vis the assignor to extinguish its obligation should have vis-à-vis the assignee.

717. Finn reported that under Common Law, the assigned right remains in the assignor until notice is given. The legal right remains in the assignor as a trustee for the assignee. Only the assignor is entitled to sue on the basis of the right, while the assignee has no standing until notice is given. Therefore, the formula contained in brackets would make no sense under Common Law because notice has the effect of changing the legal ownership.

718. Schlechtriem stated that he considered the text in brackets necessary.

719. Komarov suggested replacing the word "payment" by the word "performance". This would cover monetary and non-monetary obligations.

720. Farnsworth stated that the present draft, including the text in brackets, fully harmonised with the law of New Jersey. However, he raised an additional point which had been debated in his country, i.e. whether the debtor is considered as being aware of the assignment even in cases where it receives a notice before the assignment is made. In practice this problem arises in cases where the standard terms contain a clause stating that the obligations arising from the contract would be assigned to a specific finance company. Normally the debtor would be specifically informed when the right has actually been assigned, but there were also cases where the debtor did not receive such a notice of the assignment. If the debtor believes that the assignor is still the creditor and performs its obligation to the assignor, may the finance company, which has become the new creditor, request from the debtor a second payment, arguing that the contractual clause was a sufficient notice of assignment? It was held that such a clause was not sufficient notice. He was not sure whether this was the correct result but won-

dered whether the same would apply under the Principles. He suggested addressing this issue in the Comments.

721. Schlechtriem stated that the question of whether or not the debtor was entitled to perform its obligation to the assignor depended on whether it was aware of the assignment or not. The latter question was a matter of the burden of proof. If the debtor had received a notice, the debtor could only perform its obligation to the assignee. Yet even if no such notice has been given, the assignee is entitled to receive performance by the debtor if it can prove that the debtor was aware of the assignment. The only effect of a notice is the improvement of the assignee's position because insofar as the debtor could no longer perform its obligation to any person other than the assignee.

722. Dessemontet was concerned that the reference to the awareness of the debtor might turn out to be too narrow. Therefore, he suggested adopting an approach based on the principle of good faith by stating: "... unless the assignee proves that the debtor was or should have been aware of the assignment". This would also mean that only the debtor who performed in good faith its obligation towards the assignor would be discharged.

723. Furmston stated that under English Common Law the results are the same as those provided for in paragraphs 1 and 2. Although the reasons for the rule were different, because notice was required to perfect the assignment, the rule was the same. With regard to the point raised by Dessemontet, he reported that it was the assignor's task to give notice to the debtor and if it did not do so, the assignee has to undertake everything necessary to protect its interests. He was therefore reluctant to provide for the escape clause in brackets and even more so to broaden it.

724. Finn expressed his incomprehension about obliging the debtor to perform its obligation to the assignee although neither the assignor nor the assignee had taken care to give notice to the debtor. At least the assignee could be supposed to have a strong economic interest in giving notice to the debtor. But if the assignee did not care about it, there was no reason to oblige the debtor, even if aware of the assignment, to act in the assignee's interest.

725. Bonell replied that this result could be justified by reasons of economy in the transfer of assets.

726. Finn stated that he considered some formality in the sense of communication as useful in order to guarantee a minimum degree of certainty about the matter.

727. Hartkamp agreed with the statements made by Finn. He pointed out that not only the framework of international commercial contracts in which the Principles were to be applied, but also the particular subject dealt with in the present draft Chapter required a rather high degree of certainty. He pointed out that Dutch law, although normally providing for a wide ranging scope of good faith, had not extended it to questions relating to assignments. If the assignee was allowed to prove that the debtor was aware of the assignment, the next step

would be to argue that the debtor could not have been unaware of the assignment which would be followed by the statement that the debtor should have known of the assignment. Therefore he favoured the deletion of the exception clause in brackets.

728. Jauffret-Spinosi stated that French law was extremely strict with regard to the formalities required for a valid notice. The mere knowledge of the debtor was irrelevant. Personally, she was inclined to support the view expressed by Finn and Hartkamp.

729. Bonell stated that the same restrictive approach had been given up by the Italian Civil Code of 1942 which provides for an escape clause similar to that contained in square brackets.

730. Herrmann stated that the view expressed by Hartkamp was shared by the majority of the members of the UNCITRAL Working Group on Assignment in Receivables Financing. In fact, the adoption of an escape clause as suggested by Fontaine in brackets was considered a step backwards. The reference to the knowledge of the debtor would lead to the question what kind of knowledge must be required etc. Therefore, a clear-cut solution was preferable in the context of international commercial contracts.

731. Bonell wondered what could be clearer than the reference to actual knowledge. He asked how a situation should be treated in which neither the assignor, nor the assignee but a third party gave notice to the debtor with the consequence that it could be proved that the debtor had received notice. Nonetheless, the debtor paid to the assignor. He doubted that such a consequence was acceptable.

732. Herrmann replied that to quote an extreme case where the consequences of a clear-cut system might be considered as unfair was not sufficient to justify a different rule. What had to be considered was the majority of cases in which it might be rather unclear who was entitled to receive performance. The need to find out whether the debtor was aware of an assignment in order to satisfy the burden of proof would provoke extremely high costs.

733. Fontaine stated that he still was in favour of the text in square brackets.

734. Crépeau asked if the deletion of the text in square brackets would lead to the exclusion of specific acknowledgements by the debtor. He considered the present provision with respect to the burden of proof as being too burdensome and costly but for the sake of clarity he would tend to recognise knowledge or specific acknowledgement.

735. Bonell feared that a reference to specific acknowledgement would give rise to additional questions, e.g. if the acknowledgement had to be express or could simply be implied.

736. Jauffret-Spinosi insisted that it was difficult to prove that the debtor was aware of the assignment. She was concerned that the burden of proof might turn out to be a source of difficulties.

737. Grigera Naón asked if a debtor could still be considered as having actual knowledge if it receives notice of assignment after payment has been made.

738. Uchida was concerned that the recognition of the possibility of acknowledging an assignment would cut off possible defences under Art. 1.8.

739. Fontaine disagreed. Neither the knowledge nor the acknowledgement by the debtor could be considered as a waiver with respect to its defences.

740. Crépeau was reluctant to refer to the knowledge of the debtor which was too burdensome to prove. However, he was in favour of admitting an acknowledgement by the debtor and cited Art. 1641 of the Civil Code of Québec: "An assignment may be set-up against the debtor and the third person as soon as the debtor has acquiesced in it".

741. In summing up Bonell stated that the Group had to choose one of the three proposals so far discussed. One was to delete the square brackets; the second was to delete the text in square brackets; and the third was to replace the actual knowledge requirement by acquiescence.

742. The Group decided by majority to delete the text in square brackets.

743. Farnsworth wondered what the situation would be if no notice was given and the assignor received payment but failed to transfer it to the assignee. A further warranty was needed in order to protect the assignee from the frivolous behaviour of the assignor. Theoretically the assignee could recover the sum due from the assignor on the basis of the duty of good faith, but the Group should be aware of the fact that under Anglo-American law the principle of good faith was not generally accepted. If it was intended to adopt a solution on the basis of good faith, this should be mentioned in the Comments.

744. Fontaine confirmed that the assignee was entitled to recover the money paid to the assignor. However he had not provided for a respective warranty because he considered such a result a generally recognised principle.

745. Farnsworth doubted if this could be considered a generally recognised principle. In any case since the situation is not expressly addressed in the present rule one might infer that the assignee was not entitled to recover the money from the assignor. Therefore this situation should be addressed at least in the Comments.

746. According to Schlechtriem the assignee's right to recover the payment from the assignor derived from the agreement of assignment between the two. This was the reason why

this case had not been expressly dealt with in the framework of Art. 1.5. Continental lawyers would consequently think of the law of restitution.

747. Farnsworth replied that the distinction between a breach of an undertaking and restitutionary claims were two different approaches which might lead to different results. The Restatement on Contracts had provided for a solution based on the breach of an undertaking. Therefore an explanation in the Comments was necessary.

748. Date Bah doubted that such an explanation was really needed. He argued that the assignment was made by mere agreement. Consequently, the assignor would commit a breach of contract if it took the money from the debtor without passing it to the assignee.

749. Bonell hesitated to consider the assignor's behaviour as constituting a breach of contract. He inclined to the opinion expressed by Schlechtriem that the assignor would hold an undue payment thereby violating a duty to return the money.

750. Dessemontet reported that the problem was not expressly addressed by the Swiss Code of Obligations and a solution has to be found by a reasoning *e contrario*. He shared Farnsworth's view that this issue had to be addressed explicitly. However, he considered this issue as belonging to Art. 1.4 rather than to Art. 1.7 because it concerned the relationship between assignor and assignee rather than the debtor's status.

751. Farnsworth replied that this was possible. In any case the drafting of the Comment would not be an easy task. He referred to the so-called "silent" or "non-notification" assignments which were often made for security purposes. In such situations the assignor received performance without committing a breach of an undertaking. Nor did restitutionary claims arise in such situations either.

752. Schlechtriem suggested adding a further undertaking to Art. 1.5 (1) according to which the assignor guarantees that it would not collect the performance due after the assignment.

753. Bonell was reluctant to provide for such an undertaking and drew the Group's attention to Art. 16 (1) (b) of the UNCITRAL Draft Convention on Receivables Financing: *"As between the assignor and the assignee, unless otherwise agreed, and whether or not a notification of the assignment has been sent: [...] if payment with respect to the assigned receivable is made to the assignor, the assignee is entitled to payment of whatever has been received by the assignor"*.

754. Farnsworth suggested addressing this issue in the Comments by stating that the assignor commits a breach of the duty of good faith to collect the money from the debtor without passing it to the assignee.

755. Fontaine asked if there were strong objections to including a provision based on Art. 16 (1) (b) of the UNCITRAL Draft Convention on Receivables Financing. The advantage of this approach would be to have an explicit and clear provision on this matter.

756. It was agreed to ask the Rapporteur to draft a provision based on Art. 16 (1) (b) which would be the basis for further consideration during the next session.

Art. 1.7 (3): However, if notice of the assignment is given by the assignee, the debtor is entitled to request the assignee to provide within a reasonable time adequate proof that the assignment has been made, otherwise the debtor is discharged by paying the assignor. Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

757. Dessemontet agreed with para. 3 but proposed to include also cases where there was a dispute as to who was entitled to receive performance, e.g. where it was disputed whether the assignment was valid or not.

758. Schlechtriem wondered whether this issue had not already been covered by para. 2 discharging the debtor.

759. Furmston was not entirely happy about the structure of the first sentence in para. 3 because the wording "otherwise the debtor is discharged by paying the assignor" was unclear. He supposed that what was intended was "if the assignee does not within a reasonable period provide adequate proof, the debtor is discharged by paying the assignor".

760. Herrmann referred to Art. 19 (6) of the UNCITRAL Draft Convention on Receivables Financing stating that "[...] the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment has been made and, unless the assignee does so, the debtor is discharged by paying the assignor". Furmston approved that formula.

Art. 1.7(4): If the same right has been assigned to two or more successive assignees, the debtor is discharged by paying in accordance to the first notice received [unless a previous assignee proves that the debtor was aware of that previous assignment].

761. Fontaine pointed out that the provision could also be positioned in the framework of the provisions on third party rights which still had to be drafted. However the Group had decided in Bozen to address this issue separately because it was the easiest of the matters related

to third party rights Also both the UNCITRAL Draft Convention on Receivables Financing and the Goode draft contained a provision on this matter. In any case the text in square brackets should be deleted because it was conceptually related to the text in square brackets in para. 1 which had been deleted.

762. Hartkamp was not entirely certain whether the text in brackets really should be deleted. He referred by way of example to the case of two assignments, one made in January, the second in March. The second assignee gives notice first, stating that its right derives from an assignment made in March. According to the proposed rule, the debtor would be discharged if it performs to the second. He wondered whether this rule should also apply where, before performing its obligation, the debtor receives a notice from the first assignee stating that a previous assignment had taken place in January or whether in such a case the previous assignment should not prevail.

763. Fontaine pointed out that a modification of the present provision was possible. However, he doubted if it was advisable to restrict the basic approach chosen in Art. 1.7 which referred only to the fact that a notice has been received or not.

764. Finn preferred to stay with the present approach which meant that the text in brackets should be deleted. The first assignee should be referred to its rights against the assignor on the basis of the undertakings.

765. Furmston wondered if there were problems with several partial assignments. Bonell added that also concurrent assignments for sale and assignments for security purposes should be taken into consideration.

766. Fontaine replied that if there were two successive assignments, one being an assignment for sale which was notified first to the debtor, that assignment should prevail. If however the assignment for security purposes was notified first, then this assignment should prevail.

767. Baptista pointed out that two different situations were being discussed. The first referred to cases in which the right was assigned successively in the true sense of the term, i.e. from one assignor to an assignee who assigned the same right to a third person. The second situation concerned cases in which the same assignor assigned a right subsequently to different persons.

768. Fontaine replied that in the present context, only the second kind of case was covered by the term successive assignments. Baptista replied that this was not obvious and should be made clear.

769. Schlechtriem asked how specific a notice must be to have a discharging effect in cases of partial assignments. This could become relevant in cases in which a right to payment arising from a sales contract was assigned without specifying that only a part of it was assigned.

770. Fontaine replied that the answer could be given in para. 3 where a further requirement referring to the specification of the extent of the assignment could be added. However, he hesitated to add such additional wording because this could give rise to the inclusion of even further requirements concerning the notice of assignment.

771. Schlechtriem admitted that he could not offer a clear-cut solution but he was reluctant to leave it undecided. It may be reconsidered in the final reading of the draft.

772. Finn asked if Schlechtriem would agree to the inclusion in the Comments to Art. 1.6 of a statement that notice of assignment should reveal the character of the assignment and not only the fact of it.

773. Bonell pointed out that such an approach would be in line with the notice of defects under CISG which required also a further specification of the defects.

774. Herrmann, having in mind Baptista's statement, recalled that the UNCITRAL Draft Convention on Receivables Financing used the term "subsequent assignments" instead of the term "successive assignments" as contained in the present draft. He recommended that the same term be adopted in the present draft since it made it clear that only cases of real subsequent assignments were addressed and not cases in which the same assignor assigned the same right to different persons. However there could be two separate provisions dealing with these two situations.

775. Huang asked whether the notice could be revoked. She referred to the Chinese Contract Act, according to which a notice cannot be revoked unless the assignee agrees.

776. In Fontaine's view the notice could not be revoked. If the party which had given notice discovered a mistake, it could inform the debtor of that mistake.

777. Bonell wondered whether Huang intended to refer to a more general issue, i.e. whether an assignment could be revoked. Huang agreed. Bonell replied that in his opinion such a possibility existed as long as third parties were not concerned.

778. Kronke guessed that the idea behind the approach chosen by the Chinese Contract Law was to make things extremely certain. Obviously, possible problems arising from the subsequent application of restitution law should be avoided. He appreciated that approach as an interesting policy decision.

779. Schlechtriem thought that, having attributed a kind of constitutive function to notice by deleting from Art. 1.7 (1) the text in square brackets, revocation of the notice should be admitted. The effect of such a revocation would be that the debtor would no longer be discharged by performing to the person specified in the notice. This could be stated in the Comments.

780. According to Finn this approach would come close to the effects of a notice under Common Law where a notice was needed in order to perfect the legal effect of an assignment, i.e. a notice was needed to make the assignee the legal owner of the assigned right. Putting aside the situation under Common Law, if the Group wanted to deal with the question as to whom the performance should be rendered after the revocation of the notice, this issue should be dealt with directly.

781. Fontaine commented that a revocation of a notice could make sense in cases in which an assignment becomes invalid. There was a provision to this effect in the Goode draft (Article 12.308): *"A debtor who performs in favour of the assignee in accordance with Article 12.303 is not affected by the invalidity of the contract to assign if he performs in good faith and neither knows or ought to know of such invalidity"*. Although one might have doubts with respect to the solution, he thought it might be advisable to discuss the situation.

782. Schlechtriem added that in cases of an assignment for security purposes, the debtor should be informed that the assignor had performed the obligation and that the assigned right had been re-assigned, i.e. that the notice was no longer valid. This aim could be reached by a revocation or a new notice setting aside the previous notice.

783. Bonell suggested addressing this issue in the Comments to Art. 1.7. Fontaine agreed and suggested reconsidering whether even a black letter rule on this issue was necessary.

Art. 1.8 (1): The debtor may set up against the assignee all defences from its contract with the assignor of which the debtor could avail itself against the assignor at the time notice of assignment was received.

Art. 1.8 (2): The debtor may set up against the assignee any right of set-off in respect of claims existing against the assignor at the time notice of assignment was received.

784. Fontaine pointed out that the underlying idea was that the situation of the debtor should not be worsened as a consequence of assignment. However it was difficult to determine which defences the debtor should be allowed to raise against the assignee. He had chosen a rather restrictive approach by referring to those defences which were available against the assignor at the time notice of assignment was received. Again, the time of notice was the decisive moment. However, as already discussed, there might also be defences which were not available at the time or receipt of notice but which came up later, e.g. the right to withhold performance when the breach of contract occurs after the notice has been given. This problem could be covered by different formulas. Thus Art. 20 (1) of the UNCITRAL Draft Convention on Receivables Financing and Art. 9 (1) of the UNIDROIT Convention on International Factoring refer to "all defences arising from the contract of which the debtor could avail itself if such claim was made by the assignor". More analytic is Art. 12.304 of the Goode draft: *"(1) The debtor may set*

up against the assignee all substantive and procedural defences to the assigned claim of which he could have availed himself against the assignor. (2) The debtor may also assert against the assignee all rights of set-off which would have been available against the assignor under chapter 15 or under the applicable law in respect of claims against the assignor: (a) existing at the time of the debtor's receipt of a notice of assignment, whether or not conforming to paragraph (1) (a) of Article 12.303, or (b) closely connected with the assigned claim".

785. Bonell reminded Fontaine that it had always been the Group's policy to conform as far as possible to solutions adopted in existing international instruments and wondered whether this should done also with respect to the important question of the available defences.

786. Fontaine replied that he was probably influenced by his own legal system, yet perhaps it was also logical to say that from the time the notice was given, the assignment became effective towards the debtor and the obligor's new obligee was the assignee. Therefore one could conclude that the assignee received the right as it existed at the time notice had been given, while everything that happened after that moment could not affect the assigned right. This favoured the assignee but not the assignor and one could also argue that this approach ran counter to the general rule not to worsen the obligor's situation. The problem should be discussed in the context of clauses contained in the contract between assignor and obligor obliging the latter not to raise any defences against a possible assignee. Whatever the solution chosen, it would influence the value of the asset and thereby the costs of financing as well. A balance of interests had to be found.

787. According to Furmston there could be cases in which the present rule would lead to unsatisfactory results. One was that of an assignment made at the beginning of the performance of a contract, e.g. the right to be paid under a construction contract assigned at the beginning of construction followed by endless disputes about the quality of the work. In order to avoid such difficulties, it is quite common to prohibit such assignments. It would not be acceptable to oblige the obligor to pay the assignee when the obligor was conducting simultaneously disputes with the assignor about the quality of the work. Particularly, as the assignor's financial ability was tied up by the assignment.

788. Schlechtriem expressed his opinion that if the broader approach adopted in the UNCITRAL draft Convention on Receivables Financing and also in the UNIDROIT Convention on International Factoring was adopted by the Working Group, a further undertaking, granting that no further defences would be raised in the future, had to be provided for. In other words, if the obligor was allowed to raise later defences, then the assignee should be protected against the assignor.

789. Fontaine pointed out that the present text of Art. 1.5 (1) (c), stating that "the debtor does not and will not have any defences or rights of set-off" was inconsistent with the solution

proposed in Art. 1.8. According to Art. 1.5 (1) (c), also future defences were already covered.

790. Farnsworth agreed with Furmston's statement. He pointed out that if in Furmston's example the right to payment was assigned at the very beginning of the contract and the notice thereof was given immediately, the obligor would be able to object that the building had not been built yet although it would have been built later. He admitted that this might not be the intention behind this rule but these were its practical consequences. Consequently, the text of the rule should be harmonised with what was intended.

791. Fontaine reported that a similar case had actually occurred in Belgium. The right to payment under a construction contract had been assigned immediately after the conclusion of the contract followed by the notice thereof. When the payment came due, the obligor refused payment since in the meantime problems had occurred with assignor. The assignee objected that there had been no defences at the time of notice. The question to be considered was whether the defence had virtually existed at the time of notice.

792. It was decided to ask the Rapporteur to reconsider the draft provision in the light of the Group's observations. Fontaine asked which of the two models, i.e. the Goode draft or the UNCITRAL Draft Convention on Receivables Financing, should be taken as a guideline.

793. Date Bah preferred a solution allowing the debtor to raise all defences available as provided for in the Goode draft. Finn also favoured the broadest solution.

794. Uchida pointed out that there were also cases in which a time limit could be useful. He thought of cases concerning the right to withhold performance.According to Japanese law this right existed even before notice was given because it was based on a bilateral contract. The same was true with respect to the right to terminate with the consequence that even if the assignor failed to perform after notice was given, the obligor would be entitled to terminate the contract because the right to terminate the contract already existed before the time of notice. Such defences, as well as later agreements between assignor and debtor leading to a release of the debtor, should be excluded.

795. Schlechtriem thought that this problem could be overcome by understanding the term "paying" in Art. 1.7 in a wide sense.

796. Bonell wondered if the kind of cases described by Uchida could really occur. Hartkamp stated that cases of this kind had occurred in the Netherlands where banks had forgotten that they had already assigned the concerned right. Bonell doubted whether the defences in these cases were really available.

797. Fontaine commented that the latter statements demonstrated the danger of allowing the debtor to raise all possible defences. Schlechtriem answered that such a risk was in effect reduced by the undertakings given by the assignor.

798. Bonell suggested choosing between the all embracing approach adopted by the Goode draft and the solution contained in the UNIDROIT Convention on International Factoring referring to "all defences arising from the contract of which the debtor could avail itself if such claim was made by the assignor".

799. Komarov was convinced by the arguments given by Fontaine and favoured the more restricted approach. Schlechtriem did not agree. Since assignment could take place without the participation of the debtor, the balance of interests and the general principle that the assignment should not to worsen the debtor's situation required the preservation of all defences available to the debtor. Furmston, Hartkamp and Herrmann agreed.

800. In Bonell's view this approach could be taken by using the formula contained in the UNIDROIT Convention on International Factoring but deleting the reference to the contract: "All defences of which the debtor could avail itself if such claim was made by the assignor". Farnsworth agreed but was concerned whether there was a common understanding of the term "defences". He suggested addressing the meaning of the term in the Comments.

801. Schiavoni pointed out that in international construction contracts the main contractor often assigns its rights concerning the warranty of equipment supplied by supplier X from country A with a view to installing it in a building to be constructed in country B. Supposing the supplier is Italian who supplies a gas turbine to a French main contractor doing the works in Egypt. The Italian supplier is likely to rely, as far as the settlement of possible disputes with the French main contractor is concerned, on a court other than that competent to settle disputes arising in connection with the works of the French main contractor which may well be an arbitral tribunal. If the Egyptian assignee starts proceedings against the Italian supplier, the latter would be surprised to have to defend itself before a court it had never thought of. This was a very frequent problem of international construction contracts which was even more complicated by the additional difficulties related to multi-party arbitration. The issue should be dealt with also in the context of general rules of contract law.

802. Baptista felt that the Group should take into account the old Roman principle that one could not assign more than one had. But this was exactly the consequence of the present rule. The result would be to restrict the debtor's relevant defences.

803. Kronke considered the problem raised by Schiavoni a very important one but he suggested that it not be addressed in the Principles. In his view most legal systems would consider the question of the validity of a forum selection/arbitration clause as a matter belonging to procedural law.

804. Schiavoni replied that that one possible answer to the problem raised earlier was that the entire contract between the supplier and the main contractor was transferred from the main contractor to the client. This could be addressed in the Principles.

805. Bonell suggested coming back to this issue during the discussions on the transfer of contracts.

806. Fontaine pointed out that the Goode draft intended to cover also forum selection clauses by referring also to procedural defences. He cited Illustration 3 stating: "*S agrees to sell goods to B, and then assigns his rights under the contract to A. The contract contains a provision that all disputes are to be referred to arbitration. There is a dispute as to the quality of the goods and B refuses to pay A the price. A sues B to recover the price. B is entitled to ask that the dispute be referred to arbitration in accordance with the contract*."

807. Hartkamp commented that this approach conformed to Dutch law. In the preparatory work on the New Civil Code it is expressly stated that the forum selection/arbitration clauses belong to the defences the obligor could raise against the assignee.

808. According to Bonell this was a strong argument in favour of addressing this issue also in the Principles.

809. Kronke feared that the envisaged solution could not work with respect to forum selection clauses governed by Art. 17 of the Brussels or Lugano Conventions which provide for special form requirements. With respect to arbitration clauses one would have to justify this approach on the basis of a contractual qualification of arbitration. However the modern trend was to equalise courts and aribtral tribunals.

810. Bonell did not share Kronke's view as even according to Art. 17 of the Brussels Convention an unwritten forum selection clause could be valid if this was in accordance with the relevant trade usages. He asked Herrmann what was the actual state of work on the reconsideration of the formal requirement for arbitration agreements provided in both the 1958 New York Convention and the 1985 UNCITRAL Model Law.

811. Herrmann replied that there was no concrete reasoning yet. The question of assignments and other reasons for changes of parties in international arbitration was on the agenda in the context of the revision of Art. 2 of the UNCITRAL Model Law. As to the New York Convention, there was no answer to this kind of problem in the Convention as such. Personally he disagreed with Kronke's view that modern legislation on arbitration tended to equalise arbitration tribunals and State courts. Furthermore, he did not consider this a decisive point. He pointed out that both the Brussels Convention with respect to foreign selection clauses and the New York Convention with respect to arbitration clauses provided for formal requirements. He was in favour of addressing this issue in the Principles even if though there was little chance that such provisions would be honoured.

812. Schlechtriem stated that arbitration clauses or choice of forum clauses should have effect despite the assignment. This might be considered a very dogmatic approach but the obligation in question was shaped by the contract from which it arose. If the contract con-

tained a choice of forum clause or an arbitration clause, these clauses would be part of the obligation. This would not be changed by the assignment. Therefore, he was in favour of covering also procedural defences. However, he was in favour of addressing this issue in the Comments.

813. Kronke liked the idea that an obligation was shaped by ancillary agreements. However, he wondered if it was advisable to put something in the Principles on which one could not rely because the courts would not honour it.

814. Schlechtriem doubted that the courts would not honour such a provision. With regard to German courts, he guessed that they would honour a respective provision on condition that the formal requirements were fulfilled.

815. Schilf added that the European Court of Justice had recently given effect to a choice of forum clause contained in a bill of lading as a trade usage according to Art. 17 Brussels Convention (European Court of Justice, 16 March 1999 - Rs. C-159/97 Trasporti Castelletti Spedizioni Internazionali SpA/Hugo Trumpy SpA = EuZW 1999, issue 14, p. 441 - 444).

816. Hartkamp supported the view expressed by Schlechtriem but preferred to provide for a statement to this effect in the black letter rules in the interests of clarity. Farnsworth agreed.

817. Baptista reported that Brasilian law contained a provision that he considered useful according to which the debtor has to call upon the assignor in the same suit in which it raised defences again the assignee. Otherwise, it would lose any rights it had against the assignor. Fontaine commented that this might be useful. However, he did not find this rule in any other legal system.

818. Bonell concluded that there seemed to be a majority in favour of including also procedural defences in the black letter rules.

819. Fontaine raised the problem of waiver of defence clauses. Farnsworth commented this could be left to party autonomy without any further provisions on this issue in the black letter rules. A mention in the Comments would be sufficient. Schlechtriem expressed his position that this issue was of a general character. Therefore it should not be addressed, at least not in the black letter rules, in the context of assignment only. Otherwise it could be inferred that waiver of defences was different in the context of the other chapters. Bonell recalled that Finn had been asked to prepare a chapter on waiver in general in which this issue could be addressed.

820. Paragraph 2 was kept subject to further discussions.

Art. 1.9 (1): Accessory rights, including interests due, are transferred to the assignee.

Art. 1.9 (2): Underlying securities are transferred to the assignee without a separate act of transfer, unless the law governing the security provides otherwise.

Art. 1.9 (3): The assignor is entitled to take all necessary steps to allow the assignee to enjoy the benefit of accessory rights and securities.

821. Fontaine explained that this provision was based on the same principle as the provision discussed before with respect to defences. Its text was inspired by Art. 11 of the UNCITRAL Draft Convention on Receivables Financing.

822. Bonell asked if the reference to the law governing the security in para. 2 should not be deleted because there was already a reference to mandatory rules in Art. 1.4 of the Principles.

823. Schlechtriem, while agreeing in substance with the proposed rule, wondered what the effects of partial assignments on the transfer of securities would be, i.e. if the securities were split up or not.

824. Komarov wondered whether the general statement contained in para. 1 was really needed as it was a widely accepted principle that required no further confirmation. An explicit confirmation in this context might imply that there were different solutions in other cases than assignments. By deleting para. 1, also the problems raised by Schlechtriem could be overcome.

825. Finn suggested deleting para. 1 and para. 3. Para. 1 could be included in the definition section by stating that a right included accessory rights. This statement could be followed by the statement on partial assignments which would lead to the consequence that in such cases, also the securities were transferred partially. As to para. 3, he felt that it was an application of the general duty to co-operate stated in Art. 5.3 of the Principles. Crépeau supported this proposal

826. Fontaine preferred having an explicit provision on accessory rights. He pointed out that the same kind of rule could be found in Art. 384 of the Russian Civil Code. However, he agreed with the idea of including the general statement of para. 1 in the definition section.

827. Farnsworth proposed to move Art. 1.9 (3) to Art. 1.5 dealing with undertakings because the matter addressed in para. 3 was close to the nature of undertakings. According to Schlechtriem however Art. 1.9 should also mention the principle because otherwise it would be too narrow. Fontaine agreed with both suggestions.

828. Huang stated that she had assumed that Art. 1.3 also applied to accessory rights with exception to accessory rights of a personal character. Therefore, she wondered why there were special provisions on it. Fontaine replied that an explanation could be given in the Comments.

829. Bonell asked for further statements on the question raised by Schlechtriem, i.e. whether interest could be transferred separately. Fontaine answered in the affirmative. Hartkamp agreed, but pointed out that interest due could not be considered as an accessory as the present draft did. If however, for the purpose of these rules accessory rights should also include interests, a further provision should be added stating that the parties may agree that certain accessory rights will not be transferred automatically. Bonell agreed but wondered if there was a need for a respective black letter rule in the light of the party autonomy as a general principle.

830. Bonell asked Fontaine to express his views concerning the effects of partial assignments on accessory rights. Fontaine replied that he agreed that if the securities were separable they would be split up, but found it difficult to find appropriate language to express this idea. Schlechtriem thought that the solution should be based on the principle of party autonomy. As a rule, separable securities should be split up in proportion to the partial assignment. With respect to inseparable securities, parties should decide whether they are remain with the assignor or are to be transferred to the assignee. If there was no such agreement, the court will have to interpret the contract. However the issue should be addressed in the Comments only.

Art. 1.10 (Effect of assignment towards third parties other than the debtor)

831. Fontaine explained that Art. 1.10 should address the effects of assignments towards other parties than the creditor, debtor and the assignee. Although one might consider this issue as being a matter of the applicable law, he was in favour of addressing this issue in the Principles. Also the UNCITRAL Draft Convention on Receivables Financing contained in the Annex thereto provisions for a registration system. Likewise the Goode draft dealt with the issue in Art. 12.401 (3): *"In the event of the assignor's bankruptcy, the assignee's interest in the assigned claim has priority over the interest of the assignor's trustee in bankruptcy or other representative and creditors, subject to: (a) conformity with any publicity requirements prescribed by the law of the bankruptcy, or by any law determined as applicable by the law of bankruptcy, as condition of such priority; and (b) any special rules of bankruptcy law relating to the subordination of claims or the avoidance of transactions."*

832. Bonell asked Herrmann and Hartkamp for further explanations of these rules.

833. Herrmann explained that the Annex to the UNCITRAL Draft Convention on Receivables Financing contained two possible mechanisms, one based on a registration system, the other based on the time of assignment. States would be free to adopt one or the other solution. There was no substantive rule in the Draft Convention itself because no agreement could be reached as to the content of such a rule. Therefore the Draft Convention provided only a solution based on private international law rules, a solution which he considered hardly satisfactory. There was a trend towards substantive unification in the field of bankruptcy law. How-

ever, still many difficulties had to be overcome. From his point of view, the time was not ripe yet for a registration system. He expected that especially notification countries like England would adopt the reference to the time of assignment.

834. Hartkamp reported that Art. 12.401 of the Goode draft had been the subject of lively discussion. Personally, he disagreed with the provision because it stated what was obvious. Moreover he was not sure that it had been accepted by the majority of the Commission on European Contract Law. Therefore the Working Group should not pay too much attention to it.

835. Bonell stated that there were three possible solutions. The first was not to address this issue at all. The second was a private international law solution. The third was to draft a substantive rule. Clearly this would be the most ambitious solution. He felt that the two alternative solutions provided in the Annex to the UNCITRAL Draft Convention on Receivables Financing represented a valid basis for further discussions.

836. Herrmann was concerned that none of these solutions would turn out to be appropriate. First, because even the UNCITRAL Working Group had been unable to find a consensus on this question. Second, because the envisaged provision had to deal with the various aspects related to the effects of assignments on third parties under the Principles. Much depended, in this respect, on the intended addressees of the Principles and/or the circumstances in which the Principles would be applied. He feared that there was a great danger of conflicts with domestic law. Bonell agreed.

837. Farnsworth recalled that under Common Law assignment was considered as a transfer of property. If the effect of the assignment under the Principles were to be the same, this would mean that also under the Principles assignment would be considered as valid in cases of bankruptcy.

838. Schlechtriem agreed that the Goode draft merely stated the obvious. He recalled that the Working Group had decided to give assignments of future rights a retroactive effect. The consequence was an intermediary period between the time of the agreement to assign and the moment the right came into existence. It had been agreed to reconsider the retroactive effect in the context of the effects of assignments on third parties. He thought it would be more than stating the obvious to state that an attachment undertaken by a third party with respect to the assigned future right during this intermediary period would have no effect.

839. Farnsworth understood the solution adopted by the Working Group with regard to future rights in the sense that the assignment operated at the later moment. The consequence was that the right would come into existence in the asset of the assignor without being the property of the assignor.

840. Fontaine admitted that some aspects related to property law were involved but for the same reason also successive assignments could have been left out. He supposed that if there

had been no interference with the law of bankruptcy, the Group could have made notification a condition for the effectiveness of an assignment vis-à-vis third parties as it had provided for with respect to successive assignments.

841. Schlechtriem suggested providing that assignments under the Principles would be effective vis-à-vis third parties at the time they become effective without further requirements such as notification or registration. Bonell suggested adding the words "unless other relevant rules prevail and provide otherwise".

842. Fontaine asked if this rule should be a black letter rule. Schlechtriem replied that he preferred to mention it in the Comments. Fontaine asked where this Comment should be placed. Schlechtriem and Bonell considered the comments to Art. 1.4 as the appropriate place to deal with this issue.

843. Finn asked Fontaine what the intention behind the several references to silent assignments was. He saw no need for it. Fontaine answered that this issue had been discussed previously. Silent assignment meant an assignment without notification to the debtor. Some remarks could be included in the Comments. He pointed out that in cases of silent assignments, the debtor would be entitled to render performance towards the assignor whereas the assignee was entitled to recover the performance from the assignor.

844. Farnsworth recalled that this issue was currently under consideration by a group of experts in the context of the revision of Article 9 of the Uniform Commercial Code. He wondered whether it was possible to submit the revised draft to be prepared by Fontaine to this Group for an opinion. Fontaine answered that he could submit a tentative draft of the black letter rules in a month and a half. Crépeau asked if this draft could also be distributed to other members as well. Bonell agreed and invited the members to consult experts in their legal systems on matters discussed in the Working Group. Fontaine commented that this approach would lead to further discussions on issues which had already been decided but that the reversal of all decisions taken so far should be avoided.

III. AUTHORITY OF AGENTS

845. Hartkamp took the chair.

846. In introducing his revised draft Chapter on Authority of Agents (UNIDROIT 1999, Study L – Doc. 63), Bonell recalled that he had been asked to prepare a revised draft reflecting the changes decided in Bozen. With respect in particular to the "undisclosed principal doctrine" he had been asked to prepare two drafts, one including the doctrine, the other excluding it. The two alternatives would have to be discussed also in the light of the comments prepared by Professors D. DeMott and F Reynolds (UNIDROIT 1999, Study L – Doc. 63/Add. 1). He pointed out that the two experts had commented also on other issues, some of which had

already been decided by the Group. It was up to the Group to decide whether it wanted to reconsider them in the light of these remarks.

847. Hartkamp agreed that the main issue to be discussed was the inclusion of the undisclosed principle doctrine. The comments by DeMott and Reynolds had been solicited in order to see whether the inclusion of this doctrine was really needed from the point of view of the Common Law systems.

848. Bonell asked for permission to present briefly the changes made in conformity with the decisions taken in Bozen.

849. Hartkamp consented.

850. Concerning Art. 1, Bonell pointed out that only the words "by or" had been added. The new wording in Art. 6 reflected the Group's decision to grant only reliance interest in cases of a *falsus procurator*, and was inspired by the formula used in the Restatement on Contracts for cases of mistake. The new wording in Art. 7 had already been discussed and decided in Bozen as had the changes to Art. 10.

851. Hartkamp asked for comments on Art. 1. The provision was accepted as drafted by the Rapporteur.

852. With respect to the modification in Art. 6, Hartkamp asked what the difference was with respect to the previous version. Bonell replied that some members had objected that the original wording of this provision could lead to the conclusion that expectation interest was awarded.

853. Uchida commented that he was in favour of granting expectation interest. Hartkamp asked Bonell if there had been a majority decision in favour of reliance interest. Bonell confirmed. He recalled that both DeMott and Reynolds had expressed a preference for awarding expectation interest.

854. Farnsworth agreed with the two experts. Hartkamp added that under Dutch law expectation damages were awarded. Schlechtriem explained that under German law the amount of damages depended on the agent's knowledge of its status. If the agent acted in good faith or unaware of its lack of authority, it was liable for reliance interest. If the agent was aware of its lack of authority, it was liable for expectation interest. He added that the Geneva Convention on Agency in the International Sale of Goods provided for expectation interest, too.

855. According to Farnsworth the discussion showed that there was good reason to reopen discussion on Art. 6.

856. Finn wondered what the policy decision behind a provision awarding expectation interest could be. The situation addressed could be characterised in terms of tortious terms as being tantamount to misrepresentation being an action for damages. If this approximation with tort law was made, it was difficult to understand why expectation interest should be awarded.

857. Bonell replied that he considered the issue of *falsus procurator* as being close to the concept of a breach of warranties. He explained that one could consider the activity of an agent as including an implied warranty to be entitled to act in the name of a third person. From a comparative point of view both solutions - reliance interest and expectation interest - enjoyed strong support in domestic laws.

858. Schlechtriem thought that the idea of considering tort law as a fallback line might turn out to be deceptive because many domestic laws did not grant compensation for an economic loss in cases of negligence. Therefore, there had to be an explicit provision in this context.

859. Finn repeated his question as to which policy argument could be brought up in favour of expectation interest. Hartkamp answered that the policy argument in favour of awarding expectation interest was the protection of the third party which believed to have concluded a valid contract with the principal.

860. Furmston thought that in English law there was the theory of a collateral contract. Therefore he supposed that expectation interest would be awarded. However, he was not aware of any cases on this matter.

861. Hartkamp commented that there had been a Supreme Court decision on this matter. However the difference was not significant because also under the present text, if the other party proved that it would have concluded another contract, the same amount as reliance interest would be awarded.

862. Schlechtriem stated that if expectation interest was to be awarded also in cases of an innocent agent, the agent might be entitled to recover the damages from the principal on the basis of fraud. Therefore, a clear cut solution in favour of expectation interest was acceptable.

863. A vote was taken and it was decided by majority to opt for expectation interest. The respective provision should be formulated in accordance with the first draft presented in Bozen which had been based on Art. 16 of the Geneva Convention on Agency.

864. No objections were raised to the modification of Arts. 6 and 7.

865. With respect to Arts. 3 and 4, Bonell explained that there were two alternatives. One was to keep both Arts. 3 and 4. This would mean that two different situations would be addressed. The first, addressed in Art. 3 (1), was that of an agent acting with a third party which knew about the agent's status. The second, addressed in Art. 4 (1), was that of a third party which neither knew nor ought to have known that the agent was acting as an agent: the so-

called “undisclosed principal situation”. In such cases paragraph 2 provides for the possibility of a direct action by the third party vis-à-vis the principal, and vice versa, if the agent fails to perform its obligations. This provision had been taken from the Geneva Convention on Agency in the International Sale of Goods were it had been adopted in order to overcome the differences between Civil Law and Common Law systems with respect to this kind of case.

866. Hartkamp stated that the question to be decided was whether Art. 4 should be kept.

867. Bonell pointed out that both experts had agreed that the undisclosed principal doctrine was not an essential element of the law of agency. Therefore they saw no need to address this situation in the draft Chapter. He added that DeMott was in favour of keeping the third party’s direct action against the principal as provided for in Art. 4 (2) (b). However this might give rise to difficulties. To admit the third party’s right of direct action against the principal would be asymmetrical if the principal’s right of direct action against the third party was given up. He doubted that there were sufficient reasons to justify such a solution.

868. Finn expressed his strong reluctance to adopt the undisclosed principal doctrine. He was also reluctant to adopt the approach favoured by DeMott. Her arguments were not convincing.

869. Farnsworth hesitated to reject the idea of the undisclosed principal doctrine from the outset. Before deciding whether this doctrine should be adopted, he suggested to examine how Civil Law systems cope with situations similar to that in the *Grinder* case mentioned by DeMott.

870. Hartkamp asked Farnsworth to explain this case. Farnsworth replied that this case dealt with the generic situation in which a third party had dealt with an actor over some time when, without informing the third party, the actor transferred its business assets to a newly formed limited liability vehicle, and continued to deal with the third party as an agent of the new company. He stated that this was a troublesome case, though he did not exclude that in other legal systems similar cases might be solved on the basis of a doctrine other than that of the undisclosed principal.

871. Finn reported that there was a decision of the Australian High Court on this point. The Court had decided that a change of business had to be notified to the third party. Otherwise, the change of business would have been a ground for an estoppel.

872. Furmston commented that it was always difficult to analyse a case one had not read. He assumed that the case mentioned by DeMott dealt with a situation in which the building contractor did not tell the supplier that it had been incorporated and was no longer personally liable. Provided that the supplier could always sue the contractor personally, he assumed that the question must have been whether the supplier could sue the company that had the money as well. He felt that the company should not be permitted to escape from the payment. The

question was how this could be achieved and it was up to the Civil Lawyers to tell how their legal systems cope with such situations.

873. Hartkamp asked if the situation described by Furmston fell within the scope of Art. 4. Furmston replied that he supposed that this was the case. Farnsworth confirmed that DeMott spoke about this case in the context of the undisclosed principal doctrine.

874. Schlechtriem answered Furmston's question by stating that under German law, two obstacles had to be overcome. The first was the fact that the agent in the *Grinder* case obviously did not have authority to act on behalf of the company. This could be overcome with the help of the rules on indirect representation by assuming an implied authority. The second obstacle was that the agent did not act in the name of the company. However, if a specific transaction of an agent was considered as being related to a certain business or a company, the agent's acts were supposed to be made in the name of the company. The *Grinder* case would obviously fall under this rule.

875. Bonell's understanding of the *Grinder* case was close to that expressed by Furmston. He pointed out that the agent obviously intended to escape from his personal liability by setting up a company holding its business assets. He mentioned that the possibility of suing the undisclosed principal was also known, though in rather restricted terms, in Civil Law systems in the framework of commission agency.

876. Hartkamp explained that Dutch law offered at least three possibilities outside the law of agency to sue the company in the generic situation of the *Grinder* case. If the company knew about the actor's conduct, it would be liable according to the rules of tort law. There would also be the possibility to sue the company on the ground of the disadvantagement of creditors. Finally, there was also the possibility of applying the rules on unjust enrichment. Bearing in mind this possibility and the insufficient knowledge concerning the *Grinder* case, he was reluctant to take *Grinder* as a basis for a decision to keep Art. 4.

877. Grigera Naón was also reluctant to adopt the undisclosed principal doctrine. His criticism was based on the fundamental alteration of interests caused by the undisclosed principal doctrine.

878. Furmston supposed that English courts too could cope with such cases even without the undisclosed principal doctrine.

879. Farnsworth suggested that Bonell make further comparative research on the *Grinder* case with a view to seeing how such situations are commonly dealt with both in Common Law and Civil Law systems.

880. Finn was against Farnsworth's proposal. He pointed out that the doctrine of undisclosed principal was rarely applied by courts and therefore apparently had no great practical importance. The Principles should not deal with legal doctrines of little practical relevance.

881. Bonell asked whether the Group wanted to discuss also the other issues raised by DeMott and Reynolds. Hartkamp was reluctant to reopen the discussion on matters already discussed. Farnsworth agreed.

882. Bonell pointed out that Art. 3 (2) had been criticised by DeMott because it allowed the agent to determine the person benefiting from the transaction. This criticism was shared by Reynolds. Bonell pointed out that the provision was intended to take into account what was known in Civil Law systems as commission agency.

883. Farnsworth guessed that this criticism was obviously the result of a misunderstanding caused by the present draft. Schlechtriem agreed. Bonell was asked to reconsider the language used in Art. 3 (2) in order to stress the idea behind the provision.

884. Bonell also referred to the DeMott's remarks on the question as to whom ratification must be directed.

885. The Group agreed to ask Bonell to reconsider this issue and to prepare a new draft provision to be inclduded in Art. 9.

886. As to her comments on the question as to whether the third party may withdraw from the contract prior to ratification, Uchida recalled that the proposal to address this issue in the Principles had been rejected in Bozen by a 7:5 majority. In the light of DeMott's statements, he was in favour of reconsidering this topic. El Kholy supported this proposal. However, since no further voices were raised in favour of addressing this issue in the Principles, it was decided not to come back to it.

887. Bonell also referred to the critical comments by Reynolds on Arts. 7 and 10. The Group decided not to reopen the discussion on these provisions. With respect to the remarks made by Reynolds with respect to the wording "acting in the name of" in Art. 1, Bonell pointed out that, while the Principles of European Contract Law make a sharp distinction between direct and indirect representation based precisely on that formal requirement, under the Principles it was practically of no relevance whatsoever since the direct effect is no longer linked to that requirement.

IV. THIRD PARTY RIGHTS

888. Bonell took the Chair again.

Art. 1: Subject to the provisions of this chapter, a contract creates rights and duties only between the parties to the contract.

889. In presenting his draft rules on third party rights (UNIDROIT 2000 – Study L – Doc. 66) Furmston explained that Art.1 had been introduced in order to make it clear that there were several situations in which a third party was not entitled to enforce somebody else's contract. He wondered if it was necessary to define what was meant by the term "parties".

890. Hartkamp reported that the old Dutch Civil Code had contained a provision similar to Art.1. It had caused much trouble because it turned out to be an obstacle for further development of the law. Therefore, he suggested deleting the article. Thereby, also the definition of a party would become unnecessary.

891. Crépeau supported this suggestion. He pointed out that the present draft Chapter would be included in or around Chapter 5, dealing with the content of contracts. As to the concept of parties, it had already been expanded so as to include those persons who, though not originally parties to the contract, subsequently become parties by virtue of succession by particular title. He considered it sufficient to start with Art. 2 stating that a contract may benefit third parties if they wish to do so.

892. Fontaine was in favour of keeping Art. 1 because it was such a basic principle that it should be stated expressly before dealing with the exceptions. However, he agreed with what had been said before about the dangers of such a statement. This difficulty could be overcome by mentioning some of the exceptions in the Comments, thereby clarifying that the meaning of the term "party" could in certain situations be broader.

893. Komarov agreed. He suggested deleting the term "rights" because duties could only be created by and with respect to the parties themselves.

894. Bonell admitted that one might object to the inclusion of duties in the context of a chapter dealing with third party rights. However, he was reluctant to cut off the general trend towards the recognition that the parties to a contract may have special duties vis-à-vis third parties (e.g. the German doctrine of *Vertrag mit Schutzwirkung zugunsten Dritter*).

895. Schlechtriem asked how subrogation should be qualified. Fontaine replied that subrogation was a kind of assignment.

896. Finn stated that he had reservations about Art.1. He shared Hartkamp's concern that that sort of statement of principle might be overruled by the social-economic development, thereby becoming an obstacle for the development of the law. Schlechtriem agreed and suggested putting the statement of principle at the beginning of the Comments using the wording: "In general, contracts create rights and duties between the parties. But since in the third party beneficiary situation special provisions are necessary, the following chapter is dealing with these special provisions". Thereby, future developments would not be excluded.

897. Furmston commented that he could not imagine other exceptions to the principle contained in Art. 1 as those addressed in the following provisions. He recalled that the English

Law Commission had originally suggested for the new English legislation a provision stating that the courts should be free to invent any other exception they consider appropriate. Parliament however did not follow this suggestion. He thought it was necessary to have in the draft a provision along the lines of Art. 1 because it was the generally accepted starting point. He could also accept a statement to this effect in the Comments. The consequence of the statement in the present form was that it inhibited to some extent the development of further exceptions in addition to those referred to in Arts. 2 and 3.

898. Jauffret-Spinosi was in favour of keeping the present rule.

899. Crépeau by contrast pointed out that Civil Law and Common Law, having abandoned the requirement of consideration, had for the first time a common ground for allowing contracts to confer rights on third parties. Therefore it would be preferable to have this remarkable innovation stated at the beginning and the present statement placed in the Comments.

900. It was decided by an 8:7 majority to put the general statement contained in Art. 1 as a preliminary remark in the Comments.

Art. 2: If the parties to a contract expressly state that the contract, or some obligation under it, is intended to benefit a third party that third party shall be entitled to enforce the contract or obligation.

Art. 3: If one of the commercial purposes of a contract is to benefit a third party, the third party shall be entitled to enforce the contract [unless the contract expressly provides to the contrary].

901. Furmston explained that both provisions had to be read together. He did not expect any objections to Art. 2. Art. 3 was however much more difficult because it was difficult to find appropriate language indicating what was beyond an express statement. Domestic laws differed greatly on this point. As to the text in brackets, he suggested deleting them. In the context of the parties' intention, three questions had to be answered: first, whether the parties' intention to benefit a third party should be decisive; second, whether the parties' intention not to benefit a third party should also be expressed; and third, what the test for drawing the line between an express and implicit intention should be. He suggested that this should be done by giving some examples relating to both cases.

902. Grigera Naón stated that he had difficulties with Art. 3 from the perspective of international contract law. The consequence of this provision would be that in the absence of an agreement to the contrary between the parties, a third party could automatically claim enforcement of the contract. Such an approach could be appropriate in the framework of domestic relationships, especially consumer contracts in which public entities were involved. However, at the international level, legal certainty and predictability were much more impor-

tant. Therefore, in his view Art. 3 was not appropriate. He asked Furmston if he had had in mind domestic consumer contracts when drafting this provision.

903. Furmston denied as such cases were dealt with differently under English law. The House of Lords had decided that the relationships with public utilities were not contractual. Personally he would be satisfied with Art. 2 but that would not be in conformity with the decisions taken in Bozen.

904. Crépeau pointed out that chapter 5 of the Principles already contained provisions on implied and explicit contractual obligations. Art. 5.2 defined implied obligations. The application of these rules would have the same consequences as those of a recent Canadian case. There a municipality had entered into a contract with a snow removal enterprise which was obliged to keep the streets free of snow between October and March. However, the enterprise had reduced the space cleared. Two cars collided. Injuries were sustained and one of the injured sued the snow removal company on the basis of the contract concluded between the enterprise and the municipality. The court had no difficulty in considering this kind of contract a contract for the benefit of the users of the road. If the provisions on implied contract terms of the Principles were to be applied to the present draft provisions, the result would be the same. Furmston replied that he had no objections to these consequences. Crépeau asked whether the Group agreed to consider the example as a case concerning an implied obligation conferring a benefit upon a third party. With respect to the present wording of Art. 3, he felt that the concept of commercial purposes was much narrower than that of implied duties. He thought, it would be sufficient to state that parties might expressly or implicitly confer benefits upon third parties instead of the language used in Arts. 2 and 3. Farnsworth shared this opinion.

905. Finn too felt it difficult to define the meaning of commercial purposes. He gave an example concerning a group of companies, one of which entered into a commercial lease knowing that the actual business would be conducted by another company of the group. It was obvious to both the lessor and lessee that the actual beneficiary of the lease of the premise would be another company. He asked whether the commercial purpose of such a lease was to provide just a lease or if it was to provide a lease for the other company. Farnsworth agreed, added that the reference to commercial purposes was rather close to implied terms.

906. With respect to the example given by Crépeau, Schlechtriem pointed out that he feared that Art. 3 could be understood as entitling only the third party to enforce the contract, while in his view also the party to the contract, i.e. the municipality, should be entitled to enforce the contract. He also doubted that the third party was always entitled to claim for specific performance or even for damages. He pointed out that under German law, there existed contracts for the benefit of third parties where it was up to the party to the contract to enforce the contract in favour of the third party. He asked if such situations were to be excluded.

907. Furmston replied that he took it for granted that the other party could enforce the contract. As to the remedy of specific performance he saw no reason why the third party should not be entitled to it provided that the requirement for its exercise are fulfilled.

908. Schlechtriem stated that from his point of view, it was up to the parties of the contract to define the precise nature of the right of the third party beneficiary. They could provide for a strong right of the third party but they could also provide for a weaker right. Furmston asked Schlechtriem if he would like to have this in the text. Schlechtriem asked for modification of the text in order to make it clear that the third party beneficiary might not always be entitled to enforce the contract. Furmston doubted that this was really necessary.

909. Bonell shared Schlechtriem's concerns and recalled that in Bozen the Group had found it necessary to distinguish between a contract for the benefit of a third party and a contract to the benefit for a third party including the right to enforce it.

910. Furmston admitted that also under English Law there existed many contracts for the benefit of third parties which could not be enforced by them, but he thought that such contracts for the benefit of third parties did not fall within the scope of the present chapter. The problem so far discussed rather related to the definition of the notion of express statement, i.e. how the parties' intention to confer enforceable rights on a third party. should be expressed in the contract. Bonell agreed.

911. El Kholy stated that under Arabic laws, third parties had several possibilities to sue on the basis of non-contractual liability. Therefore, the possibility of third parties suing on the ground of contractual liability was a rather academic one. He felt that the broadening of the concept of parties went too far.

912. Kronke replied that not in all legal systems was it possible to sue on the basis of the rules concerning tortious liability.

913. Baptista mentioned the Linux license as an example for implied rights of third parties because it allowed the use of the source code free of charge on condition that the further developments made on the basis of the source code would not be used for commercial purposes. This was a clear case of a right to sue anyone violating this condition on the basis of an implied right for the benefit of third parties.

914. Date Bah also had difficulties with the commercial purposes of a contract and asked Furmston if this reference was a specification of the parties' intention.

915. Furmston replied that in the light of the discussion he would be happy to modify Art. 2 to read as follows: "If the parties to a contract expressly or implicitly ..." and to delete Art. 3. He feared however that this solution would not be accepted by the majority. As an alternative he offered to prepare examples so as to give the Group the possibility to state what the solu-

tion should be in each of these cases. This exercise could be used as the basis for new provisions to be adopted.

916. Schiavoni stressed the possible importance of Art. 2 in the framework of international construction contracts where there was a contractor performing the activity of procurement though expressly stating that it did so to the benefit of the final contractor. It was not infrequent that this final contractor decided at a relatively late moment whether it would procure the entire equipment supply or if the contract was transformed into a turnkey contract. Art. 2 could become very important in such a situation. Therefore, it was very important to achieve maximum legal certainty by using a clear language.

917. Bonell stated that two basic questions had to be decided. First, whether the "intention to benefit test", as presently stated in Art. 2, and not the "intention to confer the right to enforce test", as recommended in Bozen, was to be approved. Second, whether Art. 3 was needed at all. He suggested accepting the Rapporteur's offer to provide the Group with several examples and to use them as a basis for further considerations.

918. Furmston explained that Art. 2 addressed a situation in which the parties had hired a competent lawyer whereas Art. 3 addressed a situation in which the parties had failed to do so. He admitted that some confusion was caused by the two provisions.

919. Grigera Naón commented that previously he had gone too far in saying that only express statements vis-à-vis third parties should be enforceable. This statement had been prompted by the reference to commercial purposes in Art. 3. With respect to the notion of implied intention, he revealed that in a huge number of ICC awards the arbitrators had assumed such rights benefiting a third party.

920. Crépeau pointed out that even if Furmston was going to offer a large number of cases, everything would depend on the interpretation of the parties' intention. Therefore, he preferred the formula "if the parties intended to benefit a third party". As to the different possibilities of how an intention could be expressed, a simple reference to the language used in Art. 5.1 and Art. 5.2 of the Principles was sufficient. Bonell asked whether the intention to benefit a third party was different from conferring a right on a third party. Crépeau answered that if a person intended to benefit a third party, this party implicitly also gave the third party the right to require performance.

921. Schlechtriem suggested rephrasing Art. 2 to read: "The parties to a contract can agree that the contract or some obligation under it is intended to benefit a third party. A third party is entitled to enforce a contract only if this is in conformity with the intention of the parties to the contract."

922. Fontaine wondered what the interest of the parties to a contract could be to benefit a third party without giving it the right to enforce its rights. Schlechtriem answered that the inten-

tion was to preserve the character of a performance towards the third party as a performance of the contract.

923. Furmston suggested reformulating Art. 2 as follows: "If the parties to a contract expressly or impliedly state that a contract or some obligation under it is intended to benefit a third party and that that third party is intended to have legally enforceable rights, the third party shall be entitled to enforce it." Thereby, the concerns expressed so far could be met. However, he personally was not sure whether a reference to express or implied intentions was the best way to settle the problem. One could also argue in favour of keeping Art. 3 where some indications concerning implied statements could be given.

924. Bonell recalled that Furmston had stressed the necessity to have an objective and subjective test during the discussions in Bozen. He welcomed Furmston's intention to provide the Group with examples which could serve as a basis for further considerations.

925. Furmston suggested voting on the question whether the additional wording "or impliedly" should be put in Art. 2 with the consequence that Art. 3 could be deleted. Alternatively, he could seek to improve the present wording of Arts. 2 and 3.

926. The majority decided 9:3 in favour of a reference to the parties' express or implied intention in Art. 2. Only on vote was in favour of keeping Art. 3. It was decided to provide for a reference to the parties' express or implied intention in Art. 2 and to delete Art. 3.

927. Grigera Naón was reluctant to refer to Art. 5.2 of the Principle by using the terms "expressly or impliedly" because he did not think these provision were appropriate in the present context because they were drafted against a different background.

Art. 4: For the purposes of this chapter, enforcement by the third party shall be treated as including reliance on a clause in the contract which excludes or limits the liability of the third party.

928. Furmston explained that this provision addressed situations, quite common in international commercial practice, in which A and B had concluded a contract containing a clause providing for the limitation or exclusion of liability of C somehow involved in the performance of the same contract. As an example he mentioned the "Himalaya" clauses in bills of lading. The policy reasons for allowing third parties to enforce the contract were exactly the same. Thus, the consequence of these arguments was the provision contained in Art. 4.

929. Bonell was dissatisfied with the language used in the present provision. He wondered if Furmston did not speak about two kinds of third parties. Schlechtriem suggested using the formula: "For the purposes of this chapter, the benefit conferred on the third party also included a limitation of liability". Farnsworth agreed that the drafting could be improved and

wondered how it could be made clear that in such cases the third party could enforce the obligation not by suing but by resisting sued.

930. Komarov asked if procedural and substantive rights were covered by these provisions. Furmston replied that English courts distinguished between limitations of liability and choice of jurisdiction clauses which were often contained in bills of lading. Since it was difficult to deal with procedural aspects, he had not addressed them in Art. 4 but thought of addressing them at a later stage.

931. Bonell asked Furmston whether he wished to address specific issues related to the other provisions. Furmston replied the other provisions were based on the decisions taken in Bozen.

932. Farnsworth suggested moving Art. 7 closer to Art. 2. With respect to Art. 6, he thought that reliance should have the same effect as acceptance.

933. Crépeau had difficulties with Art. 6. The provision could be understood as entitling either both parties to revoke or one of the parties to revoke. He recalled that historically only one party, i.e. the stipulator, was entitled to revoke a contract for the benefit of third parties. He asked the Rapporteur to reconsider Art. 6 with respect to situations in which even today only such unilateral revocation of the benefit was possible.

934. Furmston replied that on the contrary he intended to entitle only both parties to revoke the rights granted to a third party. Schlechtriem disagreed and was in favour of leaving all the possibilities open. He suggested rephrasing Art. 6 as follows: “The parties can reserve the right to revoke either by the promisor or by the promissee or by both of them”. Furmston replied that he did not intend to exclude unilateral revocations. The situation he intended to address in Art. 6 was a situation in which the parties had not provided for a respective clause in their contract.

935. Fontaine supported the view of Crépeau and Schlechtriem. He added that he was also dissatisfied with the formula in Art. 7 because the word certainty was used twice. He suggested using the word “ascertainable”.

936. Hartkamp assumed that the parties could derogate from Art. 5. Under Dutch law, it was acceptable to give an abstract guarantee by way of a stipulation in favour of a third party.

937. Schlechtriem asked whether according to Art. 7 it was possible that the party was not ascertainable at the time of the contract but could be named at a later moment. He pointed out that this was a common practice in the framework of insurance contracts and factory agreements. Furmston replied that according to his rule such cases would be covered too. Schlechtriem wondered if the beneficiary was entitled to reject the benefit. Furmston replied that this could be added.

V. AGENDA OF THE NEXT MEETING AND OTHER BUSINESS

938. Bonell indicated that the next meeting would be devoted to an examination of the revised drafts on prescription, assignment, agency and third parties rights. He hoped that there would also be time to examine a draft on set-off. He regretted that due to the lack of time Jauffret-Spinosi's position paper on set-off had not been discussed. He wondered whether she could nevertheless prepare a first draft which would facilitate discussion of the topic by the Group.

939. Hartkamp asked when the next meeting would be held.

940. Bonell informed the Group that Finn had offered to organise the next meeting in Australia in 2001. Under these circumstances he thought that the European autumn would be the most suitable time for the meeting.

941. Hartkamp thought that in view of the outstanding importance of the project it was a great pity to lose more than a year, all the more so as the work of the Commission on European Contract Law was advancing very quickly. Bonell shared his concern and promised to do his best, as he had always done in the past, to see that the work on the Principles would be not unduly delayed. According to Kronke Autumn 2001 was not the only possibility since perhaps one could even envisage a meeting in Spring/Summer 2001 to be held in Rome, followed by a meeting say in February 2002 in Australia. Finn stated that there were no impediments to postpone the meeting in Australia if this would enable UNIDROIT to organise a meeting earlier in 2001 in Rome. Bonell and Kronke promised to inform the Group of the final decisions as soon as possible.

APPENDIX I

WORKING GROUP FOR THE PREPARATION OF PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Third session

Cairo, 24-27 January 2000

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