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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Sixth Session
Rome, 2 – 6 June 2003

REPORT
(prepared by the Secretariat)

Rome, September 2003

1. The sixth and last meeting of the *Working Group for the Preparation of Principles of International Commercial Contracts (Part 2)* met at the seat of the Institute, from 2 to 6 June 2003. A list of participants appears as Annex 2 to this Report.

2. Welcoming the participants on behalf of the President of the Institute, **Mr Herbert KRONKE**, Secretary-General of UNIDROIT, conveyed to the participants the appreciation and gratitude of the Governing Council for the work done in all the years of preparation of the Principles.

3. Taking the floor, **Mr M. Joachim BONELL**, who chaired the meeting, welcomed **Mr Emmanuel JOLIVET**, General Counsel of the International Court of Arbitration of the International Chamber of Commerce, who participated in the meeting for the first time. In the course of the meeting he welcomed **Mr Andrea CARLEVARIS**, also of the ICC International Court of Arbitration, **Mr Alejandro GARRO** of Columbia University (New York, USA) and **Mr Hiroo SONO** of Kyushu University (Hakozaki, Japan). He further presented the excuses of **Mr BAPTISTA**, **Mr CRÉPEAU**, **Mr EL KHOLY** and **Ms HUANG**, who were unable to attend the meeting.

4. On the table for discussion were the following documents:

Study L – Doc. 79:	Authority of Agents (Revised Draft prepared by Mr M.J. Bonell)
Study L – Doc. 80:	Limitation Periods (Revised Draft prepared by Mr P. Schlechtriem)
Study L – Doc. 81:	Assignment of Rights, Transfer of Obligations and Assignment of Contracts (Revised Draft prepared by Mr M. Fontaine)
Study L - Doc. 82:	Set-off (Revised Draft prepared by Ms C. Jauffret-Spinosi)
Study L - Doc. 83:	Third Party Rights (Revised Draft prepared by Mr M. Furnston)
Study L - Doc. 84:	Inconsistent Behaviour (Draft Article with Comment prepared by Justice P. Finn)
Study L - Doc. 87:	Discharge (Renunciation) (Draft Article with Comments prepared by Mr A. Hartkamp)
Study L - Doc. 88:	Abuse of Rights (Draft Provision with Comments prepared by Mr. P.-A. Crépeau)
Study L - Doc. 89:	Renunciation (Draft Article with Comments prepared by Mr A. Hartkamp) (submitted in the course of the meeting).

5. Also under consideration were:

Study L - Doc. 85:	Consolidated Edition of Part I and Part II of the UNIDROIT Principles: Decided Amendments and Open Questions (Prepared by the Secretariat)
Study L - Doc. 86:	Consolidated Edition of Part I and Part II of the UNIDROIT Principles: Draft Structure (Prepared by the Secretariat).

6. The drafts were examined in the order in which they are listed above.

7. **Bonell** informed the Group that a number of comments had been made in the meeting of the Governing Council, which had taken place the week before. He indicated that he would bring them to the attention of the Group when the provision concerned was being considered.

1. AUTHORITY OF AGENTS (Study L – Doc. 79)

Article 1

8. In relation to Illustration 1 to Article 1, **Date-Bah** suggested that it be clearly indicated what contention prevailed, as there at present was no indication of what the outcome should be.

9. *This suggestion was accepted.*

Article 5

10. With reference to Paragraph (2), **Bonell** indicated that **Mr Harmathy** of the Governing Council had felt it to be confusing to have both the concept of good faith and the concept of reasonableness in the same provision.

11. *The Group agreed. The reference to good faith was consequently deleted.*

Article 8

12. **Bonell** indicated that in the meeting of the Governing Council, **Sir Roy Goode** had felt that the words "...acts which it is not reasonable to expect the agent to perform itself" were too restrictive. This observation however did not open a discussion within the Group.

Article 9

13. With reference to Article 9, **Bonell** indicated that the third paragraph in square brackets had been added to the black-letter rule, and that consequently two sentences had been added also to Comment 2. The provision had been added following previous discussions within the Group on how the third party might be protected if it were not aware of the lack of authority of the agent, and what time-limits should be applied for ratification. The discussion in Bolzano/Bozen had focused only on the second issue, the result being the present Paragraph (2). As regards the lack of authority, the question was whether or not the innocent third party should be afforded the same protection as it was in the *1983 Geneva Convention on Agency in the International Sale of Goods*. The provision he proposed corresponded to the domestic law of a number of different countries, including the new draft US Restatement Third on Agency.

14. **Hartkamp** wondered what the situation would be if the third party knew or ought to have known of the lack of authority, what its position would be before ratification. **Bonell** stated that in such cases it was up to the principal to decide whether or not to ratify the act. If the third party had been aware of the agent's lack of authority, there was no reason for it to be protected.

15. **Schlechtriem** agreed with the proposal, but saw a possible conflict with the draft provision on inconsistent behaviour. He wondered if the proposed provision were needed if there was a general clause on inconsistent behaviour. **Finn** suggested that it was better to be specific.

16. *The proposed new Paragraph (3) was accepted by the Group.*

17. As regards the two sentences that had been added to Comment 2, **Bonell** observed that if revocation were permitted on the part of a principal who had ratified the act, it would amount to a unilateral withdrawal from the contract. **Hartkamp** agreed with the content of the additions proposed, but wondered whether they would not be covered by the general rule that once the declaration of intent had reached the other party, first one could not revoke it. **Bonell** agreed that they would be covered by the general rule, but felt that to help readers it would be better to be explicit in the comments. **Komarov** agreed.

18. *The proposed additions to Comment 2 were consequently accepted by the Group.*

19. **Di Majo** wondered why there was no provision in Article 9 on the rights of other persons. He proposed that the words “without prejudice to the rights of other persons” be added to the first paragraph of Comment 4. **Bonell** indicated that the reason such an addition had not been made was that the Group had always taken it for granted as the Chapter dealt only with the parties directly involved, that third parties would not be affected by the Principles.

20. *There being no support for the proposed reference to third parties, the proposal was rejected.*

Article 10

21. **Bonell** drew attention to the proposed new Comment 4, presently in square brackets. **Farnsworth** agreed with the content of the proposal, but suggested that the title be modified to read “Restriction of authority also covered”, as this terminology was used in the text of the comment.

22. **Lando** and **Schlechtriem** indicated that they would like the content of the proposed comment in the black-letter rule. **Farnsworth** stated that he thought that the comment was an attempt to indicate the application of Article 10 by analogy. He had only referred to the comment. **Schlechtriem** indicated that if the readers used the comments as well as the black-letter rules, Farnsworth’s proposal would suffice.

23. *The proposed new Comment 4 was accepted, with the title modified as suggested.*

2. LIMITATION PERIODS (Study L – Doc. 80)

Article 1

24. As regards Article 1, **Farnsworth** stated that in the US the Statute of Limitations, or limitation period, did not come into play until the controversy was in court. All the illustrations of the Chapter seemed to agree with the common law approach. There were only two exceptions: Illustration 3 to Article 1 and Illustration 5 to Article 4. Illustration 3 to Article 1 referred to “Two months after delivery”, and a common lawyer would say that it was not relevant as no one was in court. Illustration 5 to Article 4 referred to “when B asks A to cure” and in this case the observation of a common lawyer would be that it clearly did not govern cure as no one was in court. He suggested that a general comment be added to

Comment 2 to Article 1, stating that the limitation period did not apply as the case was not in court, and that the illustrations be dealt with in a slightly different manner.

25. **Schlechtriem** agreed that the limitation period defence was usually used only in court. An exception, which had been influenced by the *Principles of European Contract Law (PECL)*, had however been agreed by the Group in the context of set-off, i.e. where the exercise of this defence out of court had effects with regard to set-off (Article 10(2)). If it were decided that set-off should not have retroactive effect, then, in order to make the new rule on set-off work, it would be necessary to have an additional provision regarding when the obligor had asserted the expiration of the limitation period out of court. For that reason it was not possible to include references to raising the defence of limitation in court only.

26. As regards set-off, **Farnsworth** felt that Illustration 1 to Article 10 was an exception. He suggested that it might be enough in Illustration 5 to Article 4 to say “When B asks A to cure the defect A refuses to do so, on the ground that if B went to court this could not be enforced”. In Comment 2 to Article 1 something could be said to the effect that the rules that were listed there terminated rights, which however did not relate to the enforcement of claims in court, as did the rules that they were talking about. It did not seem to him that they employed rights in this way outside the context of set-off. He proposed that the two comments that reflected the view that the running of time prevented people from curing, terminating or performing, be eliminated.

27. *It was decided that the problem raised by Farnsworth would be dealt with by a revision of Illustration 5 to Article 4.*

28. **Bonell** indicated that Paragraph (2) clearly expressed the idea that these other kinds of time-limits, which normally were of much shorter length and which domestic law did not call “limitation of action” or “prescription”, were outside the scope of the Chapter. The same provision was to be found in the *1974 UN Convention on Limitation Period in the International Sale of Goods* and the PECL. He indicated that he had problems with the second paragraph of Comment 1 of the comments. The right of termination was covered by Article 7.3.1 which covered the shorter periods of time he had referred to.

29. **Schlechtriem** stated that his proposal in the second paragraph of Comment 1 was influenced by the on-going discussion on the reform of limitation periods in Germany. He had wanted to avoid the problems raised by that reform by saying that rights are ended by the running out of a period of limitation. In most cases this question did not arise because the rights were lost earlier as a result of inaction, as was explained in Comment 2, but there might be rights to terminate which had been agreed under the contract and which were not covered by Comment 2, which should also be barred by a period of limitation.

30. **Bonell** asked for confirmation that what was intended was the right to terminate referred to in the second paragraph of Comment 1 linked with contractually agreed rights such as the right to terminate. He suggested that the words “under Art. 7.3.1” be deleted to make this clear.

31. *This suggestion was accepted by the Group.*

Article 2

32. With reference to Comment 1 on Article 2, **Bonell** wondered what was meant by the statement that the UN Limitation Convention “offered guidance”.

33. **Schlechtriem** recalled that the Comment had been inserted at the very beginning, when the Group had not been certain as to what model should be followed. As there were other instruments that might offer guidance, such as the PECL, he suggested that the word “only” be deleted.

34. **Bonell** stated that he had understood this reference to the UN Convention to indicate that the only example of an international uniform law regulation was the UN Convention, which was however restricted to the international sale of goods. He had not understood the reference to be to the instruments that had been sources of information for the Group, also because there was a tacit agreement that the UNIDROIT Principles and the PECL would not refer to each other, except possibly in a preface.

35. **Schlechtriem** agreed with Bonell’s concerns and suggested that they might be met by replacing “only” by “in particular”.

36. *This suggestion was accepted by the Group.*

37. With reference to drafting, **Bonell** suggested that in Comment 3 the term “owner of a right” be replaced by the term “obligee”, which was more commonly used in the Principles. Similarly, in Comment 7 the term “debt” should be replaced by “obligation”.

38. *These suggestions were accepted.*

39. With reference to the text of Article 2(1) and (2), **Bonell** wondered why the provisions referred to both when the obligee’s right “can be exercised”, and when the obligor’s performance “can be required”, as neither the UN Limitation Convention, nor the PECL, referred to both. Furthermore, the Comments did not explain the difference between the two. Comment 4 spoke only of “when the right comes into existence”, and the fact that the black-letter rule offered two solutions whereas the comments referred only to one might cause doubts in the reader.

40. **Schlechtriem** recalled that this point had been discussed earlier, and that the comments had contained explanations that had been struck out as they had been considered to be superfluous. What was intended was that a right, e.g. the right to have a right repaid, might come into existence at the time of contracting, but of course was not yet due. They had discussed at length how to deal with a right or claim that was not yet due and for which the period of limitation could not start as it would have elapsed before the right became due. The only question was whether Comment 4 should be modified to avoid the impression that there was a discrepancy between the black-letter rule and the comments.

41. **Bonell** suggested that Comment 4 might repeat the language of the black-letter rule and a sentence might be added along the lines of Schlechtriem’s explanation. Another solution would be to delete the phrase in the black-letter rules and to mention the contents in the comments.

42. **Schlechtriem** indicated that the reason for the formulation was the old concern that in certain legal systems only claims could be time-barred. This had been settled, so he agreed to delete the last phrase of the black-letter rule. The comments could be expanded to contain something about the exercise of rights that were not yet due, which therefore could not be exercised, and for which the period of limitation therefore could not commence.

43. **Furmston** indicated that for a simple case such as a bank over-draft the limitation period should be clear. The world was full of people that owed money to banks, and in every developed system it was clear that the limitation period did not start in relation to such debts until the bank made a demand. Was it clear that that case was covered by the existing formula?

44. **Schlechtriem** felt that there were two questions which should not be mixed up: the first was whether the second half of the sentence – “the obligor’s performance can be required” – was already included in the phrase “a right can be exercised”, and this was Bonell’s view. The second was that a right might already exist, but could not be exercised, or a claim could not be required to be performed, for example the bank first had to send a notice of demand. It was not possible to deal with all the situations in which there was a right or a claim which could not yet be exercised. All this was included in the formula that the right could be exercised or the obligor’s performance could be required: it could not be required if the debt was not yet due. An additional comment explaining the meaning of the phrase should perhaps be added.

45. **Furmston** pointed out that in the last sentence of Comment 4 the word “longer” should not be there.

46. *It was decided to delete the word “longer”.*

47. *It was decided to delete the phrase “or the obligor’s performance can be required” in Paragraphs (1) and (2) and to add a couple of sentences at the end of Comment 4 with the content of the phrase deleted.*

Article 4

48. With reference to Illustration 5, **Farnsworth** suggested that it be modified to read “...When B asks A to cure the defects, A argues that the maximum period of Article 2(2) has elapsed so that no claim to damages can be made by B. A’s argument is incorrect if B abstained from commencing judicial proceedings on account of A’s waiver”.

49. **Lando** suggested that this case was an example of inconsistent behaviour and pointed out that this very case was an example in a case-book published by Zimmermann. In that case-book the conclusion was that in the majority of legal systems B would have had a claim, so it was controversial.

50. **Bonell** wondered whether it was necessary to have the additional sentence which introduced a different issue. It would be possible to stop after “made by B”.

51. **Schlechtriem** objected that it was not always a case of inconsistent behaviour, that more was necessary for inconsistent behaviour, not only agreeing to an investigation of defects.

52. **Finn** agreed that it was a potential example of inconsistent behaviour. He suggested that the problem **Schlechtriem** had raised was whether what **B** had done in the circumstances amounted to reasonable reliance and it was possible to have a whole spectrum of cases where that occurred.

53. **Furmston** wondered why the case was not covered by Article 3. The facts of the illustration were very good, but they might go on to say that it could be handled in four or five different ways, but all of them would come to the same result, i.e. **A** was bound.

54. **Schlechtriem** observed that Article 3 required a modification, or an additional agreement, but here it was simply a matter of the acknowledgement of the party that had caused the interruption.

55. *In the end, the Group decided to make no modifications other than what had been proposed for the wording of Illustration 5.*

Article 5

56. **Bonell** referred to a question raised by **Mr Loewe** in the Governing Council meeting. He had wondered what was meant by the words “disposed of” at the end of Paragraph (2), whether a decision declining jurisdiction, or referring to arbitration, would be covered by this formula. The PECL had the same formula, but also had detailed comments.

57. **Schlechtriem** indicated that the words “disposed of” had a broad meaning and would cover the examples given by **Mr Loewe**. Otherwise if the court refused the case as it did not have jurisdiction and advised the parties to go to arbitration, that must be the end of the matter, the suspension could not continue until the arbitral tribunal had come to a final decision.

58. **Bonell** wondered whether this was the case also if the party withdrew the claim.

59. **Schlechtriem** indicated that the question of whether a withdrawal resulted in a suspension depended on the rules of procedure of the competent court. The withdrawal might for instance end the litigation only if the other party agreed. If the other party agreed, that was a “disposal of” the court. If, however, the rules on civil procedure said that the claimant could withdraw his claim any time and there was no proceeding as a result, then there was no suspension. That depended on the effects of withdrawal under the domestic civil procedure or arbitration law.

60. **Bonell** indicated that a comment illustrating what was meant by “or has been otherwise disposed of” was necessary.

61. **Finn** suggested that the words “or had been otherwise disposed of” be replaced by “until the proceedings have been finalised”. The word “case” was problematic.

62. **Schlechtriem** recalled that first the provision had referred to a “final decision”. The Group had thought that that would not be enough, and had consequently added “otherwise disposed of”. He was willing to add a sentence in the comments explaining the meaning of “disposed of”, i.e. that when “disposal” is attained depends on the procedural law of the

competent court or arbitral tribunal, making reference to the cases of withdrawal and settlement.

63. **Komarov** suggested that “disposed of” be replaced by “terminated”, which was more legalistic, was easier to understand and easier to translate. **Fontaine** suggested “until the proceedings have been terminated”, because when there was a problem of incompetence the case would not be disposed of, it would go to another court. Furthermore “proceedings” was already used in the provision.

64. *In the end, following the discussions on Article 6, the Group decided to adopt the same formulation in Article 5(2) as had been adopted for Article 6(2) and that a new comment should reflect the change.*

Article 6

65. **Fontaine** drew attention to a discrepancy in terminology between Article 5(2), which referred to “final decision”, and Article 6(2) which referred to a “binding decision”.

66. **Schlechtriem** suggested that “final” should be used in both.

67. **Komarov** indicated that with regard to arbitration proceedings it had been decided to use the word “binding”, as the decision was not final and “binding” was used, for example, in the *1958 New York Convention on the Recognition of Foreign Arbitral Awards*. In arbitration it was very difficult to say when a decision was final. It was therefore better to leave “binding”.

68. **Date-Bah** suggested that in judicial proceedings even interlocutory decisions were binding, so to use the term “binding” as the trigger point could be misleading. **Fontaine** suggested that the same could be said about partial decisions in arbitral proceedings: they were also binding.

69. **Farnsworth** recalled that it was not uncommon to have bifurcated arbitral proceedings in which, for example, liability was dealt with first, and then damages. The first decision would be binding, even if it was not final. “Binding” therefore did not appear to do what they wanted here, it should say “final” as did Article 5. **Hartkamp** agreed, adding that if this were not the case, then the comments should explain this difference.

70. **Schlechtriem** had the impression that a policy problem might underlie the discussion. If with reference to arbitral proceedings the provision spoke of a suspension until a final decision had been issued, that could be understood as meaning that the suspension lasted beyond the ending of the arbitration - in fact until a party who contested the arbitral decision because it claimed that one of the arbitrators was prejudiced, went to a State court requesting the State court not to recognise the arbitral decision. The whole procedure might then last a very long time. If this was the desired effect, then “final decision” should be used, if what was desired was the end of the limitation matters with the termination of the arbitration, then the correct word would be until “a binding decision of the arbitration court has been reached”. He favoured using “binding decision”.

71. **Date-Bah** stated that it would be necessary to indicate that the binding decision concluded the proceedings.

72. **Farnsworth** suggested “Suspension lasts until the proceedings have been terminated by a binding decision of the arbitral tribunal or otherwise”. This would make it clear that a binding decision of a court would not necessarily have this effect. A similar formulation would be required in Article 5.

73. **Hartkamp** wondered how things worked in an ordinary appeal against a decision by a court or arbitral tribunal. Under both articles the suspension would continue in the case of an appeal, but then there was the same problem of “binding” and “final”. In that case the word “final” would be preferable to “binding”.

74. **Bonell** suggested that the wording suggested by Farnsworth be adopted, with “final” being used in Article 5, and “binding” in Article 6.

75. **Jollivet** wondered what “otherwise” referred to, whether only to arbitration or also to decisions of local courts.

76. **Schlechtriem** stated that it referred to, for example, injunctions in a State court against on-going arbitral proceedings. The case must have ended in the arbitral proceedings, not been ended by an outside force. The question was also what the situation would be if the parties reached a settlement outside the arbitral proceedings or if the claim were withdrawn, whether that would be the end of the suspension as there would not be any award.

77. **Farnsworth** agreed with the example of an injunction against the arbitration, but stated that sometimes a court would hold that there was no agreement to arbitrate and that would be final.

78. **Schlechtriem** wondered whether the decision did not have to be on the right or the claim, because in a bifurcated case, if there was a decision on part of the merits, that did not settle the right or the claim.

79. **Bonell** pointed out that that was the approach taken by the UN Convention which expressly addressed the situation where “legal proceedings have ended without a decision binding on the merits of the claim”, and in such a case it provided for no suspension. All agreed that for the purposes of the Principles suspension lasted until proceedings were terminated by a final or binding decision implicitly on the merits of the case, or otherwise.

80. **Schlechtriem** indicated that that was the reason he had suggested to explain in a comment that the details of the effects of withdrawal and settlement had to be left to the domestic procedural or arbitration law, because if the withdrawal took place very early in the proceedings, for example before the other party has reacted, that might be regarded as if there had been no proceedings at all, and consequently there was no suspension.

81. **Hartkamp** pointed out that if reference was made to the arbitral tribunal “or otherwise”, that might leave room open for another tribunal and that was not what was intended. This should be made clear in the comments.

82. **Farnsworth** stated that there were instances in which a court could terminate arbitral proceedings, e.g. the court decided that the parties had not agreed to arbitrate and dissolved the arbitration. He therefore preferred to leave the question open.

83. **Komarov** pointed out that the arbitral tribunal would in any event issue an order on the basis of the decision of the court, but **Bonell** objected that this was not always the case.

84. As regards Article 5(2), **Hartkamp** understood that the final decision referred to was a decision on the merits of the case. He wondered what was actually intended, as the comments gave no indication. Would the system of the UN be adopted, or did the decision have to refer only to, for example, the competence of the court? In that case there would be a decision terminating the procedure in the civil court, but it might continue elsewhere, for instance in the administrative court.

85. **Schlechtriem** indicated that the decision should be on the merits. This should be explained in the comments, also in view of the fact that decisions might be final as to the merits, but the case might continue as to the costs. A reference to the domestic law would cover the different options possible.

86. **Bonell** stressed that this meant a departure from the UN Convention, which stated explicitly that only a decision on the merits of the claim caused a suspension. **Hartkamp** indicated that this should be made clear in the comments.

87. **Farnsworth** observed that if there was an arbitral proceeding involving a claim and if there was a decision on the merits, in all probability that would eliminate the problem of prescription, because the arbitral award would under other rules bar further claims. The key case was that of arbitral proceedings being commenced and then terminated without there being a decision on the merits, and a party then saying that it wanted to proceed on the claim in court, but had lost time on the arbitration proceeding and consequently wanted to count that period of time as suspension. Saying “on the merits” was almost backwards, because if it was decided on the merits, would it not be possible to say that the claim was extinguished by the arbitral proceedings?

88. **Schlechtriem** observed that a claim might still be in existence after the arbitration and was not always extinguished.

89. **Hartkamp** raised the question of what the situation would be as regards suspension when a court declared a contested arbitration clause to be valid after three or five years’ litigation. Would the case have been suspended pending the decision of the court, or would it not?

90. **Bonell** indicated that the New York Convention had an additional rules for cases when no decision had been taken on the merits of the case, when there had simply been a refusal of jurisdiction. In such cases the suspension was extended for a further six months.

91. *It was decided that the formulation proposed by Farnsworth would be adopted for Paragraph (2), and that in Article 5(2) “final” would be used, whereas in Article 6(2) “binding” would be used as it related to arbitration. There would also be a comment to the effect that “or otherwise” referred to the applicable procedural law, and stating that the most frequent case of termination of the proceedings was a decision on the merits of the case, but that there might be other cases for which the applicable rules of civil procedure or arbitration also provided for termination. The comment should indicate that this was left to the applicable law, and that this was a departure from the New York Convention.*

Article 8

92. **Bonell** informed the Group that when comparing the Principles with the UN Convention and the PECL, he had discovered that under both the UN Convention and the PECL incapacity, death and *force majeure* might cause suspension, but never lead to an extension of the maximum period. The ten-year period would thus never be affected by *force majeure*, death or incapacity affecting the obligee's capacity or capability to pursue its rights. Under the present draft, however, it could well go beyond the ten-year limit, because nowhere was it stated that those possible causes could only affect the general period and up to the ceiling of the maximum period. The practical result was that the obligor might well be confronted with a claim after thirteen or fifteen years and be caught by surprise, as it was under the impression that the ten-year period could only be super-ceded either by an acknowledgement on its part, or by judicial proceedings.

93. **Schlechtriem** explained that the PECL had only one period of limitation as a dogmatic principle, and that the knowledge/ought to have known factor was simply regarded as a suspension. As regards the solution in the Principles, it was correct that even the maximum limitation period might be suspended for longer than ten years. He did not worry too much about the *force majeure* cases as they usually did not last that long. Nor was he worried about the incapacity cases, let alone death. What was a matter of concern was the winding up of companies. It was a policy question. The problem could be remedied quite easily by inserting "general" in Paragraph (1) before "limitation period is suspended". An additional comment could be added to explain why the word "general" was used. In this case only the general period of limitation would be suspended, the maximum period would expire. If an obligee came to know of his claim only nine years after its coming into existence, there was a war, or other case of *force majeure* preventing him from going to court within the last remaining year, would that mean that after ten years he would be barred, despite the fact that the general limitation period would be suspended?

94. **Bonell** suggested that if there were no limitation the obligor would be in an awkward position, because contrary to the case of acknowledgement and judicial proceedings where it knew from the very beginning that things had changed, here after a number of years, maybe fourteen or fifteen, the obligee might claim it had been prevented from pursuing and might do so at that time.

95. **Fontaine, Hartkamp and Lando** supported adding "general" to "limitation period" and preferred to stick with the ten-year maximum period.

96. *The proposal to add the word "general" was accepted and it was consequently inserted before "limitation period" in line five of Paragraph (1). It was also decided that a comment on this distinction should be added.*

Article 9

97. **Uchida** suggested that the title of Article 9 did not correspond to its content, as it did not deal with the effect of the expiration of a limitation period, it dealt with the method for enjoying the effect of the limitation period. There was no provision as such on the effect of the limitation period. He wondered whether such a provision was necessary. In his view the effect of the limitation period should be retroactive, i.e. a right should be deemed to be

extinguished at the time when the limitation period began to run. If his understanding was correct, this would have some impact on Article 10(2) which it might be necessary to revise.

98. **Bonell** indicated that there was a provision, namely Article 1(1), which dealt with the effects of the expiration of the limitation period, though in a rather hidden manner as one would not expect to find the effects of expiration in Article 1, which furthermore was entitled “Scope of the Chapter”.

99. **Komarov** agreed that Article 1 gave the effects of expiration. As regards the title, he agreed it had to be thought over, as its assertion as a defence was a pre-requisite for the effect of the expiration of the limitation period.

100. **Jauffret-Spinosi** agreed with Uchida, because also the set-off chapter had a provision on the effects of set-off and in that provision it was stated that the effect was the extinguishing of the obligations.

101. **Schlechtriem** stated that it was correct that the effects of the expiration applied not only to Article 9, but to Articles 10 and 11 as well, so the title “Effects of Expiration” should be the title of Articles 9, 10 and 11. As it was not possible to have sub-titles, he suggested changing the title of Article 9 to “Assertion of the Expiration of the Limitation Period as a Defence”.

102. **Bonell** felt that it was difficult to imagine a chapter on limitation periods without an article specifically devoted to the effects of the expiration of the limitation period.

103. As a title, **Fontaine** suggested “Assertion of the Expiration of the Limitation Period”. He wondered whether it would really be bad not to have an article with the title “Effects of the Expiration of the Limitation Period”.

104. **Schlechtriem** stated that it was possible to infer the effects of expiration only by reading between the lines in Articles 1 and 9, but a first sentence could be added to Article 9 saying that the expiration of the limitation period did not extinguish the right, continuing thereafter “For the expiration of the limitation period to have effect the obligor must assert it as a defence”.

105. **Date-Bah** suggested that the assertion in Article 1 could be repeated, namely that the effect of the limitation period was that the right was barred but not extinguished.

106. **Fontaine** agreed. A first paragraph should be added to Article 9, saying that the expiration of the limitation period did not extinguish the right.

107. **Schlechtriem** suggested such a statement should be the second paragraph and not the first.

108. **Jauffret-Spinosi** agreed that it was necessary to have an article dealing with the effect, and also felt that an addition along the lines suggested should be made.

109. **Lando** objected to making the suggested additions. He did not think that it was possible to say that the right was not extinguished under certain circumstances. He doubted it was possible to say that you had a right which you could not exercise.

110. **Farnsworth** recalled that El Kholly had made a vigorous statement that extinguishing the right would be offensive under Egyptian law, but that not being able to exercise it would make a difference.

111. **Hartkamp** agreed. He could not see why these conceptual differences should be introduced at this stage simply because the title of Article 9 was not sufficiently precise. He suggested that the Chapter could be divided into sections, one of which could deal with the effects and incorporate Articles 9 – 11.

112. **Bonell** objected that it would be difficult to divide the Chapter into sections as it would be necessary to reconsider the structure of the Principles as a whole.

113. **Furmston** submitted a proposal for Article 9 reading:

- “(1) The expiry of the limitation period does not extinguish the obligation.
- (2) The obligor is entitled to raise the expiry of the limitation period as a defence.
- (3) The defence only applies if it is asserted by the obligor.
- (4) An obligation in respect of which the limitation period has expired may still be relied on as a defence.”

114. The proposal was discussed after Article 10 had been discussed.

115. Introducing his proposal, **Furmston** indicated that paragraphs (1) to (3) stated what the situation was. Paragraph (4) was Article 10(1) of the draft Chapter in document 80. The rationale of this rule was the decision that expiry did not extinguish the obligation.

116. **Finn** suggested that “obligation” in Paragraphs (1) and (4) be replaced by “right” and that “the” replace “an” in Paragraph (4).

117. The Group came back to a formulation proposed by **Farnsworth** in the discussion on Article 10, which read “A right may still be relied on as a defence even though the expiration of its limitation period has been asserted”.

118. **Uchida** observed that the wording of Paragraph (4) differed from the proposal made by Farnsworth.

119. Farnsworth’s proposal was accepted.

120. With reference to Article 9(2) and (3), **Hartkamp** stated that he did not quite understand the relationship between them. Why was Paragraph (2) necessary?

121. **Schlechtriem** had the same problem as Hartkamp. He suggested taking the old formulation of Article 9 instead of Paragraphs (2) and (3) in Furmston’s proposal.

122. This proposal was accepted.

123. **Farnsworth** referred to the second sentence of Comment 2. It gave two alternative ways of asserting the defence: in proceedings or outside proceedings. Leaving aside set-off, he requested an example of a case in which it was asserted outside proceedings and it was not necessary to assert it in proceedings as a defence. Set-off was a special case, but if it were raised as a defence, it was necessary to assert it in the proceedings and the fact that you had said something about the period of limitation outside the proceedings did not seem to him to count.

124. **Schlechtriem** stated that it was the consequence of the new set-off rule. It was necessary to have something to cut off the set-off possibility by raising the defence outside the proceedings.

125. **Farnsworth** suggested the wording “This can be done in any proceeding and, in the case of set-off, outside of the proceedings”.

126. **Schlechtriem** stated that indicating there was an exception for set-off had been the main concern when the provision had been discussed, but it could not be excluded that the assertion of the defence outside a set-off situation might be effective without any litigation. In negotiations preceding litigation, very often one party stated that it asserted limitation, and that was the end, then they found a settlement.

127. **Bonell** suggested that a general principle underlying the Principles was that you were not obliged to have recourse to a court in order to exercise your right, and therefore if A asked for performance, the obligor, realising that A’s right was time-barred, would be entitled to raise the expiry of the limitation period as a defence. A might at that point renounce and recognise that according to the Principles that was the end of the matter. If he did not give in, the obligee would have to bring an action and then the obligor would be obliged to raise the defence in the proceedings.

128. **Farnsworth** stated that his problem was Bonell’s statement “would then be obliged to raise the defence in proceedings”. This sentence seemed to say that there were two ways in which one could raise it, in the proceedings and out of the proceedings, and he would say that he did not have to raise it in the proceedings as he had raised it out of the proceedings.

129. **Schlechtriem** gave the example of A raising the defence out of the proceedings, following which litigation began. If A referred to his assertion, that would be raising it again.

130. **Farnsworth** indicated that he understood Schlechtriem and Bonell to be saying that if A was in proceedings, he would have to raise it as a defence in the proceedings. The sentence did not say that and was therefore misleading.

131. **Finn** suggested that the paragraph could stop after the first sentence. Any matter that could be raised as a defence could be a matter of antecedent assertion and parties could negotiate, it was not necessary to get to a courtroom, but the validity of the assertion of the defence could only be tested in legal proceedings.

132. **Date-Bah** suggested that there was an implicit menace that the assertion would be made in court, so a reference to the court was necessary.

133. **Bonell** objected that the same was true as regards termination, but no similar reference had been made there.

134. **Farnsworth** replied that no similar reference had been made because nothing was said about asserting termination as a defence. Here it would be satisfactory if it were made clear that if you are in proceedings you must assert it in the proceedings and not to suggest that you could have asserted it at some time in the negotiations and could then say now I am in proceedings but I have asserted it.

135. **Schlechtriem** felt that it boiled down to the default judgment. The practical situation would be where a party has asserted the limitation period outside litigation. The case goes to court, and from the briefs it is obvious to the judge that the defence had already been asserted. Then the defendant does not show up, and does not refer to this defence again in court. Must the judge take into account what can be read in the pre-litigation communications between the parties which contain the reference to the Statute of limitation, or could the judge say that as the defendant did not show up and did not raise the defence of limitation, he would disregard it?

136. **Farnsworth** stated that that would mean that if a party in the negotiations said that the period of limitations had run, that would count in a default judgment as raising the defence and that troubled him.

137. **Furnston** observed that there were different meanings of “default judgment”. There were systems in which if one pleaded limitation and did not turn up, the judge would look at the facts and make a decision. That would not be regarded as a default judgment in England and Australia. A “default” meant people who put in no defence at all.

138. **Farnsworth** stated that he could not see how it might be relevant, even if it was somehow in the papers, that you could make an assertion in negotiations about the period of limitations, subsequently fail to raise it in judicial proceedings, and then say (maybe on Appeal) that the judge had not considered this, but that you had made that assertion. In what would be called a default judgment in the common law it would not be in the papers.

139. **Schlechtriem** suggested changing the second sentence of the second paragraph of Comment 2 to read “This can be done by refusing a request of the obligee to perform”, leaving it open where and when. In the context of set-off, he suggested adding in the Comments “It can be asserted as expressed in Article 9, Paragraph X also outside” in order to have effect on the set-off question.

140. **Bonell** suggested that the wording should be “this can be done also” as otherwise the impression was that it was the only method.

141. **Farnsworth** suggested saying “How this is done in a proceeding will depend on the domestic rules of procedure”, which said nothing about there being no alternatives. **Schlechtriem** objected that that would still give the impression that it had to be raised in legal proceedings.

142. **Fontaine** indicated that it should be more precise. It was not a matter of simply refusing to perform, the reason had to be given, i.e. that the limitation period had expired.

143. **Schlechtriem** stated that as they had decided that the assertion in itself would suffice in regard to set-off, it must suffice also in other contexts. Of course it was not possible to take all procedural rules into account, but any sentence giving rise to the misunderstanding that it was restricted to being raised in legal proceedings would seem unduly to limit the operation of this offence to those who were not aware of the discussion that had taken place in the Working Group.

144. **Bonell** stated that if the English terminology “limitation of actions” had not been used, this was because the understanding had always been that the effect was not only a procedural one which had to be tested in court, but also a substantive law one, i.e. the exercise of the right was barred. Why not accept this result if the parties so agreed, if the obligee accepted the defence raised outside the proceedings?

145. **Date-Bah** wondered whether this would mean that this rule would over-ride national procedural law. If this came before a court, and there was a system whereby that court insisted upon clearing a limitation period before it barred, what would happen?

146. **Bonell** pointed out that the concern raised was rather whether or not it had to come to proceedings and whether the impression had to be created that it had to be raised in proceedings in order to be effective.

147. **Farnsworth** indicated that he thought that in most cases the defence would be raised within proceedings. It was important to say that in the case of proceedings the rules of the proceedings had to be obeyed.

148. **Furmston** observed that the question was whether a party who wanted to rely on the limitation had to plead it expressly in court. In England, Australia, and the United States it was necessary for that party to plead it, and he was sure this was the case also in some civil law countries. So what they said was simply that in those cases which get to court or arbitration it was usually necessary to plead it expressly.

149. **Schlechtriem** suggested “This can be done in any proceeding in accordance with the applicable procedural law and also outside of the proceeding as by refusing ...”.

150. **Farnsworth** suggested incorporating “... refusing on the ground of expiration of the limitation period”.

151. *These proposals were accepted, the final text of Article 9 reading as follows:*

Article 10.9

(The Effects of Expiration of Limitation Period)

- (1) *The expiration of the limitation period does not extinguish the right.*
- (2) *For the expiration of the limitation period to have effect, the obligor must assert it as a defence.*
- (3) *A right may still be relied on as a defence even though the expiration of the limitation period for that right has been asserted.*

Article 10

152. **Schlechtriem** explained that Paragraph (2) was a consequence of the changing of the system of set-off. The words “unless the obligor has asserted the expiration of the limitation period as a defence” had been chosen to protect the obligee from the obligor asserting the expiration of the limitation period too late.

153. **Hartkamp** pointed out that Article 10 addressed two situations: the right of suspension or retention and the right of set-off. If Paragraph (1) were made more concrete, misconceptions could be avoided: Article 9 stated that in general the obligor must assert it as defence, and in Article 10 it became the defence of the obligee. That was confusing. The case would be that obligee could not enforce his right because it was time-barred, but he was being sued by the other party to perform his obligation and then he could say no, he suspended. Thus, it was entirely focussed on the right of suspension and he felt that the right of retention was a species of the right of suspension, because the right of retention was the right to suspend an obligation. Paragraph (1) should perhaps address only the right of the obligee to suspend his obligation and not speak in general about a defence.

154. **Schlechtriem** suggested that the confusion between “obligor” and “obligee” derived from the fact that the same person acted in different capacities in the two articles.

155. **Fontaine** felt the black-letter rules to be perfectly accurate and the explanation given in Comment 1 to Article 10 perfectly clear.

156. **Farnsworth** suggested that the word “obligee” in Article 10(1) could be replaced by language which had been proposed by Furmston: “notwithstanding the expiration of the limitation period for a right, the right may still be relied on as a defence”.

157. **Uchida** did not think that Article 10(1) made sense, because the expiration of the limitation period did not have legal meaning until the limitation period was invoked by the obligor. It was a matter of course, that the obligee could rely on his right until the obligor invoked the limitation period, but in order to make sense this paragraph should say “Notwithstanding the invocation of the limitation period”.

158. **Hartkamp** indicated that especially since Paragraph (2) used the concept of “assertion of expiry”, it was not very difficult to insert it into Paragraph (1), which was going to be re-drafted. It was only after reading Paragraph (2), that one understood that in Paragraph (1) the obligee may continue to rely on this right even after his assertion of the expiration.

159. **Schlechtriem** suggested placing Paragraph (1) after Paragraph (2), because it was an exception to the assertion, but it should also be made very clear that despite the assertion, the right to retain and withhold should be upheld. The consequence of Paragraph (1) might be illustrated by a case: a seller has delivered non-conforming goods but the buyer has not exercised his rights nor has he raised his claims in time. They have thus expired, barred by the period of limitation. The seller sues for the purchase price, and the buyer says that he can no longer claim for the non-conforming goods under the warranties, but that he can withhold the purchase price despite the expiration of his claims. He can do that indefinitely, even if as a consequence the situation will be in limbo for the rest of the life of the people concerned. The seller will not get his purchase money, and the buyer will keep the non-conforming goods. Schlechtriem indicated that the new German rules on limitation had the same rule as Article

10(1), but in the buyer/seller situation they granted the seller an additional right of termination if the buyer raised the defence. If the rule was kept as it was, they would have to rely on one of the general clauses to preclude the buyer from withholding the purchase price and keeping the goods.

160. **Date-Bah** suggested that in national law there would be the remedy of unjust enrichment.

161. **Hartkamp** stated that that was the problem with the law of withholding performance: you were not allowed to withhold your entire performance because part of what was due to you had not been delivered. The right to withhold performance would be limited in relation to your own performance. That should also be made clear in the drafting of the article, which could state “Notwithstanding the expiration of the limitation period for a right, the obligee is entitled to withhold the performance of his own obligation”. The comments could say that due to the nature of the concept of limitation, the obligee may always rely on his right as a defence, and the most important case has been put into the black-letter rule, i.e. to withhold the obligation.

162. **Schlechtriem** stated that that would amount to price reduction after the period of limitation had run out. In fact, the right to price reduction remained in the guise of a right to withhold. The importance of Paragraph (1) depended on the function of the right of set-off. The seller in the situation he had described would always set-off with retro-active effect, he did not need the right to withhold. It was only because they had decided on a different set-off regime meaning that set-off might be barred by the obligor having asserted that the period of limitation had expired, that the right to withhold as a second line of defence became important.

163. **Farnsworth** suggested a formulation such as “An obligation may still be relied on as a defence even though the expiration of the limitation period has been asserted”. As regards Schlechtriem’s case, in legal systems he was familiar with it was not possible for the buyer to keep the goods and not to pay the seller anything, it was possible to keep the goods and not to pay the full price.

164. **Bonell** suggested that in this case it would be much better to have this provision moved to the last paragraph of Article 9 and to have here a provision specifically addressing the set-off defence.

165. **Finn** suggested that the comment on Article 7.1.3 might have some bearing on the question. Reference could be made to it in the comment.

166. In the end it was agreed that Article 10 would become a sole-paragraph provision, i.e. the present Paragraph (2) with the title “Set-off after Expiration of Limitation Period”. Paragraph (1) would be moved to Article 9 as Paragraph (2) and it should be rephrased along the lines of Farnsworth’s proposal.

167. As regards the formulation of the former Paragraph (2), **Fontaine** wondered whether it could be left the way it was, as he felt it to be strange to start directly with “The obligee may exercise the right of set-off, unless the obligor has asserted ...”. In the sequence of the provisions, Paragraph (2) after Paragraph (1) made sense, but alone, he suggested it might be better to turn it around, and to say “After the obligor has asserted the expiration of

the limitation period, the obligee may no longer exercise the right of set-off'. Alternatively, it could be phrased "The obligee may no longer exercise the right of set-off after the obligor has asserted the expiration of the limitation period".

168. **Bonell** observed that the basic message of the provision was to tell the reader something unexpected, i.e. that you may do something of which you had not thought. He felt that the basic message of the provision was lost. He recalled that the new Article 9(3) also used a positive formula indicating that a right may still be relied on, and he thought the same applied with respect to set-off: you may use it for set-off unless, etc.

169. **Fontaine** suggested replacing "unless" in the present formulation by "until".

170. *This suggestion was accepted by the Working Group.*

171. **Hartkamp** was troubled by the fact that the word "defence" was used in different meanings. In Article 9(2) it was stated that the obligor had a defence, in Article 9(3) the obligee had a defence, and a defence of the obligor was not spoken of, the provision merely stated "even though the expiration of the limitation period has been asserted". Article 10 again referred to a defence of the obligor. It was confusing for the reader, He therefore suggested deleting "as a defence" in Article 10.

172. *This suggestion was accepted.*

Article 11

173. **Farnsworth** suggested that it was better to say "has been performance" instead of "was performance". He stated that he assumed that the editing of the Principles would also extend to such small changes as tense.

174. *The proposed modification was accepted.*

Other Questions

175. **Finn** recalled that the question of whether or not there should be a separate article on renunciation of prescription had been raised previously. As he understood it, renunciation of prescription was not covered by the draft prepared by Hartkamp, nor had Crépeau or he covered it in their drafts. He wondered whether or not the intention was to cover this question.

176. **Schlechtriem** recalled that the question had been discussed when Crépeau had raised it. At the time, the answer had been that if the obligee wanted to bar the period of limitation, the parties were free to agree to novate and to create a new obligation or to create an agreement not to rely on the running of the period of limitation. No need had been seen to deal with that question in a specific article. Furthermore, it might be partly covered even if the parties did not reach an agreement, if they said that they would never invoke the limitation period but nevertheless did so later on. Such behaviour might be inconsistent behaviour.

177. **Hartkamp** added that normally in civil codes rules about the renunciation of limitation periods existed because it was forbidden to renounce your right before the period had expired. That concept had been changed in the Principles by allowing parties to lengthen the period of limitation. The only question would be if you could renounce after the expiration

of the limitation and normally the other party would accept that even implicitly. There was consequently no need to have a special provision.

178. It was decided not to have a provision on the renunciation of prescription.

3. ASSIGNMENT OF RIGHTS, TRANSFER OF OBLIGATIONS, ASSIGNMENT OF CONTRACTS (STUDY L – DOC. 81)

(a) Section 1: Assignment of Rights

Article 1.1

179. With reference to Comment 2, **Fontaine** indicated that there were two alternatives to “tort law”: “tort or non-contractual claims” and “delictual claims”. He stated that personally he would not object to “non-contractual claims”.

180. **Schlechtriem** opted for “non-contractual claims”, as it would cover also unjust enrichment claims which were not covered by the word “tort”.

181. **Finn** added that in common law countries there were equitable claims which were neither equitable nor contractual.

182. It was decided to adopt “non-contractual claims”,

Article 1.2

183. **Bonell** informed the Group that in the Council **Sir Roy Goode** had insisted on considering the enumeration of the exceptions as incomplete. In particular, he had referred to the corresponding provision in Article 11.101 of the PECL. He had felt that it was not clear what was meant by the word “instruments”.

184. **Lando** raised the question of the pedagogical nature of the provision. When he had read “instruments” he had not known what was meant until he had read the comments.

185. **Fontaine** agreed that “instruments” was enigmatic. He himself was not satisfied with the term. Similar problems existed also for the French translation, but the Group had not been able to find anything better. He recalled that in a preceding version the terminology used had been “negotiable instruments” but that there had been objections to the word “negotiable”.

186. **Bonell** stated that the problem had been that the word “negotiable” excluded a number of instruments that were not negotiable.

187. **Furmston** agreed, stating that the problem was that most of the instruments they were talking about were not negotiable. In England 99% of cheques, for example, were not negotiable. It was not possible to replace “instrument” by another single word which would be better.

188. **Finn** stated that if the purpose of the provision was to put a person on notice that other rules might be applicable and not simply this, it could be re-cast as "... transfers made under special rules governing the transfer of particular rights or instruments".

189. **Schlechtriem** felt that it would be impossible to list all the excluded instruments. If they wanted to enlarge the black-letter rules, the only compromise that he could imagine would be to say "instruments such as", and then to name a few prominent examples, such as negotiable instruments and financial instruments. He felt that it would be better to place this specification in the black-letter rule rather than merely in the comments.

190. **Komarov** observed that he would have difficulties when translating this provision into Russian, as he would have to add something, such as "legal instruments". He therefore agreed with Schlechtriem, also because the black-letter rules were often published alone, and many more people were acquainted with the black-letter rules than with the full text of the Principles.

191. **Fontaine** suggested saying "of certain financial and negotiable instruments" in the black-letter rule.

192. **Schlechtriem** suggested "certain instruments such as negotiable instruments, financial instruments", etc.

193. **Jauffret-Spinosi** suggested "instruments governed by special rules", which would indicate immediately that these rules did not apply. The examples could then be given in the comments.

194. **Schlechtriem** was reluctant to accept the idea of instruments that followed special rules, because someone might say that also the assignment of debts followed special rules in his/her country.

195. **Bonell** suggested amending the text to read "(a) of instruments such as negotiable instruments, documents of title, and financial instruments".

196. *This proposal was accepted.*

Article 1.5

197. **Fontaine** drew attention to the fact that the black-letter rule contained the words "between parties" in square brackets. They had been inserted at the insistence of Hartkamp, but no final decision had been taken.

198. *It was decided to delete the words in square brackets.*

Article 1.7

199. **Bonell** informed the Group that Sir Roy Goode had felt that the wording of Paragraph (2) was not clear. He had referred to the PECL text, in which the concept of an obligation of an essentially personal character was expressed in a more straight-forward manner: "an obligation that could not reasonably be required to be rendered to anyone except the assignor".

200. *It was decided not to change the black-letter rule.*

201. **Bonell** wondered whether the comments were intended to be as rigid as they appeared. They referred to “a right which has been granted by the obligor in favour of a very specific person” (Comment 3). This suggested that there had been an express agreement, whereas the corresponding provision of the PECL (Article 11.302), was more flexible and referred to an obligation that the debtor “could not reasonably be required to render to anyone except the assignor”.

202. **Schlechtriem** wondered whether the PECL formulation was really clear. What was “reasonable” in this context? To him, the main question was that the character of the performance of the obligation would change if it were rendered to another person. It was that which excluded assignment. The comments should make it clear what was meant by the obligation changing character if it was performed to someone else.

203. **Fontaine** was not sure that what changed was the character of the obligation, it was rather the person of the obligee. He agreed that his language was narrow and that it could be re-drafted taking the PECL as an example.

204. *It was decided that the Comments should be modified along the lines of the PECL.*

Article 1.9

205. **Bonell** informed the Group that Sir Roy Goode had wondered whether the provision should not be restricted to future rights. He recalled that this had been extensively discussed and he recalled that the Group had felt that the provision was appropriate in its present form

Article 1.10

206. **Bonell** informed the Group that the Council had questioned such a strict rule, i.e. making a valid payment dependent upon only an effective notice and not on knowledge of the assignment. He had drawn attention to the provision and to the comments to it, which specified that, due to the international scope of application of the rules, notice was required, which did not exclude that payment made to the wrong person might in particular cases involve liability.

Article 1.11

207. **Bonell** stated that Sir Roy Goode had insisted that Article 1.11 was a priority rule, whereas he had tried to explain that the Group had deliberately excluded property right considerations.

208. **Lando** observed that the provision functioned like a priority rule.

209. **Bonell** objected that this was not necessarily the case vis-à-vis third persons.

Article 1.13

210. **Fontaine** indicated that he had difficulties with Article 1.15 as regards the changes to Article 1.13(2) made at the Rome meeting in relation to set-off. Prior to this modification, the solution had been that, as regards set-off, the order of the notices had been followed. The obligor could assert set-off if it had sent notice of set-off before receiving notice of assignment. This had been changed in Rome, and had become “The obligor may assert against the assignee any right of set-off available to the obligor against the assignor up to the time notice of assignment was received”. The decisive factor was whether the conditions of set-off were satisfied, whether the right of set-off was available before notice of assignment was given.

211. **Bonell** added that Sir Roy Goode had wondered whether one should not add a reference to “closely connected” rights, which were referred to in PECL Article 11.307.

212. **Schlechtriem** felt that such an extension could cause trouble: what was meant by “closely connected”?

213. **Fontaine** expressed surprise, as he would have expected to find a provision on the enlargement of set-off in the chapter on set-off. He wondered why the extension had been placed here in the PECL. .

214. *It was decided not to make the proposed addition.*

215. **Uchida** referred to line 6 of Illustration 3, which said “set-off by giving notice to the assignee”. He wondered whether it should not be “assignor” instead of “assignee”. He observed that in order to be effective, the notice of set-off had to be sent to the assignor first.

216. **Fontaine** thought it should be to the assignee, because there had been an assignment, so if a defence were asserted against the assignee, it was to the assignee that notice had to be given. It was however ambiguous as the assignor had to be notified as well. Both the assignor and the assignee needed to know.

217. **Schlechtriem** thought that the obligor asserted a defence saying that he could set-off, but the set-off had to be declared to the assignor. So far it was only a defence to withhold one’s performance, but in order to finalise it, the notice of set-off had to be sent to the right party, i.e. the assignor.

218. **Fontaine** added that you asserted it against the assignee, but you gave notice to the assignor.

219. **Schlechtriem** thought that this was not clear in the text. He stated that it was possible to have it both ways, you could say that the obligor may set-off as against the assignee, but that would be an exception to the requirement of mutuality under the set-off provisions. Logically Uchida was correct, the set-off had to be declared against the obligee, i.e. the assignor, and you could use the possibility to set-off only as a defence against the obligor.

220. **Bonell** stated that he would have thought that it was an exception and that the right was transferred to the assignee.

221. **Fontaine** observed that the right had been transferred, but the obligation was still between the obligor and the obligee. He stated that Illustration 3 should be revised on that point and an explanation should be given in the comments. He felt that the defence would be asserted against the assignee, but notice must be given to the assignor.

222. **Bonell** observed that Fontaine and Schlechtriem insisted on using the term “defence”, whereas the language used referred to “any right of set-off may be asserted”, which was exactly the language used in the set-off chapter. He would therefore have taken it for granted that it was the other way around. The black-letter rule was therefore ambiguous.

223. **Slechtriem** stated that he could live with both solutions, but wanted to the comments to be clear. If an exception from the general rules on set-off were made, then this should be stated in the comments: i.e. that the set-off was achieved by raising this defence against the assignee. Alternatively they had to say that it was simply a defence, but that the effectiveness of the set-off could be achieved only by declaring the set-off against the assignor.

224. **Fontaine** stated that he reasoned along the lines of defence, because they were discussing Article 1.13 which was entitled “Defences” and from the beginning his impression had been that they were treating this as a defence. He did not think it necessary to change the black-letter rule, but they had to take a position in the comments.

225. **Lando** recalled that Article 11.307(2) of the PECL read as follows:

“The debtor may also assert against the assignee all rights of set-off which would have been available against the assignor under Chapter 13 in respect of any claim against the assignor:

- (a) existing at the time when a notice of assignment, whether or not conforming to Article 11:303(1), reaches the debtor; or
- (b) closely connected with the assigned claim”.

226. **Slechtriem** observed that the PECL followed the German solution, i.e. that the obligor can effect set-off by declaration to the assignee. Furthermore, they were even broadening the right of set-off to include closely connected claims. This should however be dealt with in the set-off chapter. If this solution were opted for it should be made clear in the comments.

227. **Komarov** saw no difficulties in the present wording. The idea was clear: when the right had been assigned, it was the assignee who had relations with the obligor, and it was the obligor who gave notice of set-off to the assignee.

228. **Slechtriem** observed that as regards the position that the set-off could be effected as against the assignee, by the time this had happened the assignor might be out of the picture. The assignee was the one who went against the obligor, and if the obligor defended himself with set-off, the assignor might have vanished, with a limbo situation as a result. He therefore suggested making an exception from the basic rules of set-off and to allow set-off as against the assignee. It would be sufficient to state this in the comments.

229. **Bonell** observed that the rule was clear: “may assert any right of set-off” meant according to the chapter on set-off. If the Group agreed on such a reading, the black-letter rule should remain as it was, with the comments providing further explanation.

230. **Fontaine** remarked that the assignor had not totally disappeared, because he still had an obligation to the obligor which was going to be set-off. If after successfully invoking set-off against the assignee the obligor claimed its right against the obligee, the obligee should be informed of the fact that the right had been set-off. He suggested broadening the title to “Defences and Rights of Set-Off”.

231. **Schlechtriem** suggested explaining in the comments that “to assert” meant “to effect” set-off.

232. *It was decided not to modify the text of the Article, but to broaden its title to “Defences and Rights of Set-Off”.*

233. *Subsequently, in the context of the discussion on the proposal submitted by Finn for Article 4(2) of the Chapter on Set-Off, it was decided to replace “assert” by “exercise” in Article 1.13(2). It was therefore not necessary to add any explanations to the comments.*

Article 1.14

234. **Fontaine** stated that he had modified the black-letter rule by replacing “claim” by “right” as the whole chapter spoke of the assignment of rights, and only Article 1.14 spoke of the assignment of claims.

Article 1.15

235. **Bonell** stated that Sir Roy Goode had suggested to add “except as otherwise disclosed to the assignee” in the opening sentence., which was language that was to be found in Article 11.204(a) of the PECL. He himself felt that it was understood, but Goode had stated that it must be the assignor who made the disclosure.

236. **Fontaine** observed that the provisions were not mandatory and could be modified by the parties.

237. **Schlechtriem** stated that it was not an agreement between the parties, it was simply that the undertaking of the assignor would not be effective if he disclosed that set-off had already taken place. What Goode proposed made sense to him, but it went to the very basis of their concepts that the undertaking was one in the context of assignment and not in the context of the underlying contract. “Otherwise disclosed” did not sufficiently refer to the following defences.

238. **Finn** stated that he had difficulties with Article 15.1(e). The object would seem to be to protect the assignee in the event of a right of set-off being exercised against the assignee, but the language in which it was cast was not that there was a right of set-off, but that notice of set-off was not being given. That seemed to be odd, because it under-cut the benefit of the undertaking. The PECL only spoke in terms of a right of set-off, he found that to be an intelligible undertaking to give, he was not aware that there was any right of set-off

that could affect the right of assigning. It was quite a different thing to say that one was not aware of any notice invoking the right of set-off.

239. **Bonell** wondered whether there was any difference between Article 1.15(e) and Article 11:204(a)(ii) of the PECL which referred to set-off (“including any right of set-off”).

240. **Finn** stated that it was not affected by any right of set-off, i.e. notice had not necessarily been given, you had a right which was susceptible to having a sum set off against it, although a notice had in fact not been given. What you were talking of was not a right of set-off, but notice of a right of set-off. For a person to give an undertaking where a right of set-off had been given, it seemed odd to say “unless otherwise disclosed to the assignee”.

241. **Fontaine** suggested the formulation “unless otherwise agreed or disclosed”. The list was so long that disclosure was, for example, relevant to (a) but not to (f).

242. **Bonell** objected that if “unless agreed” were adopted, it would have to be placed everywhere.

243. **Lando** supported the idea of disclosure, even if the word might not be correct. “Agreed upon and disclosed” he felt to cause confusion.

244. **Furmston** could think of no better word than “disclosure”. It was not a linguistic problem.

245. **Schlechtriem** felt that it was not a theoretical problem. It happened quite frequently that someone assigned a right, but a third party claimed that he had attached that right or that it had been assigned to him. The assignor would tell the assignee that claims by a third party existed, that he did not think that they were founded, but that he nevertheless had to tell the assignee to cover his back. The disclosure moment was therefore important.

246. **Fontaine** observed that they should not be too dogmatic, and that if they used “disclosed” it would not hurt too much even if it did not fit exactly with everything in the list.

247. *In the end, the Group decided to adopt the suggested additional language “except as otherwise disclosed to the assignee” and to place it in the chapeau of the Article.*

248. As regards lit. (e), **Fontaine** indicated that, as regards the set-off, earlier the difference had been clearly between the obligor and the assignor. The assignor was undertaking that he had not and would not give any such notice in the future. They had however decided that for the obligor they could only ask the assignor to undertake that the obligor had not given notice in the past, but they could not ask the assignor to undertake that the obligor would not give notice in the future. When he had prepared his document, he had realised that they had changed Article 1.13. In Article 1.13 they had adopted a rule according to which the right of set-off could be asserted when the right of set-off was available at the time notice of assignment was given. This placed the assignee under the risk that after giving notice of assignment the obligor would then raise set-off, even though he had not given notice before, because the other may raise set-off if set-off had been available before. This was a big risk for the assignee. It would make it possible for an obligee who would be aware that the obligor was in a position to give notice of set-off, to assign the whole right and leave the assignee with the risk of losing the balance if subsequently the obligor gave notice of set-off.

For this reason he had suggested enlarging upon the assignor's undertakings under Article 1.15(e). The assignor would undertake that neither the obligor, nor the assignor, had given notice of set-off concerning the assigned right, and would not give any such notice in the future. This was an extra burden on the assignor, but the assignor was in a good position to know at the time of the assignment that set-off was available.

249. **Schlechtriem** felt that the burden placed on the assignor was not undue.

250. *The modification introduced by Fontaine was accepted.*

251. As regards Comment 3, **Bonell** informed the Group that Sir Roy Goode had referred to the statement "If the assignor has already assigned the right to another assignee, it is not entitled to make this second assignment (...)". He had suggested making it clear, that if you had previously assigned the right for security purposes only, you may still be in a position to assign the right.

252. *This suggestion was accepted.*

253. **Uchida** recalled that it had been decided to change the black-letter rule of Article 1.13 to say "against the assignor". He therefore suggested that this wording replace "made by the assignor" in line 2 of Comment 4.

254. *This suggestion was accepted.*

Section 2: Transfer of Obligations

Article 2.1

255. **Bonell** informed the Group that Sir Roy Goode had felt lit. (a) to be misleading, because it did not mention the agreement of the obligee. He himself had pointed out that in Article 2.3 there was the requirement of consent, which Goode had felt to be the same, but which in any case was not mentioned in lit. (a). He recalled that the Group had felt it important to draw the attention of the user to the fact that there might be two different techniques of transferring an obligation depending on who was taking the initiative. Goode had insisted that it was not possible to say in a black-letter rule that an obligation might be transferred by agreement between the original obligor and the new obligor and to say only later on that in order to be effective the consent of the obligee was necessary. Goode's first preference was to merge Articles 2.1 and 2.3, the second to include in lit. (a) something along the lines of "with the consent of the obligee" or "subject to Article 2.3".

256. **Schlechtriem** saw no problem adding something in lit. (a) along the lines suggested.

257. **Fontaine** felt that the present texts were satisfactory, but merging Articles 2.1 and 2.3 would not create too many problems.

258. **Furmston** suggested moving Article 2.3 to become Article 2.2 and then to start Article 2.1 with "Subject to Article 2.2".

259. **Fontaine** observed that that would be complicated because Article 2.3 was connected to Article 2.1(a) but not to Article 2.1(b).

260. *It was decided to add “subject to Article 2.3” at the end of lit. (a).*

Article 2.4

261. *It was decided to delete the language in square brackets and not to have “then” in Paragraph (2).*

Article 2.5

262. **Fontaine** observed that Illustration 4 had to be re-drafted as it related to the first three illustrations and changes had been made to those illustrations that had to be taken into account.

263. **Farnsworth** suggested finding a synonym for “happy”.

Article 2.7

264. **Fontaine** observed that set-off was treated as a defence in this Article. He therefore suggested modifying the title to read “Defences and Rights of Set-Off”, deleting the words “except set-off” in that paragraph, and adding instead a second paragraph reading

“(2) The new obligor may not exercise against the obligee any right of set-off available to the original obligor against the obligee”.

265. *These suggestions were accepted by the Group.*

Article 2.8

266. **Fontaine** pointed out that the reference in Paragraph (2) to Article 2.6(1) should be to Article 2.5(1).

267. **Schlechtriem** drew attention to Paragraph (3), which ended with “obligors” in the plural. This was corrected to the singular.

(c) Section 3: Assignment of contracts

Article 3.1

268. **Bonell** wondered whether the Latin expression “*ipso iure*” should be used, as they were drafting for readers world-wide.

269. *It was decided to replace the expression “ipso iure” with “by operation of law”.*

Article 3.4

270. *It was decided to delete the language in square brackets in Paragraph (2).*

Article 3.6

271. **Fontaine** suggested to modify the title to read: “Defences and Rights of Set-Off”.

272. *This suggestion was accepted.*

273. **Hartkamp** wondered whether Articles 3.6 and 3.7 could not be merged.

274. **Fontaine** expressed a preference for keeping them separate.

275. **Bonell** indicated that the two Articles should be kept separate to preserve the symmetry with the other sections.

4. SET-OFF (STUDY L – DOC. 82)

276. **Jauffret-Spinosi** stressed the difficulties with the word “obligations”, because set-off set a debt against a “*créance*” or credit, whereas only one word was used in the draft, i.e. “obligation”, and it was only the context which revealed whether it meant “*créance*” (credit) or debt. The civil codes she had consulted had indicated that normally a debt was set against a “*créance*”, even if it did happen that a debt was set off against another debt, or a “*créance*” was set off against another “*créance*”. The opening comment was intended to illustrate this difference. Finn, her co-rapporteur, had however felt that this explanation was not necessary.

277. **Bonell** informed the Group that a similar objection had also been raised in the Governing Council. The language of the opening comment had been considered to be surprising or even obscure.

278. **Schlechtriem** suggested modifying the text of Paragraph (1) of the black-letter rule to read “Where two parties owe each other to pay money or to render other performances” thus avoiding the word “obligations” altogether in Paragraph (1). **Di Majo** agreed with this proposal.

279. **Bonell** pointed out that there was still the set-off of the obligation later on in the Article.

280. **Jauffret-Spinosi** stated that in Paragraph (1) “obligation” corresponded to “debt”, but there was a problem in Paragraph (2).

281. **Finn** explained that the reason he had suggested the deletion of the first paragraph of the Comments was that it seemed to do no more than say that the word “obligation” could be active or passive and that seemed to be precisely what the first two lines of the black-letter rule said, adding the words “active” and “passive”.

282. **Schlechtriem** stated that in German law there was the same problem of finding the right word for the two obligations. The word in the Civil Procedure Act was in fact different from the one used in the BGB. He still felt that the first time the word “obligations” was mentioned it could be deleted. The second time it was mentioned its meaning was clear, as it was in Paragraph (2). The only clarification that might help could be “may set-off its

obligation against a counter-obligation of the other party which is not ascertained”. As regards the comments, he agreed that the first paragraph was not needed.

283. **Hartkamp** felt it to be essential to be clear in the terminology used. What exactly did “set-off” mean?. What was set off against what? The possibilities were: (a) the first party has a debt and the second party has a claim; (b) the first party has a claim and the second has a debt. What was set off: the claim of the first party against the claim of the second party? (This was the case in the PECL). Or was the claim of the first party set off against the debt of the other party, or was the claim of the first party set off against the debt of the first party? In the European Group Prof. Zimmermann had stated that to his understanding in the common law you set off two claims against each other, i.e. the claim against the first party against the claim of the second party. If a different terminology were chosen without any explanation, all readers of the two instruments would become confused, it was necessary to explain. In Romanist terminology a debt and a claim of the same party were compensated, whereas in these articles one thing of one party was set-off against something of the other party, which was a different concept.

284. **Schlechtriem** did not think it necessary to decide whether it was set-off of the claim or of the debt: it was both at the same time. It depended on the view-point from which one looked at it. The debtor could perform his debt by set-off, but since he was an obligee as well, he could enforce his claim by set-off against the other party.

285. **Finn** suggested the following wording: “Where two parties owe each other obligations of the same kind, whether to pay money or to render like performances”. This defined internally the scope of what they were talking about.

286. **Bonell** felt that it was clear in the provision that what was set off was the passive obligation, i.e. the debts.

287. **Schlechtriem** modified his proposal slightly, following which it read: “Where two parties owe each other money or other performances of the same kind ...”.

288. **Farnsworth** felt it to be a good suggestion. He had no idea what the answers to Hartkamp’s questions were, but it seemed to him that at no time was he talking about setting something off against a person, he therefore suggested that what was meant by “set off its obligation against its obligee” was “set off its obligation against the obligation of the obligee” or more simply “against that of the obligee”.

289. **Hartkamp** agreed that what was referred to was the obligation of the obligee. He found it strange that in English it was possible to set off a claim against a claim or an obligation against an obligation.

290. **Furmston** indicated that considered from the linguistic point of view, there was nothing inelegant in the wording of the present provision, but he would not object to some changes. It was possible to talk of two parties owing each other money, which was one of the cases discussed. Article 1(1) and Article 1(2) discussed quite different situations, but Article 1(1) discussed the situation where two people owed each other money, or owed each other performances of the same kind. It could be shortened along the lines suggested.

291. *In the end, the suggestion to change Paragraph (1) to read: “Where two parties owe each other money or other performances of the same kind, either of them (“the first party”) may set off its obligation against that of its obligee (“the other party”)....” was adopted.*

292. As regards Paragraph (2), **Jauffret-Spinosi** felt that the phrase “the first party may also set off its obligation against an obligation of the other party” was misleading. “The first party may also set off its obligation” was a passive obligation against the passive obligation of the other party. Here it was therefore not a case of a credit against an obligation, it was an obligation against an obligation. She suggested it would be less misleading to say “If the obligations of both parties arise from the same contract, the first party may also exercise set-off against an obligation of the other party”, i.e. to delete the first “obligation”.

293. **Bonell** expressed surprise at this proposal, as Paragraph (2) was in exact parallelism with Paragraph (1), except that it was an exception.

294. **Jauffret-Spinosi** explained that when she and Fontaine had attempted to translate the provision, they had had a problem, and she had come to the conclusion that they would be forced to translate “obligation” with “debt” both times “obligation” was cited in Paragraph (2), whereas her point of departure was that set-off was a debt being set off against a credit.

295. **Hartkamp** indicated that it was clear in the English text that what was set off was two obligations. When, however, you had to translate the text into French, there were problems, because in French “*compenser*” related to the debt of the first party and the claim of the first party.

296. **Bonell** suggested that, even if it was different from the usual structure, the same word might be used also in French, as he would do also for the Italian (“*debito*”).

297. *It was decided to delete the opening two paragraphs of the Comments.*

298. As regards the second sentence of Comment 7, **Fontaine** wondered whether the specification “monetary obligation” was correct.

299. *It was decided to delete “monetary”.*

300. **Fontaine** suggested changing the title of Comment 7 to read “Set-off of obligations arising out of the same contract” and to start immediately by having a special explanation of Paragraph (2).

301. *This suggestion was accepted.*

302. **Finn** suggested modifying the last sentence of the first paragraph of Comment 1 to read “Set-off avoids the need for each party to perform its obligation separately”. Furthermore, in Comment 2 the last word of the first sentence, “quality”, would not mean much to a common lawyer. He therefore suggested replacing it by “capacity”.

303. *These suggestions were accepted.*

Article 2

304. **Finn** suggested replacing the word “qualified” by “classified” in the first line of Comment 1.

305. In the same sentence, **Farnsworth** suggested saying “obligations to render performances of the same kind” as Article 1 had been re-phrased to read “Where two parties owe each other (...) performances of the same kind”, and it was not the obligations that were of the same kind.

306. **Bonell** suggested modifying the whole sentence to read “Payment in different currencies cannot be classified as performances of the same kind”.

307. **Furmston** observed that obligations to pay in different currencies could be classified as obligations of the same kind and there were probably instances in which they were. What they meant was that they were not to be classified as obligations of the same kind for the purposes of that Article.

308. **Farnsworth** suggested saying “are not “performances of the same kind” under Article 1”.

309. *The final text of the first line of Comment 1 therefore read “Payments in different currencies are not performances of the same kind according to Article 1”.*

310. **Lando** recalled that at the last meeting El Kholy had suggested the possibility of adding something about exchange rates. He wondered whether there might not be a problem with exchange rates, as he thought that they might be different in different places.

311. **Furmston** observed that time was the first critical factor, because in modern markets exchange rates changed all the time. He believed it to be true that there were different prices in different places, but he felt that time was more critical than place.

312. **Fontaine** recalled that there were provisions in the Principles on the currency of payment and on the rate of exchange, for example Article 6.1.9(3). The problem with set-off was that there might be two different places of payment. The problem of rates of exchange had to have a specific solution in the chapter on set-off.

313. **Lando** suggested that the question should be dealt with in the comments.

314. **Schlechtriem** wondered whether it might not be expected that the question would be dealt with under Article 6.1.9(3) accordingly.

315. **Bonell** wondered what that would mean in the set-off scenario: the original places of payment of the two obligations?

316. **Furmston** stated that the party who was setting off was obliged to pay in the place where he was supposed to pay, so he could not choose place of payment to get the benefit of his home-town rates. The obligation was the obligation of the party who was choosing to set off. It should therefore be quantified in terms of the obligation at the place of payment of his obligation.

317. **Fontaine** suggested that the comments refer to Article 6.1.9(3) and say that the relevant place of payment was the place of payment of the obligation of the party who exercised his right of set-off, i.e. the first party.

318. *This suggestion was accepted by the Group.*

Article 3

319. **Schlechtriem** wondered whether Article 1.9 would be revised, because the end of the second paragraph of the Comments to Article 3 referred to “other forms of electronic communication” and Article 1.9 only spoke of “communication”. He wondered whether an electronic communication, even if it reached the server of the addressee, necessarily always “reached” the addressee in legal terms. For example, in the case in which it was sent in a format that the addressee could not open, the communication had not “reached” the addressee. This had to be considered also as regards Article 1.9. He wondered whether the reference to electronic communication was not too broad here. He suggested that the word “electronic” before “communication” be struck out.

320. **Bonell** observed that the case of the electronic message that could not be opened would be covered by Article 1.9. More generally, the statement contained in the last sentence of the second paragraph might be misunderstood. The words “other forms of electronic communication” could suggest that oral notice would not be sufficient, whereas under the general principle in Article 1.9 even an oral notice might, under the circumstances, be effective.

321. **Fontaine** thought that if they did not want to change anything in the rule of Article 1.9, it would be sufficient to make a reference to Article 1.9.

322. *It was decided to add “see” to the brackets in the second paragraph of the comments (“(see Article 1.9 of the Principles)”) and to delete the second sentence.*

323. **Di Majo** stressed the need for all the requirements for set-off to be present before set-off could be made. He felt that they were mandatory.

324. **Jauffret-Spinosi** agreed with Di Majo, but recalled that it had been decided otherwise at the previous meeting of the Group.

325. **Uchida** suggested that it was possible to send notice beforehand. He suggested that the words “some days” in the third paragraph of the comments were not necessary and could be deleted. In any event, the provision did not deal with the timing of the notice, so they did not need to say anything about the time.

326. **Jauffret-Spinosi** felt that it would be too broad and dangerous if they allowed the sending of the notice before all the conditions had been met, even if it was understandable if there was no doubt that the missing conditions would be fulfilled.

327. **Schlechtriem** wondered what the consequences would be if they permitted notices of set-off before all the requirements for set-off were met. It made sense at first sight to say that it did not matter if the notice were sent a couple of days in advance, but there could

be cases that would cause him some problems, such as, for example, if, at the time when a debt was incurred, the party already declared set-off which would be effective five years later.

328. **Bonell** recalled that Hartkamp's primary concern when he had proposed the addition of the sentence had been that the notice should not be conditional. The borderline between a conditional notice and a premature notice could become very thin.

329. **Furmston** could not see what the objection was to giving notice in advance when it was certain that the debt would fall due. If, for example A owed B 1000 dollars payable on the next anniversary of independence day, and B owed A 1000 dollars payable on the next anniversary of the third day of the Battle of Gettysburg, and it was now May, why could not one of them give a notice saying they had to set off in July? He could see that there were problems with things that were not certain, but where it was clear that the money was going to be owed, but it was not owing until a future date, he could not see what the objection was.

330. **Schlechtriem** stated that there were always uncertainties even if the dates were clear. The debt might be discharged by payment by an agent. If the parties wanted to have set-off before the obligations became due, they could always contract to set off, if they needed premature set-off by unilateral notice.

331. **Hartkamp** stated that it was in the interest of legal certainty to know whether the debt had been paid or not, whether or not it had disappeared by set-off. It was mainly important with a view to the interests of third parties. If a creditor seized a claim against somebody, he must know if it existed and he could not say that perhaps it had been paid subject to a condition. That was why they had said that it could not be made subject to a condition, it could not be made subject to a period of time, but there were border cases. Simply to permit it to be made in advance they had felt to be too broad a rule and too novel, which was why they had attempted to reach a compromise.

332. **Lando** observed that Article 5(3) stated that set-off took effect as from the time of notice. If the rule that you could give notice earlier were introduced, when would set-off take effect? He presumed from when the conditions were fulfilled, but that was not the time of notice. He could see no real commercial reason for giving early notice.

333. **Schlechtriem** observed that it should be possible. It would not be a condition to send a notice early saying it should be effective on the date when the obligations became due, because it could very well be that A had to pay money the following week, but would be out of the country. Would it not be possible for him to send a notice of set-off saying that it "shall be effective on 10 June when my obligation falls due". That would not be a condition, because it was not an uncertain event, it was a fixed date. He felt that it would be sufficient to explain in the comments that it could be made effective at a later date if the sender of the notice indicated this. **Uchida** agreed with this suggestion.

334. **Schlechtriem** felt that the specification of the advance notice being made "some days before" should be omitted, as it could be misleading. There were, for example, instances in which people were absent for a longer period of time, such as a month.

335. **Finn** observed that if one had convertible currencies, the date on which the set-off would take effect should be specified, because there could be considerable variation over a few days.

336. **Schlechtriem** suggested the question be dealt with in the discussion on Article 5(3), as it was becoming clear that it was not only a question of sending a premature notice, with the addition that it should be effective at a certain date, it could also be that the setting-off party, by reason of fluctuating exchange rates, asked that the set-off should be effective only on such and such a date.

337. **Date-Bah** observed that if the comment were deleted, the outcome Schlechtriem was seeking would not be prevented.

338. *It was concluded that the third paragraph of the comments should be deleted.*

339. *It was also decided that the first paragraph of the comments should refer to the “court” and not the “judge”, so as to make it clear that it covered also the case of arbitration.*

Article 4

340. **Schlechtriem** felt there to be a contradiction between the black-letter rule and the comments, the rule referring to “the obligation to which it relates” whereas the comments stated that the obligations of both parties that are to be set off must be specified.

341. *It was decided to refer to “obligations” in the plural in Paragraph (1).*

342. **Hartkamp** wondered whether the terminology “which must be set off” in Paragraph (2) was correct in this chapter. Article 1 referred to the first party who “sets off its obligation” and here there was suddenly another obligation of the other party that was set off.

343. **Schlechtriem** felt Paragraph (2) to be superfluous. He referred to the case where the debtor wanted to pay without being approached by the creditor, and wanted to do so by set-off. He must then specify the obligation he used for set-off, i.e. for payment, and of course the obligation of the other party as well.

344. **Fontaine** suggested that if Paragraph (2) were not deleted, it could be reformulated as follows: “If the notice does not specify the obligation of the other party against which set-off is asserted, the notice is ineffective”.

345. **Hartkamp** stated that the structure of the article as such was correct, because it discussed the possibilities, first, that the obligation of the first party had not been sufficiently identified, and secondly, that the obligation of the other party had not been sufficiently identified. That was Paragraph (1). Sanctions followed in Paragraphs (2) and (3). Paragraph (2) stated that if the obligation of the other party had not been identified, the notice was ineffective, and if the obligation of the first party had not been identified, then the rules on appropriation applied. If Paragraph (2) were deleted, you would not know what happened if the obligation of the other party were not sufficiently identified. He suggested that the wording proposed by Fontaine be adopted.

346. **Furmston** did not understand the illustration and why it was not governed by Article 4(3) rather than Article 4(1) and (2). He did not understand why at the end it said “none of B’s obligations will be discharged”, when at the beginning it spoke of the discharge

of A's debt to B. It seemed to him that A was saying to B that B owed him 10,000 dollars and that he owed B 5,000 dollars and that the 5,000 should be set off against the 10,000, even if he did not specify which were the particular sums concerned. To him that seemed a perfectly sensible thing to do. Nor could he see why it was not covered by the rules in Article 6.1.12 which were referred to in Article 4(3). He wondered if the result would be different if, in the same fact situation as in the illustration, it were B who took the initiative, if B said "you owe me 5,000, set it off against the money I owe you".

347. **Hartkamp** indicated that then it would come under Paragraph (3).

348. **Schlechtriem** still felt that Paragraph (2) could be deleted, if in Paragraph (1) they had the statement that, in order to be effective, the notice must sufficiently specify the obligations to which it related. They then needed a default rule for the debt of the setting-off party, i.e. the reference to Article 6.1.12, but only to Paragraph (3), because Paragraph (1) had the same rule as this and was an unnecessary repetition.

349. **Bonell** observed that if you started with the general proposition in Paragraph (1), and then addressed only one possible "wrong" situation, stating the sanction, the question of what the situation would be if the situation of the other party was not specified would immediately arise.

350. **Hartkamp** recalled that the discussion of the previous year had concerned a clarification of the comments. They had spelt out in the article what was in the comments, as the article had not specified what the consequences of not specifying the sums were. They had decided to specify in the article what the sanction was, and the model of the European Principles had been followed. Re-considering the matter, they could change the solution of Paragraph (2), introducing also for this case a rule on appropriation. However, he did not know if that rule could be the same as the one that was in Article 6.1.12(3).

351. **Fontaine** observed that if Paragraph (2) were deleted, that would raise a problem. The Article had a structure, and if there was a solution for the case dealt with in Paragraph (3), there should be one also for the case dealt with in Paragraph (2). If Paragraphs (2) and (3) were kept, then the illustration which took up the case of imputation should not deal only with a situation where the rules on imputation did not apply, but there should be also, or instead, a positive illustration. As regards "obligations owed by the first party" in Comment 2 there should be an illustration about where imputation would apply. It was a little surprising to have Paragraph (3) that said that Article 6.1.12 applied, and then to have an illustration which said that it did not apply, instead of one where it did apply.

352. **Finn** observed that as far as specifying the obligation owed by the other party was concerned, the issue arose only if the other party owed multiple obligations. If one did not specify which one, the other party should be able to choose which one was discharged. It was anomalous that a party might owe 100,000 dollars made up of three separate debts, that the other party wanted to set off 5,000 dollars, but because he did not specify where out of the 100,000 dollars it was to be appropriated towards a discharge of the obligation he would not be able to set it off at all. He could see no rational reason for that. The other party should be able to select to which debt the money should be *pro rata* discharged.

353. **Komarov** supported the retention of Paragraph (2), for the sake of clarity but also for educational purposes.

354. **Date-Bah** felt that the point raised by Furmston was not inconsistent with the retention of a re-drafted Paragraph (2). What was needed, was to ensure that even if there was not a full indication, the rules on appropriation could nevertheless be used to save the transaction.

355. **Farnsworth** observed that Paragraph (1) said “sufficiently specified”, whereas Paragraphs (2) and (3) said only “specified”. Perhaps “sufficiently” could be inserted, which would soften the effect of Paragraph (2) in particular.

356. **Hartkamp** also preferred the solution illustrated by Furmston. Contrary to normal preferences – that declarations and legal acts were valid if possible and should not be rendered null and void unless there was a strong urgency to do so – it would be preferable if it were possible to find a rule that could save such a notice of set-off without endangering legal certainty in commercial transactions. The first thing that came to mind was to create a rule on appropriation. Article 6.1.12, in which the debtor had more than one obligation, said that if the debtor did not specify, the creditor may specify, and that if the other person did not specify either, that there were rules on appropriation that could not operate directly, e.g. because normally they would operate the other way around, as in the appropriation case of Article 6.1.12, it was said that the debtor would like to pay if he had chosen to pay the debt that was the least burdensome to him, whereas in this case, he would of course like to retain the debt that was most to his advantage, so it would be rather difficult to draft an entire set of rules on appropriation with a view only to this not very ordinary case. The problem could perhaps be solved by saying that if the notice did not specify the obligation of the other party against which set-off was asserted, then the other party could indicate it himself. The comments might add that in the case that even the other party would not indicate the obligation which should be set off, then you might try to appropriate it along the lines of Article 6.1.12.

357. **Lando** indicated that he could go along with what Hartkamp had illustrated, but in the case where none of the parties specified, then it might be possible to say that there was no set-off.

358. **Schlechtriem** agreed with that solution: it should be left to the other party to specify, and if he did not specify within a reasonable time the set-off would be ineffective.

359. **Finn** added that in the absence of the other party making a specification within a reasonable time, the obligations should be imputed in the order in which they fell due.

360. **Hartkamp** stated that that was not possible, because it was not possible to set off against an obligation that had not yet fallen due.

Proposal submitted by Finn

361. **Finn** submitted a proposal for Article 4(2) which read as follows:

“Where several obligations are owed to the first party and their performances are due at the time of notice, if the first party does not sufficiently specify the obligation against which set-off is asserted then

- (a) the other party may, within a reasonable time, declare to the first party the obligation to which the set-off relates;
- (b) if no such declaration is made, then the set-off will relate to the obligations in the order in which they have fallen due”.

362. **Finn** indicated that the language of his draft followed the language of Article 6.1.12.

363. **Farnsworth** observed that this provision was in part analogous to the provision on the payment of debts: if someone owed him a debt, and they sent him some money and he was not sure what to apply it to, he might want to find out what he was permitted to do. Set-off was a little different: it was a means of enforcing someone else’s right and if he received a notice of set-off and it was unclear, under the existing provision he could say that the notice did not tell him what he needed to know, so forget it. This contained a default rule which the creditor might want to know. He was not sure that that was a good position to put a creditor in, or one particularly analogous to one in which the creditor had received some payment money.

364. **Finn** suggested that the alternative for lit. (b) would be “If no such declaration is made, then the notice will be ineffective”.

365. **Schlechtriem** recalled that the Group had discussed at length whether the notice should be ineffective or whether there should be some mechanism to save the set-off. He thought that the majority opinion had been that if they found an acceptable solution the set-off should be saved, even without there being a clear declaration.

366. **Bonell** wondered whether a modification of lit. (b) to the effect that if no declaration was made the notice would be ineffective would meet Farnsworth’s concern. **Farnsworth** confirmed that it would.

367. **Furmston** thought that a rule which said that if neither party did anything the set-off was ineffective was not the best rule. He would prefer a rule which would produce a solution in all eventualities. He would not mind another default rule.

368. **Lando** did not think that there was much sense in relating the set-off to the obligations in the order in which they had fallen due. When they had all fallen due, there was not much reason to look back at the order in which they had fallen due. He suggested that the proportionality rule be adopted, and that the sums be set-off proportionally to the debts. He did however favour that set-off should be effective to the greatest extent possible.

369. **Komarov** also favoured having a rule which would save the notice. As far as the consequence was concerned, he preferred to have Lando’s suggestion to use proportionality and not the rule proposed by Finn.

370. *Lando’s proposal was accepted.*

371. **Hartkamp** suggested that the first line be simplified. **Bonell** agreed, suggesting that it begin with “If the notice does not specify ...”.

372. *This proposal was accepted.*

373. **Jauffret-Spinosi** raised the question of the terminology used. The proposal adopted stated that set-off was “asserted”, whereas in the provisions on assignment “exercised” was used. She referred to Article 3 of the chapter on set-off, which stated that the right of set-off was exercised by notice to the other party.

374. **Bonell** understood the difference in terminology to refer to the right being “exercised” by a party, and the declaration of the party stating that he “asserts” set-off against an obligation.

375. **Schlechtriem** felt Jauffret-Spinosi to be correct: “assertion” was the “exercising” of the right.

376. *It was agreed to replace “asserted” by “exercised”.*

377. **Schlechtriem** recalled that the term “assert” had been used for set-off in the context of assignment. There, the situation was different, because a party was asserting someone else’s right of set-off as a result of the assignment. In that case (Article 1.13) it was correct to use “assert”.

378. **Bonell** wondered whether “assert” was correct or necessary in that context. If it was not necessary, then they should try to have uniform language throughout the Principles.

379. **Fontaine** observed that when Article 1.13 was first written it was entitled “Defences”, now the title was “Defences and Rights of Set-Off”. The term “asserted” was linked to the conception that it was a defence, so it was correct to use “assert” in Paragraph (1), but in Paragraph (2) “exercise” would be preferable.

380. *It was decided to replace “assert” by “exercise ” in Article 1.13(2) of the Chapter on assignment.*

381. In the end, the text of Article 4(2) as adopted read as follows:

“If the notice does not specify the obligation against which set-off is exercised then

(a) the other party may, within a reasonable time, declare to the first party the obligation to which the set-off relates;

(b) if no such declaration is made, the set-off will relate to all the obligations proportionally ”.

382. *It was further decided that lits. (a) and (b) should be merged into one sentence.*

Article 5

383. **Schlechtriem** felt that the rule in Article 5 created uncertainty in cases where the party declaring set-off said that it should take effect on such-and-such a date. That was not covered by the concept of the time of notice.

384. **Bonell** asked for confirmation that Schlechtriem could not imagine that the first party could in his notice state that he asserted set-off, but with retroactive effect. Under the present rule you would not think that this was possible.

385. **Slechtriem** stated that it would be very difficult to read that from the present formulation of Paragraph (3).

386. **Bonell** wondered whether he then could take it for granted that under the present rule the first party could in the notice declare that it asserted set-off as from, e.g. the following Monday.

387. **Slechtriem** stated that he did not take that for granted, and that he would make that clear by stating in the black-letter rule “unless otherwise indicated in the notice of set-off, set-off takes effect as from the time of notice”, where notice was notice on both sides.

388. **Hartkamp** agreed that in certain cases it might be desirable to pin-point the effect of the notice in the near future, but he did not think it should be possible to pin-point it in the past, because then to a certain extent the disadvantages of the retroactive effect would be re-introduced. The entire purpose of Paragraph (3) was to make it clear that set-off did not have retroactive effect. He however agreed that as phrased, it seemed to exclude the possibility of saying that the debts were set off on the first of the following month and this should perhaps not be the case. The matter might be made clear by saying that the set-off took effect as from the time of notice or any later time specified in the notice.

389. **Jauffret-Spinosi** stated that it was always possible for the parties to come to an agreement as to when set-off should take effect, but she did not think that it was possible unilaterally to impose payment by set-off and to decide when it should take effect.

390. **Slechtriem** stated that the party was free to decide when to send the notice of set-off. If the party was denied the chance to indicate in the notice of set-off that it should be effective on a particular date, he would programme his computer to send the notice on that date.

391. **Hartkamp** observed that as they had deleted the comment on the advance notice in Article 4, they should not re-introduce it here in the black-letter rule. He suggested the problem could be solved if they took away the impression given by Paragraph (3) that only the time of notice was relevant. It should be made clear that set-off did not have retroactive effect, and then the rest would be left to the court or arbitrator. They should not give the impression that it was impossible to say that the set-off would be effective the following week. The comments could state that “set-off does not operate retroactively, it has prospective effect only”.

392. **Bonell** wondered whether an interpretation of the present text whereby the effects might be proposed could be totally excluded. Personally he could not exclude it, especially if a statement to that effect appeared in the comments.

393. **Slechtriem** wondered what solution had been adopted in Scandinavia and the Netherlands as regards the postponing of the effect of set-off, as according to the PECL it took effect at the time of notice, and Lando and Hartkamp had strongly favoured that solution. Secondly, if a later date were allowed for set-off to take effect, what was the situation in the

meantime? The notice was received, it was to take effect four weeks later, the addressee of the notice observed the currency exchange market, and before that date he himself declared set-off at a date more favourable to him. Would he be precluded from doing that?

394. **Hartkamp** stated that in the Netherlands there was no rule as specific as the one under discussion, but in the parliamentary history, the comments or *travaux préparatoires* to the new Civil Code, there were firm statements that it took effect not retroactively, but for the future, that the nature of the declaration of set-off was incompatible with a condition or with a time-period. A case such as the one offered by Schlechtriem, had not yet arisen in practice.

395. **Lando** indicated that in Denmark there were no statutory provisions, it was regulated by practice. He had never heard of any set-off which was given effect in the future. He did not think the question had ever arisen, and did not find it a very practical question.

396. *It was decided that both the text and the Comments should stand and not be modified.*

5. THIRD PARTY RIGHTS - STUDY L – DOC. 83.

Article 1

397. Introducing Article 1, **Furmston** indicated that Illustration 1 had been modified to make it more obviously commercial. Furthermore, in Illustrations 6 – 9 he had added at the end of each illustration the words “He has no enforceable contract right” to make the end result explicit. It had previously been observed that some illustrations could not claim to be regarded as commercial or international. He observed that it was hard to find examples that were realistic, because in an international commercial contract one would expect the parties to employ competent lawyers, and if they did so one would expect the lawyers to answer the question by saying that the intention was or was not to confer enforceable benefits on the third party. In England an effect of the 1999 Act had been a massive increase in the presence of clauses stating that the contract did not confer rights on third parties. He also believed that people would look at the Principles outside the field of international commercial contracts. Looking at third party contract rights in other systems, it was extremely difficult to tell, if all one had was a statement of principle, which side of the line the difficult cases fell. The illustrations were intended to help people see where the line was. They had all been discussed at a previous meeting, and they reflected the preferences expressed by the Group at that meeting. Hartkamp, who was his co-rapporteur, had observed that Illustration 5 was a case which was naturally a tort case and not a contract case. He observed that there were cases which were treated as both contract and tort cases.

398. **Finn** stated that he would still like to see more commercial examples. Illustration 1 could in fact be an international speaking obligation of, say, Mr Gorbachev or Mr Clinton. That would take it out of a domestic environment and place it into an international environment. Similarly the wills case in Illustration 5 could be advancing for a time-share agreement with some of the owners of the property left out. The same idea could be captured in several examples but translated into something which was not family or private.

399. **Farnsworth** also felt that there might be more commercial cases. The USA had produced a vast number of potential examples. For example, a shopping centre or mall had a

contract with a security company to protect people. Someone was injured and sued the security company as the beneficiary; or a disaster occurred and there was a power cut and someone sued the power company as the beneficiary. The answer generally was probably that there would be no right, but there were exceptions that might make interesting illustrations. There were also a vast number of construction cases to which the Principles might apply.

400. **Furmston** agreed the Illustration 1 could easily be changed. In Farnsworth's examples, if the lawyers did not advise their clients to insert a clause saying that the contracts did not confer rights on third parties, they sued their lawyers. He could, however, insert examples such as those suggested.

401. **Bonell** stated that he had been surprised to find typical consumer cases in two or more illustrations, and that should perhaps be avoided.

402. **Di Majo** felt that in the case of Illustration 2, it was not a third party problem, but one of the subject-matter of the contract. Whereas the taking out of an insurance in favour of a wife was a third party beneficiary contract, the taking out of an insurance to cover a fleet of lorries was not.

403. **Fontaine** agreed that it was a problem of the subject of the contract, but stated that in such a case, under Belgian and French law at least, it would be considered a third party beneficiary contract. It depended also on the type of insurance. If A took an insurance on a car or lorry irrespective of who drove it, it was still A's insurance. In the example, T's liability was covered: what was covered was the liability of the person who took the insurance and of the group of people whose liability would also be covered.

404. **Bonell** wondered whether the illustration could not mention that it was not only T's injury that was covered, but also his liability towards third parties.

405. **Schlechtriem** observed that in Illustration 9, which was a real case, the reader who did not know the background might be misled by the example. He suggested adding "against A" to "T has no enforceable contract right" in the last sentence, as he of course had an contract right against B up to the amount of 1 million dollars. He was not sure that it was necessary to mention the limitation of B's liability in the contract, as it had no bearing on the third party beneficiary problem. It would be interesting if in the contract between A and B there was a respective limitation of A's liability towards B, and if it was assumed that T was a third party beneficiary. In that case, T could go against A, but only up to the amount of 1 million dollars.

406. **Furmston** observed that the limitation had been introduced to show that he did not have a direct right to his total loss, so he was looking for an alternative strategy which he would not need if it was not there.

407. **Schlechtriem** suggested that that could perhaps be added by saying that T could only recover one million from B as he had no enforceable contract right against A.

408. **Jauffret-Spinosi** observed that there was nothing which said that the third party could require performance. The PECL did provide for this. She suggested adding that it was possible for the third party to request performance.

409. **Fontaine** observed that the comments were extremely prudent. What they said was true, but perhaps the comments should add a paragraph saying what it meant for the third party to have a right: it meant that he could ask for the enforcement of the promise that had been made to him.

410. **Schlechtriem** stated that he found the formulation in the Principles better because it covered also situations such as those of Illustration 5, where the beneficiary certainly could not request specific performance from the lawyer, i.e. to make him the beneficiary in the will, but could only claim damages.

411. **Furmston** stated that if the question was whether in some cases the third party could get specific performance, the answer was yes, but he would not be anxious to try to set out in detail in this part of the Principles what those circumstances were, because they had other parts of the Principles which answered that. In certain circumstances one was entitled to performance, in others one was entitled to damages. What one was entitled to was partly a question of what the contract said, and partly a question of what the Principles said, which was found elsewhere in the Principles. He had no problem adding a cross reference.

412. **Fontaine** agreed that there were different possibilities, but still felt that an additional paragraph explaining, with due reference to the other provisions of the Principles, what the position of the third party was, and what the consequences of his acquiring a right were for him.

413. **Schlechtriem** stated that it was only a question of adding a sentence saying that “the right of the third party beneficiary in regard to the claims flowing from that right, is the same as every other contractual right”.

414. **Lando** stated that he had great difficulty in seeing the rationale behind the illustrations. In his view Illustration 5, for example, was a tort case. On conceptual grounds it was very difficult to draw the line between contract and tort. Illustrations 6 and 7 were perhaps going to be deleted as they dealt with consumer contracts. When he read the illustrations, he could not see why there was no right. He indicated that he would like the Reporter, when he gave his examples, not only to say that there was no right, but also to try to explain why.

415. **Furmston** indicated that he would hesitate to give full explanations to every illustration, which would be a departure from what practice had been in the Principles so far.

416. **Schlechtriem** felt that the only comment that could be added was one which said that the extent of third party beneficiaries depended on their protection under tort law.

417. **Finn** agreed that one could not explain in each case why the outcome was what was indicated. It seemed to him that the comment above the illustrations provided the explanation for the outcome in each of the cases, which they were endorsing. He felt that that was as far as it was possible to go.

418. **Fontaine** suggested being a little less affirmative in the introduction to the first set of illustrations, perhaps “could be the following” instead of “are the following”.

419. **Furmston** drew attention to the bottom of page 2, where it said “In a number of examples it is likely that there will be tort claims in some jurisdictions”.

420. **Schlechtriem** wondered whether it would not be possible to add a half-sentence to the one cited by Furmston reading “relieving third party beneficiary contracts from the necessity to grant third party rights”.

421. **Furmston** stated that if the sentence suggested were to be added, then also another topic, which was not mentioned anywhere, should be added, i.e. the problem of the borderline between tort and contract, because in some countries one could have claims in both contracts and tort on the same facts between the same parties and in other countries this was not possible, so the importance of the relationship between contract and tort was different depending on whether you had a rule of cumule.

422. With reference to Illustration 2, **Uchida** stated that he was not certain that it was a case of liability insurance. If T had an accident and if he was negligent, generally A would be liable as T’s employer, and the insurance would cover A’s liability. If T were injured in the accident, and if A’s insurance covered T’s injury, then it would be a case of a third party beneficiary. He did not think that a liability insurance case was appropriate in this case.

423. **Furmston** stated that in England, if T had an accident, T could be sued, and he thought that was true in a lot of countries. The question of whether T was insured, was therefore a question of whether T could take the benefit of the contract between his employer and the insurance company, which was a third party rights question.

424. **Fontaine** added that if T was injured and they were dealing with an injury insurance, that was a perfect case and there were no problems. As regards liability insurance, A would in most jurisdictions be liable too, and T might in some cases even be exempt from liability, but in some jurisdictions if, for example, there had been gross negligence in provoking the accident, T would be liable.

425. **Hartkamp** stated that he would very much favour adding words along the lines suggested by Schlechtriem, indicating that the way this chapter operated, was also dependent on how tort law operated. Normally, a stipulation in favour of a third party did grant a contractual right to the third party, which was a right to performance and not a secondary right to damages. He did not deny that a stipulation in favour of a third party might operate so as to give only a right to damages to the third party, but normally that was the case only if tort law did not grant such a right in a given legal system. From Illustration 5 (and also Illustration 2 in Article 2) his conclusion was that they considered it normal that a stipulation in favour of a third party could have this effect, but it was an exception which came into play only if tort law did not operate.

426. **Bonell** saw a difficulty in the case where, in an arbitration, the parties had expressly stipulated that their contract should be governed by the Principles. He asked Hartkamp whether the kind of remedy given by the arbitrator notwithstanding the fact that even the right to performance was envisaged, would depend on the remedy available under the tort law of the otherwise applicable law. He wondered what the purpose of such a reminder would be.

427. **Furmston** indicated that he had thought that the system of contract law laid down in the Principles was neither common law nor civil law, but a neutral system. It was undoubtedly true that there was a difference between common law systems and civil law systems in conceptual terms as to the relative primacy of specific performance and damages, but the Group had not taken a position on that question. He did not think they should adopt a rule that was based on any notion that specific performance was the primary or natural remedy. Of course they should have statements permitting specific performance and it did not worry him that they would give specific performance more easily under these provisions than under English law. There were a lot of factual situations in the Illustrations where the only conceivable remedy was damages. He stated that he would be reluctant to open Pandora's box and go into this question.

428. **Komarov** felt that the addition of a few words along the lines suggested by Schlechtriem and Hartkamp would be very helpful. What would also be useful would be to have an explanation of what preference should be given in the competition between the contract right and the tort right.

429. **Farnsworth** stated that the problem of this principle in the context of a tort claim could hardly be ignored. In an arbitration governed by the Principles any lawyer making some of the claims in the Illustrations was going to say that he had a contract claim first and a tort claim second. Since they did not give any rules about the tort claim, he thought they should acknowledge that they had thought about it. He suggested saying "The application of this Article will often come up in the context of an associated claim in tort" and then leave it to the imagination of the reader whether the availability of the tort claim might affect the application of the Principles.

430. **Bonell** wondered whether the two lines already referred to by Furmston might be sufficient.

431. **Lando** preferred to be more specific. They were not legislating only for arbitrators, but also to help legislators and courts who were in doubt as to what to do.

432. *It was decided that the formulation proposed by Farnsworth should be adopted.*

Article 2

433. **Fontaine** observed that Illustration 1 was a family illustration. One could perhaps instead imagine a contract for the benefit of a new company to be created in the future.

434. **Farnsworth** recalled that in the set-off provisions, instead of "adequate certainty" "sufficiently" was used ("sufficiently specified"). He suggested the same term be used throughout.

435. **Fontaine** recalled that Article 1.12 in the Assignment Chapter referred to "adequate proof of assignment".

436. **Furmston** observed that such problems could be dealt with in the editorial process.

Article 3

437. *It was decided to delete the opening words “For the purposes of this Chapter”.*

438. **Jauffret-Spinosi** wondered why the first paragraph of the comments referred to “those who are not parties to the contract” and not to the beneficiaries.

439. **Furmston** thought the reason to be that the original black-letter rule had not used the word “beneficiary”. It had subsequently been brought into the black-letter, but he had not necessarily revised the comment. The other reason was that one did not know whether they were beneficiaries until one got to the end of the clause: the effect of the clause was to make them beneficiaries.

Article 4

440. **Schlechtriem** observed that, considering the terminology adopted – “assertion” of defence and “exercise” of set-off – it should follow that the promisor could not set off a claim he had against the promisee against the third party beneficiary. The promisor could assert all defences he has against the promisee against the beneficiary. However, he might have a right to set off against the promisee but that did not mean that he could set off a claim against the beneficiary. This was clear because a distinction was made between the assertion of a defence and the exercising of a right such as set-off.

441. **Jauffret-Spinosi** wondered what was meant by “normal default rule” in the comment.

442. **Furmston** indicated that the previous text said that it was open to the promisor and promisee to make any agreement they liked. Thus, the promisor and promisee could provide that the third party beneficiary could only recover if he first of all went on a pilgrimage, but on the whole people did not do this, so they had to provide both for the possibility that they made some special provisions, and also for the case that they had not said anything. Article 4 was the rule that would normally apply if the parties had not made some other provision.

443. **Fontaine** suggested starting the comments by explaining the rule of Article 4, even without calling it a default rule, and then saying that the parties could vary or introduce conditions or limitations.

444. **Hartkamp** observed that the right of the beneficiary was not more restrictive, but on the contrary more extensive than the right of the promisee. This occurred frequently in insurance contracts, especially in life insurance contracts, that exceptions that the promisor might have against the promisee did not revert to the beneficiary.

445. **Fontaine** added that it happened in credit insurance. In credit insurance the benefit of credit insurance taken out by a seller was often by stipulation of the bank which financed the operation and the bank would insist on having a provision in the insurance contract saying that many defences, if not all defences, could not be asserted against the bank. One could also say in the comments that the parties could also expand the position.

446. **Lando** suggested that Fontaine’s example be made into an illustration.

447. *This suggestion was accepted.*

Article 5

448. **Schlechtriem** recalled that he had not been happy with permitting a restriction of the modification or revocation when the beneficiary had accepted his right. He requested that when Finn's proposal was discussed, there should be some remark in the comments that this was a special case acted in reliance and therefore blocking any modification or revocation of the beneficiary's right if he had acted in reliance.

449. **Farnsworth** wondered whether the word "revoke" was the correct one for ending a right, "modify" or "terminate" seemed more consistent with what they had used elsewhere.

450. **Schlechtriem** stated that "terminate" implied from now on, whereas "revoke" implied that it was taken away from the very beginning.

6. INCONSISTENT BEHAVIOUR (STUDY L – DOC. 84)

451. **Finn** stated that he had originally thought of simply adding a comment to the good faith provision, probably because he anticipated that there would be widely diverging views on what the scope of the provision should be. At the last meeting he had only been asked to draft an article on estoppel, and he felt this to be an important limitation to be understood at the outset. They were talking about only one of a number of possible mechanisms by which rights could be lost, suspended, modified or acquired. That could happen by agreement, by unilateral renunciation or waiver, because a party had to make an election because of inconsistent rights, or because of reliance upon the conduct of the other party, such that it was unfair to allow a return to the original position. In this provision they were only dealing with the last of these, the inconsistent behaviour. It might be observed that some of the illustrations were simply cases of agreement. He had had several of the examples litigated before him, in some instances the estoppel cases and in some instances the agreement cases. It only took slight forensic differences for a case to fall on one side of the line or on the other. He did not think that mattered as estoppel often came quite close to agreement. He had circulated eight different versions of an estoppel draft, seven were elaborations of the same model. The favoured view was the one he had used in the document with slight amendments. The more interesting proposition was a shorter draft proposed by Farnsworth which was set out in the document. The proposal did raise the question of whether reliance should be reasonable. In his view an estoppel provision in which reliance did not have to be reasonable would be unacceptable.

452. **Schlechtriem** wondered what the remedies were in the case of inconsistent behaviour. He also queried the use of the word "cannot" in the text of the provision.

453. **Finn** suggested that an imperative word was needed. The consequences were to hold a person to the state of affairs which they had compelled the other to understand and, as he had indicated in the comment on detriment, those consequences could involve making monetary payments and the like. What they were talking about was the state of affairs commonly which produced a contractual modification as between the parties and the normal

contractual remedies flowed if that person did not adhere to the state of affairs which had been represented to it.

454. **Fontaine** added that this provision would be an application of Article 1.7 and Article 1.7 stated that each party must act in accordance with good faith and fair dealing in international trade without specifying the remedies.

455. **Date-Bah** wondered whether the provision was limited to an existing contract, as the term “party” presupposed an existing contract.

456. **Finn** stated that the intention behind the first illustration was that the parties had not in fact entered into a contract but, by virtue of the operation of estoppel, the party would be compelled to deal with his representative will and execute a contract.

457. **Date-Bah** observed that in the Illustration 1 situation, you were not yet a party to a contract, it was your inconsistent behaviour which was going to lead to it being construed into a contract. He had hesitations about this principle leading to the creation of a contract as opposed to the modification of rights under a contract.

458. **Farnsworth** observed that in Article 2.15 dealing with negotiations in bad faith the term “party” was also used. **Bonell** added that this was the case also in Article 1.7.

459. **Komarov** observed that this Article stated a general principle which was to be placed in the general provisions chapter, and general provisions did not need to refer to sanctions or remedies. He supported the adoption of the version of the text suggested by Farnsworth.

460. **Bonell** observed that a preference for the shorter form had been expressed also by the Governing Council.

461. **Di Majo** questioned the decision to have a provision on inconsistent behaviour. It was an application of the principle of good faith, but it was not possible to have special provisions for every application of this principle.

462. **Finn** recalled that at previous meetings the view had been expressed that the good faith principle could not be made to bear too great a burden in many legal systems, particular in systems where good faith was near to an anathema. To deal with specific but very common instances that arose which would be regarded as the good faith principle it had been thought appropriate to have an article on inconsistent behaviour, or estoppel, which was a very well-known doctrine.

463. **Schiavoni** observed that this was a rule with an excess of potential. It contained a certain number of values and evaluation. It was an excellent rule.

464. With reference to Illustration 1, **Uchida** observed that the outcome which was most favourable to B would give B a right of option, i.e. he could choose between concluding the contract or claiming damages. He wondered whether the possibility to claim damages could be deduced by way of interpretation. If B could claim damages in this case, he thought that the amount of damages would be the expectation interest. In accordance with Article 2.15

the damage would be reliance interest in a very similar case. He wondered how the relationship between those two outcomes could be explained.

465. **Finn** indicated that he was intending to convey no more than that the parties would be treated as if they had a contract. At that point, the question arose of what the appropriate remedy would be in the circumstances. That would turn sharply upon what A's behaviour was, whether A would go ahead with the contract so that it was performed in the usual manner, or whether A repudiated the contract, in which case there were the appropriate contractual remedies. Uchida's question raised the issue of what remedy would be available on the assumption that a contract had been entered into. This provision dealt with the stage prior to that, which said that the contract would be treated as if it had been entered into.

466. **Farnsworth** agreed with **Schlechtriem** that there should be more emphasis on remedies, even if he did not think that it would require another provision. All the illustrations with the exception of Illustration 5 involved preclusion. Illustration 5 involved a person (A) who conceded that reliance damages should be paid. He suggested that Illustration 5 be amended or an additional related illustration be added saying that A could be required to pay that amount.

467. *The suggestion to add another illustration was adopted.*

468. **Schlechtriem** indicated that he had not proposed to add a black-letter rule dealing with the consequences of inconsistent behaviour. Instead, he suggested describing two types of consequences in the comments: that the party acting inconsistently would lose a right, a remedy or a defence, and that if a party acted inconsistently, the other party could acquire rights or remedies. Then they would not have to go into the details.

469. **Finn** drew attention to the second paragraph of Comment 1, which already dealt with this problem, but stated that it could be enlarged upon. **Komarov** supported this proposal.

470. **Jauffret-Spinosi** and **Di Majo** had doubts about the provision on inconsistent behaviour, the latter stating that it created a new form of liability for loss.

471. **Fontaine** observed that in Belgium the emergence of the principle of estoppel was very obvious. It came through a Dutch concept, and there was a decision of the *Cour de Cassation* partly stopping the evolution of this concept by saying that it was not a general principle of Belgian law, but that it could be inferred in many circumstances as a consequence of the principle of good faith. He therefore favoured having such a provision, especially for international contracts.

472. **Furmston** and **Farnsworth** observed that for common lawyers the provisions on good faith were startling, as were the provisions on hardship. The fact that the provision on inconsistent behaviour was unknown in some legal systems was not, in their view, an overpowering argument not to have it.

473. Referring to Illustration 1, **Jolivet** wondered whether the pre-contractual stage was also covered, or whether the existence of a contract was presupposed.

474. **Finn** indicated that Illustration 1 was intended to be a case where the effect of an estoppel would create a contract which would not exist otherwise.

475. **Bonell** referred to a recent decision of the European Court of Justice according to which in instances when the behaviour of one party caused the other to believe that there was a contract, the first party could not get out of the contract unless he paid expectation damages. He wondered whether the illustration referred to this case.

476. **Finn** stated that that had not been his intention. His intention had been that the terms had been agreed, but that there was an outstanding requirement, i.e. that a contract would be executed but it was done in a promissory fashion (“the contract will be executed”). The contract had reached a position where it was safe for one party to proceed even though the contract had not been executed.

477. **Farnsworth** indicated that he would be happier if the illustration went in the direction of the lower court decision of the case on which the illustration was based, i.e. that one was precluded from denying that there was a contract.

478. **Uchida** wondered whether there was any difference between saying that a contract was executed and that a contract was concluded.

479. **Finn** stated that there could be agreement on all the terms of the contract, but it may be a condition to entering into the contract that the contract actually was executed in the sense of a formal document, and unless and until that occurred, there was no contract.

480. **Lando** referred to the note on page 1 which queried whether there would be a special provision on renunciation of prescription. He drew attention to Illustration 5 to Article 4 in the Chapter on Limitation where A was the person who could invoke prescription saying that he would not invoke the period of limitation until six months after the experts had submitted their report. In the example, as the period of limitation had passed, B could not invoke prescription. He wondered what Finn thought of the note, and how he would interpret the case.

481. **Finn** stated that although the Illustration was not cast necessarily in the language of the inconsistent behaviour provision, it would appear to fall easily and naturally into that category. If you looked at what the representation had been, it had actually been falsified and it had been relied upon.

482. With reference to the relationship between estoppel and limitation, **Fontaine** stated that limitation could be considered an obligation of estoppel. You did not do anything for a certain number of years, and you were estopped from acting. There had been discussion in Belgium on cases where an obligee had been passive for quite a long time, but before limitation, and the other party when sued had stated that the other was estopped from acting because he had been passive for so long. The reply was that he could wait until the last day before limitation. He suggested that the comments should perhaps say that mere passivity on the part of an obligee when there was a limitation period did not suffice to enable the other party to raise estoppel because there was the limitation. This would be the case if it was more than mere passivity, when there was some behaviour which gave the impression that he would not sue, or a statement causing the other party to rely on the fact that he would not be sued.

483. **Schlechtriem** indicated that the same problem had been discussed also in Germany. He thought it was taken care of by the wording of the provision on inconsistent behaviour. They said that in order to have estoppel, there must not only be a lapse of time, which could be shorter than the limitation period, there must in addition be circumstances on which the other party had relied.

484. **Finn** indicated that he would be happy to use an example such as the one provided by Fontaine, because it illustrated both the causation point and reasonable reliance.

485. **Bonell** stated that under the system of the Principles, mere passivity could hardly be considered to be a sort of estoppel, because they had a rather short limitation period and it was linked to actual or constructive knowledge. Even two and a half years after having become aware of the action or event, would be in time.

486. *It was decided that the relationship between the provision on inconsistent behaviour and limitation would be dealt with in the comments.*

487. *It was decided to adopt the shorter version of the black-letter rule suggested by Farnsworth.*

488. While **Lando** assumed that the new article would be a mandatory rule, **Schlechtriem** indicated that he had second thoughts as regards its mandatory character, considering the wide range of consequences that would result. He wondered whether it was really true that the parties could not exclude at least some of the consequences which followed from inconsistent behaviour. He was not sure. In certain cases he felt that it should be possible for the parties to include a clause in their contract according to which they could behave inconsistently. For instance, in a public procurement procedure he thought that they should not state from the beginning that it was not possible for a party procuring parts to write in its procurement conditions that they can change right up to the last second.

489. **Bonell** suggested that as soon as something like that was put in writing from the beginning, you could never reasonably lead the other party to believe that he should not reasonably rely on you.

490. **Finn** stated that there were many ways in which a contract could be drafted which had the effect of preventing someone being able to satisfy the conditions of estoppel, by reliance being unreasonable or whatever.

491. *It was decided that the Article on Inconsistent Behaviour should be placed in the Chapter on General Provisions as Article 1.8.*

492. **Bonell** queried the translation of the provision on inconsistent behaviour.

493. **Fontaine** stated that the Franco-phone members of the Group had had a problem translating “to its detriment”. “Upon which that other party reasonably has relied” they had translated “*lorsque cet dernière a cru raisonnablement à cette attente*” and “to its detriment” “*et en a subi un préjudice*”. He wondered whether the French translation went too far. Did “to its detriment” mean that that party had suffered a prejudice?

494. **Hartkamp** replied in principle yes, but stated that the concept would perhaps even imply that he would suffer a detriment if the other party came back on its action.

495. **Fontaine** observed that then the English “has relied on it to its detriment” did not convey the whole idea. To him, the words seemed to indicate that the detriment was already there. He suggested that the French text could perhaps say “à son *détriment*”.

496. **Finn** stated that there was no doubt that the English formula was somewhat oracular, but what it was intended to signify was well understood, i.e. that the consequence of acting inconsistently actually occasioned the detriment. The original formulation made it plain that it was the acting inconsistently which occasioned the detriment. The shorter formula adopted implied the same but the comments made it plain.

497. **Fontaine** observed that if the English text remained with an explanation in the comments, there would be no problem using “à son *désavantage*” in French. The French version would of course also have the comments.

498. **Hartkamp** stated that he had always thought that the concept of reliance included that of detriment. He wondered whether relying on something was different from relying to its detriment.

499. **Finn** stated that a party would only suffer detriment if the other were allowed to act inconsistently because he had acted in reliance on what had been indicated to him. The reliance was in no way harmful unless the other party were allowed to act inconsistently.

500. **Furmston** observed that there were debates in England about whether it was necessary to use the word “detriment”. Some people did talk simply about reliance. Detriment did not consist in doing something which was irretrievably harmful to you. In Illustration 6 the behaviour which took place was not intrinsically harmful, it was only harmful if you were allowed to change your mind.

501. *It was decided that the French version would use an expression such as “à son désavantage”.*

7. DISCHARGE (RENUNCIATION) (STUDY L – DOC. 87) RENUNCIATION (STUDY L – DOC. 89)

(a) *Discharge (Renunciation) (Study L – Doc. 87)*

502. **Hartkamp** stated that the draft he had prepared only referred to contractual rights or obligations and not to other rights that a party might have, such as a defence, or a right to invoke prescription. To be decided, was whether the renunciation of a contractual right should be an agreement because it required the consent of the obligor, or whether it could be effected unilaterally. He thought it would be more consistent with general principles to require an agreement because renunciation might or might not be for value. If it was for value an agreement was required. He preferred to say this, and to add that if the renunciation was by gratuitous title, meaning that in a sense it was a gift, then the consent of the other party, the obligor, would generally be deemed to have been given.

503. **Schlechtriem** supported the underlying decision that the extinction could be by agreement only and not unilaterally. He suggested replacing “by a contract” with “by an agreement”. He also suggested the title of the article be “Discharge by agreement”.

504. *It was agreed to replace “contract” by “agreement”.*

505. **Furmston** stated that his understanding was that the comments in Doc. 87 were not the comments that would eventually be published. He agreed with the proposal to entitle the article “Discharge by agreement”. As regards Paragraph (1) of the black-letter rule, he suggested the word “terminate” be used instead of “extinguish”. He wondered whether there would not be quite a lot of cases in which the agreement would terminate the rights and obligations of both parties. He suggested that this article did not deal only with the case where there was only one obligor and one obligee left. Two different cases could be envisaged: where both parties had obligations still to perform and the agreement was simply that both parties’ obligations should be released, and when the contract was one in which both parties assumed obligations but one had performed the whole of its obligations and the purpose of the agreement was to release the obligations of the one who had not yet completed performance. In English and Australian law the second of the two cases gave rise to a lot of practical problems because of the doctrine of consideration which the Principles did not have. He suggested they make it clear that the two cases were different.

506. **Hartkamp** confirmed that the document was more in the nature of a position paper and stated that he agreed with the comments made by Furmston.

507. **Komarov** referred to the words “acceptance without delay” at the end of Paragraph (2): he suggested saying “without reasonable delay”. As formulated, it might be understood that the rejection should be immediate.

508. **Bonell** confirmed that the “without delay” formula which was used in other articles did mean immediately. The idea was that something should occur quickly.

509. **Komarov** suggested that if this were the case, it should be specified in the comments.

510. **Bonell** raised the question of the terminology used, which he found confusing, for example the use made of words such as “extinguish” and “renounce his claim”.

511. **Finn** suggested the following drafting changes: “(1) An obligation may be renounced by agreement of the parties. (2) A gratuitous offer to renounce an obligation shall be deemed ...”. He observed that the terminology “An offer by gratuitous title” might lead some common lawyers to wonder what it meant, whether it was a notion of land law.

512. **Hartkamp** objected that the proposed formulation of Paragraph (1) left open the possibility of renunciation by other means, i.e. unilaterally. He indicated that he wanted Paragraph (1) to express the notion that renunciation required an agreement.

513. **Schlechtriem** wondered whether “fully or partially” should be added.

514. **Finn** suggested “The agreement of the parties is required to renounce an obligation in whole or in part”.

515. **Bonell** wondered whether one renounced an obligation.

516. **Jauffret-Spinosi** suggested “An obligee may renounce its rights by agreement with the obligor”.

517. *The proposed formulation was accepted.*

518. *The formulation of Paragraph (2) suggested by Finn was accepted and read: “A gratuitous offer to renounce a right shall be deemed accepted if the obligor does not reject the offer without delay after having become aware of it”.*

519. *The title accepted was “Renunciation by agreement”.*

520. **Furmston** objected to the use of the word “renunciation” as it indicated a unilateral renunciation, and suggested that it be replaced by “discharge”. “Release” was a subclass of “discharge by agreement”.

521. **Finn** observed that Paragraph (2) referred to the renunciation of “a right”, which suggested what was being renounced, whereas Paragraph (1) referred to renouncing “its right” and it raised the question: its right to what?

522. **Schlechtriem** stated that in Paragraph (1) it was clear it was the right of the obligee, because he could not renounce another right.

523. **Furmston** felt the English to be awkward. He suggested using “release”: the obligee could release its right.

524. **Fontaine** wondered if “waive” could be used, but **Finn** cautioned against the use of the word “waive”, as it had a host of different meanings that were not agreed between common law countries.

525. **Bonell** wondered how the meaning would be rendered in other languages without using the word “renunciation”.

526. **Schlechtriem** stated that the word that would be used in German was “*Erlaß*”, which meant “release”.

527. **Bonell** observed that he would have thought that what could be released was the other party’s obligation, not his right.

528. **Schlechtriem** suggested the formulation “An obligee may release the obligor by agreement with the obligor”. As to Paragraph (2), it could be formulated “A gratuitous offer to release an obligor shall be deemed accepted if the obligor does not reject it ...”.

529. **Hartkamp** observed that the problem was that an obligor might have several obligations and you may want to release him from only one of them.

530. **Bonell** wondered whether “release” really was the same as “renounce”. He did not think it merely a linguistic question. The Italian “*rinunciare*” and the French “*renoncer*” were

unilateral. Even if they used “release” in English to avoid the problem of the unilateral act, they would still have the problem in the other languages.

531. **Fontaine** also felt that “*renonciation*” in French had a unilateral connotation, but why be so formalistic? He thought they could say in a text that if the obligee wanted to renounce the other party had to agree, which meant that it was a renunciation which would be effective only by agreement.

532. **Furmston** commented that an English lawyer reading the provision would not know what it was talking about, because if one took the whole range of arrangements that could be made between the parties to bring a contract to an end, many of those arrangements were made by agreement and they typically involved either both parties giving up their rights to performance of the other side, or they involved one party paying money to be released. An English lawyer would not realise that the text of Paragraph (1) included all of those cases. This could however be made clear in the comments. He suggested they had to decide what the article enabled the parties to do.

533. **Finn** felt that for practical purposes Paragraph (1) was unnecessary, because all it dealt with was a simple contract modification. Paragraph (2) instead allowed a renunciation, subject to a right of rejection. They had decided to turn that into a deemed agreement and it was the process of deeming an agreement that was unusual. They were allowing a unilateral act, but giving the other party a right to veto it.

534. **Hartkamp** observed that then there were two different concepts of renunciation: for value would require an agreement, gratuitously would be a unilateral act. What happened to cases where it was not clear if it was for value or gratuitous? The problem with this made him think it was better with a unitary concept.

535. **Bonell** stated that at the beginning they had decided that no one should be forced to be released. If this were the case, and what was at stake was that the obligor should never have to say that he did not like it, but had only a right to do so, what was the purpose of distinguishing between renunciation for value and gratuitous renunciation? To speak of an agreement, or to say that a party could do so but the other party may object and therefore nullify his act from a functional point of view was pretty much the same.

536. **Hartkamp** agreed that it would be practically the same, at which point the question was whether it was necessary in an instrument for international commercial contracts to have a rule just on gratuitous renunciation.

537. **Date-Bah** felt that the discussion led to the conclusion that there should not be unilateral renunciation. Why, then, were they doing it the other way round, saying that you may renounce with agreement, and not stating expressly that renunciation may not be by unilateral act?

538. **Hartkamp** felt that all dogmatic distinctions would then be blurred. He suggested that he had to say that there had to be agreement, in which case acceptance had sometimes to be deemed, or that a unilateral declaration was sufficient, but on condition that it was not rejected by the other party.

539. **Jauffret-Spinosi** observed that if the provision stated that “renunciation by agreement”, it was evident that it was no longer a unilateral act.

540. *It was decided to keep the formulation “by agreement”.*

541. *It was decided to place the article in Chapter 5, as Article 5.9.*

(b) Renunciation (Study L – Doc. 89)

542. Introducing his new draft, **Hartkamp** indicated that there were two typing error in the document: in the first line of the comments “form” should read “from” and in the third line of Illustration 2, the brackets should say “instead of” and not “interest of”. He indicated that he had tried to reflect the discussions, and that he had used the term “renunciation”. He had added two illustrations, one of renouncing gratuitously, one of renouncing for value.

543. **Schlechtriem** felt that the word “renounce” was misleading. He therefore proposed rephrasing Paragraph (1) to read “An obligor can be released from its obligation by an agreement with the obligee”. Paragraph (2) should then be adjusted: “A gratuitous offer to release a right shall be deemed accepted if the obligor does not reject it”.

544. **Hartkamp** had no problems with Schlechtriem’s suggestion for Paragraph (1) if the common law colleagues accepted it, but he could not as yet see how Paragraph (2) could be adapted, because the concept of offer was needed.

545. **Furmston** suggested replacing the word “renounce” with the word “release” in Paragraph (1). **Farnsworth** agreed with this suggestion.

546. **Finn** also suggested having “release” in Paragraph (1), but suggested leaving “renounce” in Paragraph (2).

547. **Fontaine** indicated that the French version had “*renoncer à son droit*” and it could be kept if no change in meaning were intended. As regards Illustration 1, it was obviously intended to be an illustration of a gratuitous offer, whereas Illustration 2 was intended to be an illustration of a non-gratuitous offer. He stated that in his perception Illustration 1 was also a non-gratuitous offer.

548. **Hartkamp** stated that in legal theory there was a distinction between a gift, which was something one gave without counter-value but to benefit the other party, and another type of legal act which was also without counter-value but which was not done to benefit the other party. This could be done also in the course of business, and that was Illustration 1.

549. **Finn** wondered whether Paragraph (2) would be in any way different if the word gratuitous were left out. He wondered what the meaning of “gratuitous” was.

550. **Bonell** stated that if the word “gratuitous” were omitted, it would not be necessary to have Paragraph (1) at all, they could have only one, very clear-cut rule.

551. **Hartkamp** wondered how that would work, if the offer was conditional upon the counter-performance.

552. **Schlechtriem** felt that such a proposition went too far. Very often there were releases in settlement situations: A wrote to the contractor stating he would release him from his obligation to pay damages, but that he had to cure the non-conformity of the work. If the contractor did not reply, should the contractor then be bound?

553. **Bonell** stated that he should clearly not be bound: if it was part of a package, then there had to be a settlement agreement. Even if the rule were only the one in Paragraph (2), in such a case the rule would not apply, because it was not an unconditional offer.

554. **Hartkamp** stated that in Paragraph (1) the general case of renunciation was envisaged, with the exception being in Paragraph (2), where it was renunciation without counter-performance.

555. **Fontaine** gave the example of a bank which wanted to make a donation to an organisation that dealt with environmental questions. The bank had not monitored that organisation and said that it would make the donation by releasing the organisation from the balance of credit granted to it. Such a case would be a gratuitous release.

556. **Farnsworth** suggested striking “gratuitous” in Paragraph (2) and saying “an offer to renounce a right”, which at least to common lawyers would suggest that the party was unconditionally giving up the right unilaterally, without any counter-performance by the other party.

557. **Bonell** indicated that he felt that the purpose of Paragraph (1) was vague, because what it said was that if the idea of renunciation or release was part of a package, then also this part of the package needed an agreement, while if a party simply offered to renounce a right, this supposedly did not need a formal agreement, acceptance, etc. He missed the necessity of addressing the first scenario. When he had considered the for value option, he had simply thought that it was not a gift, even if there were some advantages – pretty much for consideration – but now he heard examples which were not for value as he would have understood it, but which were settlement agreements.

558. **Hartkamp** stated that Paragraph (1) included also the quite well-known concept of “novation” in French law, e.g. a party gave up his right, but the obligor obliged himself in a different way, so it was not always settlement in a broad sense. As well as being a bilateral agreement, novation was a release of a right in conjunction with the acquisition of another right.

559. **Schlechtriem** stated that Paragraph (1) did not deal only with the counter-performance situation which existed in a settlement, it might for instance be a partial release of interest due if the other party paid the principal the following week. Even that might not necessitate Paragraph (1), but for the sake of clarity it made sense to keep the paragraph to make it clear that a release should only be by agreement, and this agreement was facilitated if it was without any counter-performance or strings attached by Paragraph (2).

560. **Fontaine** agreed with Schlechtriem. He stated that he preferred to keep the text as it stood.

561. **Finn** pointed out that to an English-speaker “renounce” was a unilateral act.

562. **Schlechtriem** suggested that Paragraph (2) be phrased “An offer to release a right gratuitously...”.

563. *This proposal was accepted by the Group.*

564. **Bonell** proposed that the order of the two illustrations be inverted.

565. *This suggestion was accepted by the Group.*

8. ABUSE OF RIGHTS (STUDY L – DOC. 88)

566. **Hartkamp** stated that acting with malice should of course never be allowed, but he questioned whether acting unreasonably would always be equivalent to acting contrary to good faith. In many jurisdictions abuse of rights required more than just being unreasonable. Either the behaviour should be grossly unreasonable, or there should be a test of proportionality according to which, weighing the interest on both sides, the conclusion that it would be contrary to good faith to stick to your rights was arrived at.

567. **Finn** agreed with Hartkamp. He felt it would be unwise to support a proposal that simply used the word “unreasonable”. He could think of hosts of cases in which one party thought the other was unreasonable, but the other in fact had perfectly legitimate interests. On the other hand he thought cases of malice were clear cases. There were hazards in what was being proposed. He could accept reference to malice and grossly unreasonable conduct in comments to Article 1.7, but he would not be in favour of a black-letter rule.

568. **Jauffret-Spinosi** agreed with Finn. She suggested the question could be dealt with in the comments to one of the other provisions.

569. **Fontaine** stated that having a provision on the abuse of rights would be an important feature of the Principles. He agreed that the unreasonableness criterion was unsatisfactory. Furthermore, there were developments in many countries. In Belgium the principle of the abuse of rights was gaining much ground as an application of good faith, but with its own criteria, of which the idea of proportionality was one.

570. **Hartkamp** stated that the Dutch Civil Code had a provision on abuse of rights (Book 3, Article 13), but that it was not used in contract law. In contract law they had the good faith rule and they stuck to that in all obligation matters, whereas in France and in Belgium the general good faith principle was not used as broadly as in the Netherlands and the abuse of rights criterion had been worked out also in contract law. The concept of abuse of rights was used mostly in the law of property. They had tried to define it when drafting the new Civil Code and had given three examples: to use rights merely to damage the other party, to use the right for another purpose than the one for which it had been granted, and the proportionality rule. However, looking at case law they had not been convinced that all the relevant cases had been covered by those three applications, so they had left the courts discretion to develop other instances of abuse of rights.

571. **Komarov** supported the inclusion of a provision on abuse of rights in the article on good faith. He stated that such a provision had been included in the Russian Civil Code. In Russia, however, the notion of abuse of rights was used quite frequently in contractual

relationships, perhaps because in Russia there was no principle of good faith in contract law. He suggested, however, that it should be limited to malicious actions, as unreasonableness was a very vague concept in this context, as what was good faith was sometimes unreasonable and vice versa.

572. **Lando** stated that since they had introduced the rule on inconsistent behaviour he would favour also the adoption of a rule on abuse of rights. He was however not satisfied with the formulation as proposed.

573. **Farnsworth** identified two different levels: one was to talk about abuse of rights, which was a flexible doctrine that was growing in several countries. The fact that it was difficult to be precise about it even where it existed was rather frightening to those who did not have the doctrine. On the other hand there was the question of filling out good faith with some black-letter and of the two terms suggested in this provision, “unreasonably” seemed not to have found any favour with the group. As regards “maliciously” he did not think that it was necessary to have black-letter on it. The Restatement had some English words associated with good faith in a comment, such as “evasion” and “subterfuge”. There were words of condemnation that could be used, that would not involve the concept of the abuse of rights.

574. **Schlechtriem** stated that in German law the concept of abuse of rights had been developed from the general good faith and fair dealing provisions. It was a sub-category developed by courts and scholars. If they created a black-letter rule on abuse of rights, e.g. by using “malicious”, they might have the problem of whether, if the requirements of the special provision (such as malicious) could not be proved, the party could fall back on the general provision. The party could not prove that the other one had acted maliciously, but at least it would be against good faith and fair dealing if he had tried to enforce his rights. If they said that the exclusive provision on maliciously etc., was here, it was not possible to fall back on Article 1.7. He did not think that courts would accept that, they would always use the general provision to fall back on. It would therefore perhaps be better to have the abuse of rights category mentioned in the comments as a very important instance, but not to have it in the black-letter rule.

575. **Date-Bah** supported having an explanation in the comments.

576. **Hartkamp** felt that it was important to add the explanation to the comments on Article 1.7. He suggested enlarging the comments to Article 1.7 in general, as he had read a lot of questions that had been raised, such as whether it could operate to extinguish contractual rights.

577. **Furmston** suggested that if they were to adopt this approach, it would be necessary to produce examples of situations where you needed to use the technique of abuse of rights in order to produce a result which could not be attained by any of the other techniques.

578. **Fontaine** stated that it would not be possible to have an example in which there were a difference between good faith and abuse of rights, because under Belgian law abuse of rights was considered in contractual matters as a consequence of good faith. He suggested the following practical example: in a long-term contract, or a contract for a certain duration, if one party did not perform properly, the other party had the choice between termination of the contract or specific performance. There had been cases with leases, where the tenant had not

fulfilled his obligations and the owner had the right to either ask for termination of the contract for non-performance, or to sue the tenant to pay the rent for the extra two years the controversy was about. There were decisions according to which even though in principle the owner had the right to choose, that would be an abuse of rights, because he could ask for termination and damages for the short period of time necessary to find another tenant and the court had refused to grant the right to ask for specific performance, because that would be an abusive exercise of that right.

579. **Komarov** suggested taking inspiration from the Dutch Civil Code for the examples to be inserted in the comments.

580. *It was decided to deal with the abuse of rights in a new section of the Comments to Article 1.7.*

9. AMENDMENTS AND OPEN QUESTIONS (STUDY L – DOC. 85)

581. **Bonell** illustrated Doc. 85, which in Part I contained indications of the decided amendments to the Model Clause and the black-letter rules of Articles 1.2 and 2.18, as well as to the comments. The document specified that the comments should deal with electronic commerce where appropriate. Part II instead dealt with open questions, the first one of which related to the Preamble.

(a) *Preamble: Proposals in Doc. 85*

582. **Bonell** stated that in the light of practical experience and scholarly comment, the Preamble in its present form might require some additions. It was therefore proposed that additional paragraphs referring to other possible uses be added. The first was “They may serve as a model in drafting contracts”.

583. **Date-Bah** suggested using the word “guide” instead of “model”. He stated that individual contracts would be drafted in the context of the legislation. It was not a model in the sense that if one were entering into a contract, one would not model it on the rules, the rules were the legal frame within which one would draw up the contract. Model in the last paragraph was appropriate as it was addressed to legislators.

584. **Bonell** observed that the use of the word “model” in the last paragraph had been criticised because the Principles were clearly not a model law, and it should not be suggested that they should be taken as a model. If they used “guide” users might wonder if there was a difference between the two.

585. **Farnsworth** preferred “guide”. He saw no harm in adding paragraphs on the uses of the Principles, although he observed that the more paragraphs were added, the more it detracted from the other ones and the hard core were perhaps in the first three. It was always possible to use the Principles as a guide in drafting contracts even if there was no specific statement to this effect in the Preamble.

586. **Schlechtriem** also supported the use of the word “guide”, as it covered more situations, such as where you used the Principles as a check-list.

587. **Hartkamp** stated that his objection against “guide” was that several international organisations, including UNIDROIT and UNCITRAL, had issued guides – the Franchising Guide, the International Construction Contract Guide, etc. – and they were different. That might create confusion as to what kind of a guide the Principles were. He suggested saying merely “They may assist parties when drafting contracts”.

588. **Finn** agreed with Farnsworth as regards the length of the list. He suggested adding a comment at the end on “Other uses of the Principles”. Then it would be possible to say what one liked in a manner which was intended to be of assistance to people rather than trying to find justifications for the Principles, which was what the Preamble might suggest.

589. **Schiavoni** agreed with Finn. The Principles were not intended to be guidelines. If the Principles were used as guidelines in the drafting of international contracts, this was a consequence, not one of their main purposes.

590. **Fontaine** suggested that a sentence could be added to the comments on the second paragraph saying that the parties could of course also use the Principles as a guide or checklist or whatever.

591. **Farnsworth** suggested that if they decided to have a comment, the use of the Principles in legal education should also be mentioned.

592. **Komarov** indicated that if they wanted the Principles to be applied as extensively as possible, they should state in the Principles that they could be used not only as rules, but also as a model or as providing guidance.

593. *It was decided that the reference to the use of the Principles as a model in drafting contracts should be inserted in the Comments, in a new section on “Other Uses”.*

594. Turning to the second proposed addition, i.e. “They may be used to interpret or supplement domestic law”, **Bonell** indicated that practical experience indicated that almost half of the 82 decisions referring to the Principles collected in the UNILEX data base made use of the Principles as a support for a solution adopted under the otherwise applicable domestic law, i.e. to corroborate or strengthen an argument developed by the arbitral tribunal or domestic court to interpret or supplement the applicable domestic law. He found this remarkable and wondered whether it should not be high-lighted in the Preamble. The paragraph could be placed after “They may be used to interpret or supplement international uniform law instruments”.

595. **Hartkamp** favoured such an addition in principle, but in order not to extend the article too much, it could perhaps be added to one of the other paragraphs, e.g. by adding “or domestic law” to “They may be used to interpret or supplement international uniform law instruments”.

596. **Bonell** objected that such a course of action would combine two different questions. Furthermore, while for the interpretation of domestic law the Principles were consulted very informally by the courts, the interpretation and supplementation of international uniform law instruments had proved to be very controversial. He therefore had hesitations to mix the two uses in one paragraph.

597. **Fontaine** nevertheless indicated that if they did not wish to make the Preamble much longer, and if they used exactly the same formulation (“interpret or supplement”), he wondered if it really was a problem placing the two in the same paragraph. He indicated that he preferred merging the two.

598. **Komarov** supported the inclusion of the provision into the Preamble. In his experience the lack of an express provision permitting the use of the Principles to interpret or supplement domestic law stopped many of those who would otherwise have used them.

599. **Schlechtriem** felt Hartkamp’s proposal attractive, in particular considering the new civil codes of the former socialist countries. The Principles had often been used in those countries when they had drafted their domestic legislation and he suggested that they should be encouraged to use the Principles when they interpreted their own domestic law.

600. **Lando** agreed with Bonell that the two uses should be kept separate. He felt that the proposed addition should be placed together with the paragraph which stated that the Principles may provide a solution when it proved impossible to establish the relevant rule of the applicable law.

601. **Bonell** observed that the paragraph referred to by Lando had been questioned as it had turned out to be of almost no practical value, and that it was consequently suggested that it be replaced by the proposed addition they were discussing.

602. **Fontaine** suggested that if the proposed addition were made, the paragraph Lando had referred to would not be needed.

603. *It was decided that the proposed addition “They may be used to interpret or supplement domestic law” should be added to the Preamble and placed after the paragraph “They may be used to interpret or supplement international uniform law instruments”, and that the paragraph referring to the impossibility to find the relevant rule of the applicable law should be deleted.*

604. **Bonell** stated that the Principles were increasingly applied in actual practice even if the parties had not expressly chosen them. If they had not included a choice of law clause in their contract in favour of the *lex mercatoria*, general principles or the like, the arbitrators considered the Principles the most appropriate rules of law to apply. He therefore suggested that a new paragraph reading “They may be applied when the parties have not chosen any law to govern their contract” be added.

605. **Date-Bah** recalled that it had been suggested that the comments could have a generic reference with several illustrations. He suggested that this use be inserted as an illustration, with an appropriate *caveat*: merely not choosing a proper law, ought not to bring about this consequence, as there would be rules to determine the appropriate national law to govern the contract. Merely because the parties were silent, ought not to displace the national law which would ordinarily be pointed to. It therefore seemed to him that language inviting arbitrators or others to apply the Principles ought to reflect appropriate circumstances. He would prefer it not to be in the black-letter rule, but in the comments.

606. **Bonell** pointed out that the proposed language did however indicate that the application of the Principles was a mere possibility (“may be applied”) and this was stressed

even more in the comments. Furthermore, with the exception of the two uses referring to interpretation and supplementation, all the others were possible only in the context of international arbitration.

607. **Lando, Fontaine, Komarov and Finn** preferred to have the proposed use in the black-letter rule.

608. **Komarov** added that many arbitral tribunals now had provisions in their rules which empowered them to apply rules of law. If the Principles did not have any provision, it would be difficult for the tribunal to decide whether the Principles fitted into this category or not.

609. *It was decided to add the proposed paragraph to the Preamble as a new fourth paragraph.*

(b) Preamble: Proposal submitted by Furmston

610. **Furmston** submitted a proposal re-drafting the Preamble which read as follows:

“These Principles set out general rules for international commercial contracts.

They are to be applied when the parties have agreed that their contract shall be governed by them.

They may also be used:

- 1) when the parties have agreed that their contract shall be governed by general principles of law, by the *lex mercatoria* or other similar provisions;
- 2) when it proves impossible to establish the relevant rule of the applicable law;
- 3) to interpret or supplement international uniform law instruments;
- 4) as a model for national and international legislators;
- 5) to interpret or supplement the applicable domestic law;
- 6) when the parties have made no express choice of an applicable domestic law;
- 7) in the drafting of contracts;
- 8) in legal education.”

611. **Furmston** indicated that his proposal was not intended to change the substance of the Preamble. He had changed the title to “Use of the Principles” as he was not sure that they had had the purpose to do all the things that were enumerated in the Preamble. The numbers were not essential and could be converted into letters or taken out.

612. **Bonell** drew attention to the decision the Group had taken not to have what was under points 2, 7 and 8 of the proposal, but they could easily be struck out. He had doubts about the appropriateness of having the first use so distinguished from the others. A reader could be tempted not to take the second paragraph very seriously and then immediately go to

the list, as lists always drew the attention of the reader. Furthermore, having a list conveyed the message that it was more or less exhaustive, whereas it had always been thought that the list should not be exhaustive.

613. **Hartkamp** agreed with Bonell.

614. **Date-Bah** stated that he liked the presentation which divided the uses into the principal uses and other uses. If it was a question of format, the numbers could be taken out. One use was however almost mandatory, and that was if the parties chose them, whereas the other were all indicative uses. It was therefore useful to bring that out.

615. **Kronke** did not agree that the indication that the Principles were to be applied when the parties had agreed that their contract should be governed by them was the principal thrust. First of all there were countries in which they would not be applied even if the parties had an agreement. Secondly, it was not possible to tell quantitatively whether in fact they had been used more by legislators than by parties. Institutionally speaking, he did not want to convey the message to legislators, who were the members of the Institute, that they took their action and use of any materials produced by the Institute less seriously than the action and use by private parties.

616. **Bonell** informed the Group that statistically, what was indicated in the Preamble as the most important use of the Principles, i.e. they should be applied because chosen by the parties, was far from being the most important instance. To interpret and supplement the applicable domestic law seemed statistically to be the most attractive use. The reference to the Principles to determine what was meant by “general principles of law”, *lex mercatoria*, etc. also seemed very popular. For this reason the words “may also be used” might convey the wrong message.

617. **Furmston** agreed that the comments raised were very important. He pointed out that the distinction he had drawn was the distinction which was already drawn in the Preamble as it stood. To a common lawyer the antithesis between “shall” and “may” was a very, very important signal. As he understood the comments, they wanted to abandon this distinction, but if so the Preamble would have to be changed.

618. **Bonell** indicated that the distinction between “may be applied” and “shall be applied” must remain. From a presentation point of view, the Preamble as it stood was more solemn, whereas the proposal, by presenting the uses as “They are to be applied” and then “They may also be used”, seemed to indicate that they were saying “by the way, there are some other possible uses”.

619. **Hartkamp** stated that if they were to go along with the proposal, perhaps they could number the three paragraphs, because every paragraph would have the same weight. Then, the third paragraph could open “They may be used among other things” or “*inter alia*” in order to indicate that it is not limitative, and the numbers could be taken out.

620. **Schlechtriem** felt this proposal to make sense. He suggested that in the third paragraph the words “They may serve” might be changed to “They may be used as a model”.

621. **Bonell** preferred the repetitious present formula, because it was solemn, and it permitted the proper phrasing to be used in each instance: “They may be applied when the

parties have...”, then “They may provide a solution...”, then “They may be used to interpret...”. For this reason he did not think that it was possible to have a common opening.

622. **Kronke** wondered whether there was anything wrong with the present Preamble. If not, institutionally speaking there would be a strong case for leaving it as it stood. He stated that questions were being asked as to whether the old Principles were superseded, and users were asking that as little as possible change.

623. Taking these observations into consideration, **Furmston** proposed that the old Preamble, in the form already printed in the Principles, be maintained without additions or modifications. He agreed that it was very important not to confuse the States, and he could understand that the Governing Council might be alarmed at seeing something different from what they were used to, but if they were not to make modifications, it would have been preferable if they had been informed of this earlier.

624. **Bonell** indicated that he had understood the words of the Secretary-General to convey the message that, as a policy, as little as possible, if anything, should be changed unless it was considered that the proposed modification was very important. He agreed that there might be valid reasons to change the formal presentation of the Preamble, but this should be discussed and the Group should decide whether there were such valid reasons.

625. *In the end, it was decided to keep the old Preamble, subject to the additions and deletions that had already been decided.*

(c) **Article 2.8**

626. **Bonell** recalled the discussions that had taken place within the Group with reference to Article 2.8 and referred to the proposal in Doc. 85 for a shorter and media-neutral wording of what currently was Paragraph (1) of the provision reading:

“A period of time for acceptance fixed by the offeror begins to run from the time that the offer is dispatched. A time indicated in the offer is deemed to be the time of dispatch.”

627. The second sentence was a default rule and was sufficiently broad to cover more or less all means of communication, including electronic means. As regards Paragraph (2), it applied only in the context of a situation in which the offer gave an indication of a time-limit for acceptance and there in this period of time were holidays in one place or the other, or the time elapsed on a holiday, and aimed at solving the problems. A new Article 1.11 was proposed to take its place and to broaden the scope by adopting a more general provision.

628. **Date-Bah** suggested adding words such as “unless the circumstances indicate otherwise” at the end of Article 2.8. **Komarov** agreed with this proposal.

629. **Uchida** wondered whether there was any difference between the proposal made by Date-Bah and the result if the second sentence of Article 2.8, which currently stated that “A time indicated in the offer is deemed to be the time of dispatch”, were amended to read “is *presumed* to be the time of dispatch”. If there was no difference, he thought that the proposed amendment would bring about some substantial change, because each party could prove that the time of dispatch was different from the time indicated in the offer. The provision was

intended to bring a very stable and rigid rule, but if the proposed addition were made, the situation would be unstable.

630. **Finn** agreed with Uchida.

631. **Hartkamp** did not think there was any difference between the two proposals.

632. **Schlechtriem** stated that he had understood Date-Bah's proposal to be not only to add the words "unless the circumstances indicate otherwise", but also the words relating to the time zone, and that had troubled him. For example, he received a communication, a time for acceptance had been fixed by the other party, he received it via e-mail and the e-mail showed a certain time and a certain date. He received the communication from New York. His limited knowledge and understanding of how computers and Internet work, did not tell him whether the time indicated on the message was New York time or Central European Time. He had thought that Date-Bah had wanted to include the rule of Paragraph (3) of Article 1.11 in Article 2.8 and not only the last half of the sentence.

633. **Date-Bah** stated that he wanted to make what at present was an un-rebuttable presumption into a rebuttable presumption, because there could be circumstances in which it would be reasonable to rebut a presumption. For example, the provision only referred to the time being indicated in the offer. A secretary could for example have stamped the wrong time on the fax, and without more, that would be an un-rebuttable presumption. It seemed to him that the provision was too rigid for such a case.

634. **Fontaine** added that there could also be a letter with a certain date which was faxed two days later. In such a case circumstances would have to decide which was the date of dispatch.

635. **Bonell** stated that the purpose of the rule was precisely to provide a clear-cut solution, i.e. the date indicated in the offer is decisive.

636. **Furmston** observed that in the case of faxes, it often happened that the date printed out by the machine was different from the one indicated in the letter, as people did not always send faxes on the day the letter-fax was dated, and people tended to think the date of the fax to be more authentic than the date typed by the secretary. Most computers had time systems, but not all provided for day-light saving time, so they were often one hour wrong.

637. **Kronke** added that there were cases in which people wrote the wrong date, especially around New Year.

638. **Bonell** observed that the last examples were mistakes, which had nothing to do with the provision they were discussing and would have to be solved under the rule of mistake.

639. **Schlechtriem** stated that the case of the different dates on the letter and printed by the fax machine showed that it should be a rebuttable presumption. He could rebut the presumption that the letter was dispatched on the date indicated in the letter by proving that there was another date on which it was dispatched by the fax machine. The only question was whether they needed to change the wording, or whether it could be expressed in the comments.

640. **Fontaine** wondered whether instead of referring to the complex rules on mistake, it would not be easier to state in the article “unless the circumstances indicate otherwise”, even if cases, such as writing a letter on the computer by taking an old letter as the basis but forgetting to change the date, could be solved by the rules on mistake.

641. **Finn** stated that the date a letter was written was not the date of its dispatch. He thought that this provision was concerned with the process of dispatching something, which may be days after the letter was written. There were now means available to know when something was dispatched. When it said that the time indicated in the offer was deemed to be the time it was dispatched, he would have said that in a letter that said that the offer was to be accepted within seven days of the above date, the “deeming” provision would operate on the date actually in the letter.

642. **Schlechtriem** indicated that these uncertainties should be at the risk of the sender. He saw no need to state more than a presumption.

643. **Hartkamp** stated that if one said “seven days from the above date”, it was clear. The problem was when one said “within seven days”. If he received a letter by fax which said 1 January and he received it on 3 January, he would always think that within seven days was within seven days as from the time when he could reasonably know that the offer was made to him. In this case he saw “dispatched” as referring to 3 January. The second sentence was therefore misleading unless the words “unless the circumstances indicate otherwise” were added.

644. **Furmston** indicated that he would have no problems either deleting the second sentence, or amending it to read “presumed” rather than “deemed”.

645. **Uchida** pointed out that Article 2.8 was a rule on the time-period of acceptance, and not a general rule on the time of dispatch. If there was some ambiguity about the starting time, the offeree could ask the offeror. As far as the time-period of acceptance was concerned, they needed a clear-cut rule and the present rule provided just that.

646. *In the end, it was decided to accept Date-Bah’s proposal.*

(d) Article 1.11

647. As regards Article 1.11, **Furmston** observed that if one had a contract that contained provisions for things to be done within a short number of days, it was common in England for people to give notices on the afternoon of the last working day before Christmas because they knew that many people did not work on the afternoon of that day, and if one then treated Christmas Day and Boxing Day as days for counting, one would be left with a very short period of time indeed. The rule in its present form would therefore provide facilities for people who were sharp to take advantage. He stated that personally he would say that official holidays and non-business days should not be days for counting.

648. **Schlechtriem** recalled that they were dealing with international contracts and if they had to take into account official holidays or non-business days they would then have to specify in which country, possibly in several countries, which would make it unworkable. It was only in Paragraph (2) that it would be justified to prolong the period by taking account of

all holidays and non-business days in all countries where the parties had their place of business. This was the reason CISG had not adopted this approach.

649. **Hartkamp** agreed with the proposed new Article 1.11, including Paragraph (3), and stated that they should not depart from CISG unless it was really necessary.

650. *The proposed new Article 1.11 was adopted as proposed.*

(e) Article 2.9

651. *The proposed modification to Article 2.9 was accepted.*

(f) Article 1.2

652. **Bonell** recalled the discussion that had taken place within the Group in 1999 in relation to proposal that there should be a general provision stating that all references to contracts in the Principles would include unilateral acts. This issue came up in relation to Articles 1 and 9 of the Chapter on the Authority of Agents. To take care of this issue, it was proposed that Article 1.2 be modified to read:

“Nothing in these Principles requires a contract, [statement of intention] or any other act to be concluded in, made or evidenced by a particular form. It may be proved by any means, including witnesses.”

653. **Finn** wondered whether “concluded in” was necessary if “statement of intention” was added. You did not “conclude” a statement of intention.

654. *It was agreed that the words “concluded in” be deleted.*

655. **Hartkamp** agreed with the words in square brackets. He felt it would be good to have the addition considering the link between statement of intention and unilateral act.

656. **Finn** wondered whether “of intention” was intended to limit “statement”, whether simply “statement” might not be sufficient.

657. **Schlechtriem** suggested that consideration be given to whether the Principles referred to statements that were not statements of intention. A “statement of intention” referred to something that was legally relevant, but there were millions of other statements that did not have this legal relevance and for those they did not need to say anything about legal form. He therefore stated that he would keep the words “of intention”.

658. To **Bonell**’s recollection, “statement of intention” and “statement” did not appear anywhere in the Principles. He referred to Article 1.9 and to the discrepancy in terminology with that article. He suggested that mere “statements” should also fall under Article 1.2. He wondered whether they would be covered by “any other act”.

659. **Finn** observed that a rejection of an offer would be a simple statement and not a statement of intention.

660. **Schlechtriem** disagreed, stating that a rejection of an offer was a statement of intention. He indicated that he could live with the proposed formula “contract, statement or any other act”. In this case he suggested the comments should say that the statements were usually statements of intention.

661. **Fontaine** stated that “statement” was not necessarily included under “other act”. The expression “statement of intention” seemed too much like a translation from German, and he felt that expressions that had a particular meaning in some legal systems which were not understood in the same way in other systems should be avoided. “Statement” would cover “statement of intention”. He suggested therefore “contract, statement or any other act”.

662. *It was agreed that the provision should refer to “contract, statement or any other act” and that the comments should indicate that “statement” referred in particular to statements of intention.*

(g) Reliance / Reasonable reliance

663. **Bonell** recalled that on several occasions the Principles referred to reliance situations, in which one party relied on the other party’s representation. At times the provisions referred to “reasonable reliance” or “reasonably relied”, whereas at others they did not contain any such reference. He wondered whether the expression should not be consistent, and the qualification “reasonable” be used everywhere (or nowhere, as they now had a general provision on inconsistent behaviour).

664. **Finn** observed that he preferred neither course indicated, because in some cases you were concerned only with the fact of reliance. In Article 3.5, for instance, the question was simply whether the person had acted in reliance on the contract. In other cases the concern was whether the reliance had been reasonable. In the fact case, asking whether the reliance was reasonable was asking an irrelevant question, whereas not having the qualification “reasonable” when one wanted the reliance to be reasonable would change the nature of the provision.

665. **Schlechtriem** stated that the necessary differentiation could be made by what was reasonable in the circumstances of the provision. He would therefore use “reasonable” throughout, assuming that in some situations the reasonableness concept would be narrower than it was in others.

666. **Farnsworth** agreed with Schlechtriem. He felt that they should require that reliance be reasonable wherever they spoke of reliance, and somewhere they would want to say that what was reasonable depended on the circumstances.

667. **Lando** raised the question of the burden of proof and suggested that a party would have to demonstrate that he had acted in reasonable reliance. He wondered whether that was what they wanted.

668. **Fontaine** thought that reasonableness was presumed, as was good faith, so the party had to show that he had acted in reliance and the other party then had to show that it was not reasonable.

669. *Examining all the provisions referring to “reliance” (Articles 2.18, 3.5(1)(b), 3.10(3), 3.11(2), 3.13(1) and Article 5 of the draft Chapter on Third Party Rights), it was decided that they should all include the qualification “reasonable” and that the formulation should in principle be “reasonably acted in reliance”.*

670. **Furmston** suggested that the formulation be simply “reasonably relied” and not “acted in reliance”.

671. **Fontaine** preferred keeping “acted in reliance”, which was the formulation decided on, as if a party simply relied on the statement and did nothing, he would require less protection than someone who actually did something, who acted in reliance.

672. **Schlechtriem** indicated that he had problems attaching the reasonableness to the acting and not to the reliance. To him, it was the reliance that had to be reasonable.

673. **Furmston** saw no difference between the two versions.

674. **Hartkamp** felt that linguistic problems did make their appearance, especially as the concept of reliance was not familiar to many lawyers. It would not be clear to everybody that “rely” was the same as “act in reliance”.

675. **Furmston** recalled that the example given in the chapter on third party rights of relying was a case where the person relying did nothing – he did not take out an insurance because he relied on the insurance taken out by his employer and to him that case was clearly covered by “reasonably relied” but perhaps not by “reasonably acted in reliance”. One entered a debate on whether doing nothing was an act.

676. **Hartkamp** stated that there were two issues on the table: the “reasonable” issue, and the “acting” issue. He thought that the “acting” issue had been decided, and added that in many more cases, even in the articles they had just discussed, “acting in reliance” might not in fact be “acting”, because you would have acted if you had not relied. He thought it dangerous to use the form “rely” in only one place, because it might imply not to take out an insurance. He also seemed to recall that somewhere they had stated that “acting” implied not acting where you would otherwise have acted. If there was no specific article on this, it should perhaps be made clear in one of the comments, perhaps in the comments to the article on inconsistent behaviour.

677. **Lando** suggested that a definition stating that “acts” includes “omissions” would solve the problem.

678. **Finn** recalled that in the formulations of the article on inconsistent behaviour “acting in reliance” was not used, “reasonably has relied” was.

679. **Hartkamp** stated that the German, Dutch and French translations would all have to say “act”. He did not know if it was advisable to have a shorter formulation in English unless it was absolutely necessary.

680. *It was decided that the formulation should be a form of “act in reliance”, that consequently the article on inconsistent behaviour would be amended to conform to this formulation (“reasonably has acted in reliance to its detriment”).*

681. As regards the placing of the word “reasonable”, **Schlechtriem** reiterated his view that there was a difference between saying “reasonably acted in reliance” and “acted in reasonable reliance”, as what had to be reasonable was the reliance and not the acting.

682. **Hartkamp** and **Jauffret-Spinosi** agreed with this view.

683. **Finn** and **Farnsworth** felt that “reasonably acted in reliance” was better English, but did not think that there was a difference in meaning between the two options.

684. **Furmston** however expressed a certain concern, because if there was a difference in meaning to civil lawyers he felt there should be also to common lawyers. As a common lawyer, once it was reasonable to rely on a statement, some of the behaviour would also qualify as reasonable. The fact that the party relying went over the top and did unreasonable things would not prevent some of the reliance or some of the action from being reasonable and therefore making it binding.

685. **Farnsworth** also expressed unease at hearing that there would be a substantive difference depending on where “reasonable” was placed. Did it make a difference if the person went “over the top” and had some reasonable reliance plus some unreasonable reliance? The common lawyers would think that as long as there was some reasonable reliance that was enough.

686. *In the end it was decided that the word “reasonable” should be placed before the “act” concept.*

687. *As regards the articles which already had the “reasonable” concept, it was decided that in Article 2(4)(2)(b) one “reasonable” was sufficient and that therefore the present formulation should remain as it was. It was furthermore decided that in Article 5(2) of the chapter on authority of agents which referred to both good faith and reasonableness, it was sufficient to refer only to reasonableness and that therefore “and in good faith” should be deleted.*

(h) Agreement to negotiate in good faith enforceable?

688. With reference to the proposed addition to the comments to Article 2.15, **Farnsworth** stated that the comment presently said that for breach of the obligation to negotiate in good faith that was imposed by the Principles, reliance damages would be available. In the example that came up, the question was whether it would not be possible to have all the contract remedies if there was an agreement to negotiate. Clearly the answer should be yes, and he did not think that they should leave open the argument that even if you had an agreement to negotiate in good faith you could only get reliance interest.

689. *The proposed addition was accepted by the Group.*

(i) Article 6.2.2 Comment 2

690. **Lando** had doubts as to the proposed deletion of the reference to 50% in Comment 2 to Article 6.2.2, as he felt that some guidance was needed and that the objections to this reference might be dictated more by a general dislike of the hardship rules.

691. **Furmston** felt that it would be rather feeble not to offer any guidance, whereas **Hartkamp**, **Fontaine** and **Komarov** were aware of the criticism that had been forthcoming as regards this reference and advised to delete it.

692. *The proposal to delete the reference to 50% in Comment 2 to Article 6.2.2 was accepted by the Group, thereby leaving the question to be decided according to the circumstances of the case.*

10. STRUCTURE OF THE PRINCIPLES (STUDY L – DOC. 86)

693. **Bonell** suggested the following structure so as to incorporate the new chapters into the new edition of the Principles:

Authority of Agents:	Section 2 of Chapter 2 (Formation)
Third Party Rights:	Section 2 of Chapter 5 (Content)
Set-Off:	New Chapter 8
Assignment:	New Chapter 9
Limitation:	New Chapter 10

694. The numbering of the articles would follow the same system as that adopted for the 1994 Principles, with the first number of the article indicating the chapter, the second the section of the chapter, and the third the number of the article.

695. *This suggestion was accepted by the Group.*

696. As regards the titles of the Chapters, **Uchida** wondered whether the title of Chapter 2 as it stood was appropriate, and whether it included agency.

697. **Bonell** recalled that they dealt with the authority of agents, and not with agency as such, and basically the conclusion of the contract through an agent. He agreed that the understanding was that whenever the rules of this section applied, they would apply also to specific acts, perhaps in the course of performance – notices, etc. The main subject of the section was however the conclusion of a contract through an agent.

698. **Kronke** suggested adding the title of the new section to the title of the chapter to read “Formation and Authority of Agents”.

699. **Bonell** observed that if this were done, then perhaps the same should be done for the other chapters as well.

700. **Schlechtriem** pointed out that the authority of agents played a role in cases where notice was given by an agent also when it had nothing to do with formation.

701. **Kronke** drew attention to the fact that the title of the chapter on assignment mentioned the titles of all three sections. In Chapter 7 the sections were in effect sub-species of non-performance, and in Chapter 6 both sections were species of performance, whereas that was not the case with formation and authority of agents. He therefore suggested mentioning both formation and authority of agents in the title of Chapter 2.

702. **Finn, Schlechtriem** and **Uchida** supported this proposal.

703. **Furmston** also supported this proposal, and suggested that the title of Chapter 5 should also indicate that it contained a section on third party rights, as common lawyers would not expect to find those provisions in a chapter on content.

704. *In the end, it was decided to add references to the new sections to the chapters in which they were placed. The titles of the chapters concerned were therefore as follows:*

Chapter 2: Formation and Authority of Agents

Chapter 5: Content and Third Party Rights

CONCLUSION OF THE MEETING

705. **Bonell** thanked the members of the Group for their contribution to the work during the week.

706. **Lando** stated that he felt nostalgic, because it was perhaps the last day of this Working Group. Together with Fontaine, he had been one of the few who had been involved in this exciting project from the very beginning back in 1979. What three “wise men” (René David, Tudor Popescu and Clive Schmitthoff who then had had the same venerable age that several members of the Group now had), originally had proposed as “Progressive Codification of the Law of International Trade Law”, had subsequently become the “Principles of International Commercial Contracts”, and had turned out to be perhaps the most successful product of UNIDROIT. He wished to thank Bonell for his conducting of the meetings, his keeping the discussions at a very high scholarly level, his kindness and his preparedness. He felt that Bonell was a worthy successor of Ernst Rabel who in that very room almost a century before had started one of the most unification projects.

707. **Kronke** associated himself with Lando’s words. He also thanked the members of the Working Group for their extraordinary input over many years. He was convinced that this was not the end of the story, and that the enlarged version of the Principles would be even more successful in the various areas set out by the Preamble. He stated that the Institute however did not wish to release the members from service to the Principles, because the idea was to have a launching event for the new, enlarged version in 2004 or shortly thereafter, and they would be thinking about the input that could be made by the members of the Group as well as by others.

708. The meeting was thereupon adjourned.

REVISED TEXT ADOPTED AT THE SIXTH SESSION

PREAMBLE

These Principles set forth general rules international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.

They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.

They may be applied when the parties have not chosen any law to govern their contract.

They may be used to interpret or supplement international uniform law instruments.

They may be used to interpret or supplement domestic law.

They may serve as a model for national and international legislators”

CHAPTER 1: GENERAL PROVISIONS

Article 1.2

(No form required)

Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses.

Article 1.8 (new)

(Inconsistent Behaviour)

A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.

Article 1.12 (new)

(Computation of time set by parties)

- (1) Official holidays or non-business days occurring during a period set by parties for an act to be done are included in calculating the period.
- (2) However, if the last day of the period is an official holiday or a non-business day at the place of business of the party to do the act, the period is extended until the first business day which follows, unless the circumstances indicate otherwise.
- (3) The relevant time zone is that of the place of business of the party setting the time, unless the circumstances indicate otherwise.

CHAPTER 2: FORMATION AND AUTHORITY OF AGENTS

Section 1: Formation

Article 2.1.8

(Acceptance within a fixed period of time)

A period of acceptance fixed by the offeror begins to run from the time that the offer is dispatched. A time indicated in the offer is deemed to be the time of dispatch unless the circumstances indicate otherwise.

Article 2.1.9

(Late acceptance. Delay in acceptance)

(2) If a communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that it considers the offer as having lapsed.

Article 2.1.18

(Modification in particular form)

A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.

Section 2: Authority of Agents

Article 2.2.1

(Scope of the Section)

- (1) This Section governs the authority of a person, the agent, to affect the legal relations of another person, the principal, by or with respect to a contract with a third party, whether the agent acts in its own name or in that of the principal.
- (2) It governs only the relations between the principal or the agent on the one hand, and the third party on the other.
- (3) It does not govern an agent's authority conferred by law or the authority of an agent appointed by a public or judicial authority.

Article 2.2.2

(Establishment and scope of the authority of the agent)

- (1) The principal's grant of authority to an agent may be express or implied.
- (2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted.

Article 2.2.3

(Agency disclosed)

- (1) Where an agent acts within the scope of its authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly affect the legal relations between the principal and the third party and no legal relation is created between the agent and the third party.
- (2) However, the acts of the agent shall affect only the relations between the agent and the third party, where the agent with the consent of the principal undertakes to become the party to the contract.

Article 2.2.4

(Agency undisclosed)

- (1) Where an agent acts within the scope of its authority and the third party neither knew nor ought to have known that the agent was acting as an agent, the acts of the agent shall affect only the relations between the agent and the third party.
- (2) However, where such an agent, when contracting with the third party on behalf of a business, represents itself to be the owner of that business, the third party, upon discovery of the real owner of the business, may exercise also against the latter the rights it has against the agent.

Article 2.2.5

(Agent acting without or exceeding its authority)

- (1) Where an agent acts without authority or exceeds its authority, its acts do not affect the legal relations between the principal and the third party.
- (2) However, where the principal causes the third party reasonably to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

Article 2.2.6

(Liability of agent acting without or exceeding its authority)

- (1) An agent that acts without authority or exceeds its authority is, failing ratification by the principal, liable for damages that will put the third party in the same position as if the agent had acted with authority and not exceeded its authority.
- (2) However, the agent is not liable if the third party knew or ought to have known that the agent had no authority or was exceeding its authority.

Article 2.2.7

(Conflict of interests)

- (1) If a contract concluded by an agent involves the agent in a conflict of interests with the principal of which the third party knew or ought to have known, the principal may avoid the contract. The right to avoid is subject to Articles 3.12 and 3.14 to 3.17.
- (2) However, the principal may not avoid the contract
 - (a) if the principal had consented to, or knew or ought to have known, the agent's involvement in the conflict of interests; or
 - (b) if the agent had disclosed the conflict of interests to the principal and it had not objected within a reasonable time.

Article 2.2.8

(Subagency)

An agent has implied authority to appoint a subagent to perform acts which it is not reasonable to expect the agent to perform itself. The rules of this chapter apply to the subagency.

Article 2.2.9

(Ratification)

- (1) An act by an agent that acts without authority or exceeds its authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority.
- (2) The third party may by notice to the principal specify a reasonable period of time for ratification. If the principal does not ratify within that period it can no longer do so.
- (3) Where, at the time of the agent's act, the third party neither knew nor ought to have known of the lack of authority, it may, at any time before ratification, by notice to the principal indicate its refusal to become bound by a ratification.

Article 2.2.10*(Termination of authority)*

- (1) Termination of authority is not effective in relation to the third party unless the third party knew or ought to have known of it.
- (2) Notwithstanding the termination of its authority, an agent remains authorised to perform the acts that are necessary to prevent harm to the principal's interests.

CHAPTER 3: VALIDITYArticle 3.5*(Relevant mistake)*

- (1) [...]
- (b) the other party had not at the time of avoidance reasonably acted in reliance on the contract.

Article 3.10*(Gross disparity)*

- (3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. The provisions of Article 3.13(2) apply accordingly.

Article 3.11*(Third persons)*

- (2) Where fraud, threat or gross disparity is imputable to a third person for whose acts the other party is not responsible, the contract may be avoided if that party knew or ought to have known of the fraud, threat or gross disparity, or has not at the time of avoidance reasonably acted in reliance on the contract.

Article 3.13*(Loss of right to avoid)*

- (1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and

before that party has reasonably acted in reliance on a notice of avoidance.

CHAPTER 5: CONTENT AND THIRD PARTY RIGHTS

Section 1: Content

Article 5.1.9 (new) (*Release by Agreement*)

- (1) An obligee may release its rights by agreement with the obligor.
- (2) An offer to release a right gratuitously shall be deemed accepted if the obligor does not reject the offer without delay after having become aware of it.

Section 2: Third Party Rights

Article 5.2.1 (*Contracts in favour of third parties*)

- (1) Parties (the “promisor” and the “promisee”) may confer by express or implied agreement a right on a third party (the “beneficiary”).
- (2) The existence and content of the beneficiary’s right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement.

Article 5.2.2 (*Third Party Identifiable*)

The beneficiary must be identifiable with adequate certainty by the contract but need not be in existence at the time the contract is made.

Article 5.2.3 (*Exclusion and Limitation Clauses*)

The conferment of rights in the beneficiary includes the right to invoke a clause in the contract which excludes or limits the liability of the beneficiary.

Article 5.2.4 (*Defences*)

The promisor may assert against the beneficiary all defences which the promisor could assert against the promisee.

Article 5.2.5
(*Revocation*)

The contracting parties may modify or revoke the rights conferred by the contract on the beneficiary until the beneficiary has accepted them or reasonably acted in reliance on them.

Article 5.2.6
(*Renunciation*)

The beneficiary may renounce a right conferred on it.

CHAPTER 8: SET-OFF

Article 8.1
(*Conditions of set-off*)

- (1) Where two parties owe each other money or other performances of the same kind, either of them (“the first party”) may set off its obligation against that of its obligee (“the other party”) if at the time of set-off
- (a) the first party is entitled to perform its obligation,
 - (b) the other party’s obligation is ascertained as to its existence and amount and performance is due.
- (2) If the obligations of both parties arise from the same contract, the first party may also set off its obligation against an obligation of the other party which is not ascertained as to its existence or to its amount.

Article 8.2
(*Foreign currency set-off*)

Where the obligations are to pay money in different currencies, the right of set-off may be exercised, provided that both currencies are freely convertible and the parties have not agreed that the first party shall pay only in a specified currency.

Article 8.3
(*Set-off by notice*)

The right of set-off is exercised by notice to the other party.

Article 8.4
(*Content of Notice*)

- (1) The notice must specify the obligations to which it relates.

(2) If the notice does not specify the obligation against which set-off is exercised, then the other party may, within a reasonable time, declare to the first party the obligation to which the set-off relates, or, if no such declaration is made, the set-off will relate to all the obligations proportionally.

Article 8.5
(*Effect of set-off*)

- (1) Set-off discharges the obligations.
- (2) If obligations differ in amount, set-off discharges the obligations up to the amount of the lesser obligation.
- (3) Set-off takes effect as from the time of notice.

**CHAPTER 9: ASSIGNMENT OF RIGHTS, TRANSFER OF OBLIGATIONS,
ASSIGNMENT OF CONTRACTS**

Section 1: Assignment of rights

Article 9.1.1
(*Definitions*)

“Assignment of a right” means the transfer by agreement from one person (“the assignor”) to another person (“the assignee”), including transfer by way of security, of the assignor's right to payment of a monetary sum or other performance from a third person (“the obligor”).

Article 9.1.2
(*Exclusions*)

This Section does not apply to transfers made under the special rules governing the transfer :

- (a) of instruments such as negotiable instruments, documents of title and financial instruments, or
- (b) of rights in the course of transferring a business.

Article 9.1.3
(*Assignability of non-monetary rights*)

A right to non-monetary performance may be assigned only if the assignment does not render the obligation significantly more burdensome.

Article 9.1.4

(Partial assignment)

- (1) A right to payment of a monetary sum may be assigned partially.
- (2) A right to other performance may be assigned partially only if it is divisible, and the assignment does not render the obligation significantly more burdensome.

Article 9.1.5

(Future rights)

A future right is deemed to be transferred at the time of the agreement, provided the right, when it comes into existence, can be identified as the right to which the assignment relates.

Article 9.1.6

(Rights assigned without individual specification)

A number of rights may be assigned without individual specification provided such rights can be identified as rights to which the assignment relates at the time of the assignment or when they come into existence.

Article 9.1.7

(Agreement between assignor and assignee sufficient)

- (1) A right is assigned by mere agreement between assignor and assignee, without notice to the obligor.
- (2) The consent of the obligor is not required, unless the obligation, in the circumstances, is of an essentially personal character.

Article 9.1.8

(Obligor's additional costs)

The obligor has a right to be compensated by the assignor or the assignee for any additional costs caused by the assignment.

Article 9.1.9

(Non-assignment clauses)

- (1) Assignment of a right to payment of a monetary sum is effective notwithstanding an agreement between the assignor and the obligor limiting or prohibiting such assignment. However, the assignor may be liable to the obligor for breach of contract.

(2) Assignment of a right to other performance is ineffective, if it is contrary to an agreement between the assignor and the obligor limiting or prohibiting the assignment. Nevertheless, the assignment is effective if the assignee, at the time of assignment, neither knew nor ought to have known of the agreement; the assignor may then be liable to the obligor for breach of contract.

Article 9.1.10
(Notice to the obligor)

- (1) Until receiving a notice of the assignment, from either the assignor or the assignee, the obligor is discharged by paying the assignor.
- (2) After receiving such a notice, the obligor is discharged only by paying the assignee.

Article 9.1.11
(Successive assignments)

If the same right has been assigned by the same assignor to two or more successive assignees, the obligor is discharged by paying according to the order in which the notices were received.

Article 9.1.12
(Adequate proof of assignment)

- (1) If notice of the assignment is given by the assignee, the obligor may request the assignee to provide within a reasonable time adequate proof that the assignment has been made.
- (2) Until adequate proof is provided, the obligor may withhold payment.
- (3) Unless adequate proof is provided, notice is not effective.
- (4) Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

Article 9.1.13
(Defences and rights of set-off)

- (1) The obligor may assert against the assignee all defences which the obligor could assert against the assignor.
- (2) The obligor may exercise against the assignee any right of set-off available to the obligor against the assignor up to the time notice of assignment was received.

Article 9.1.14*(Rights related to the claim assigned)*

Assignment of a right transfers to the assignee :

- (a) all the assignor's rights to payment or other performance under the contract in respect of the rights assigned, and
- (b) all rights securing performance of the rights assigned.

Article 9.1.15*(Assignor's undertakings)*

The assignor undertakes towards the assignee, except as otherwise disclosed to the assignee, that :

- (a) the assigned right exists at the time of the assignment, unless the right is a future right;
- (b) the assignor is entitled to assign the right;
- (c) the right has not been previously assigned to another assignee, and it is free from any right or claim from a third party;
- (d) the obligor does not have any defences;
- (e) neither the obligor nor the assignor has given notice of set-off concerning the assigned right and will not give any such notice;
- (f) the assignor will reimburse the assignee for any payment received from the obligor before notice of the assignment was given.

Section 2 : Transfer of obligationsArticle 9.2.1*(Modes of transfer)*

An obligation to pay money or render other performance may be transferred from one person ("the original obligor") to another person ("the new obligor") either

- (a) by an agreement between the original obligor and the new obligor subject to Article 2.3, or
- (b) by an agreement between the obligee and the new obligor, by which the new obligor assumes the obligation.

Article 9.2.2*(Exclusion)*

This Section does not apply to transfers of obligations made under the special rules governing transfers of obligations in the course of transferring a business.

Article 9.2.3

(Requirement of obligee's consent to transfer)

Transfer of an obligation by an agreement between the original and the new obligor requires the consent of the obligee.

Article 9.2.4

(Advance consent of obligee)

- (1) The obligee may give its consent in advance.
- (2) The transfer of the obligation becomes effective when notice of the transfer is given to the obligee or when the obligee acknowledges it.

Article 9.2.5

(Discharge of old obligor)

- (1) The obligee may discharge the original obligor.
- (2) The obligee may also retain the original obligor as an obligor in case the new obligor does not perform properly.
- (3) Otherwise the original obligor remains as an obligor, jointly and severally with the new obligor.

Article 9.2.6

(Third party performance)

- (1) Without the obligee's consent, the obligor may contract with another person that this person will perform the obligation in place of the obligor, unless the obligation, in the circumstances, has an essentially personal character.
- (2) The obligee retains its claim against the obligor.

Article 9.2.7

(Defences and rights of set-off)

- (1) The new obligor may assert against the obligee all defences which the original obligor could assert against the obligee.
- (2) The new obligor may not exercise against the obligee any right of set-off available to the original obligor against the obligee

Article 9.2.8

(Rights related to the obligation transferred)

- (1) The obligee may assert against the new obligor all its rights to payment or other performance under the contract in respect of the obligation transferred.
- (2) If the original obligor is discharged under Article 2.5 (1), a security granted by any person other than the new obligor for the

performance of the obligation is discharged, unless that other person agrees that it should continue to be available to the obligee.

(3) Discharge of the original obligor also extends to any security of the original obligor given to the obligee for the performance of the obligation, unless the security is over an asset which is transferred as part of a transaction between the original and the new obligor.

Section 3 : Assignment of contracts

Article 9.3.1 *(Definitions)*

“Assignment of a contract” means the transfer by agreement from one person (“the assignor”) to another person (“the assignee”) of the assignor’s rights and obligations arising out of a contract with another person (“the other party”).

Article 9.3.2 *(Exclusion)*

This Section does not apply to assignment of contracts made under the special rules governing transfers of contracts in the course of transferring a business.

Article 9.3.3 *(Request of consent of the other party)*

Assignment of a contract requires the consent of the other party.

Article 9.3.4 *(Advance consent of the other party)*

- (1) The other party may give its consent in advance.
- (2) The assignment of the contract becomes effective when notice of the assignment is given to the other party or when the other party acknowledges it.

Article 9.3.5 *(Discharge of the assignor)*

- (1) The other party may discharge the assignor.
- (2) The other party may also retain the assignor as an obligor in case the assignee does not perform properly.
- (3) Otherwise the assignor remains as the other party’s obligor, jointly and severally with the assignee.

Article 9.3.6*(Defences and rights of set-off)*

- (1) To the extent that assignment of a contract involves an assignment of rights, article 1.13 applies accordingly.
- (2) To the extent that assignment of a contract involves a transfer of obligations, article 2.7 applies accordingly.

Article 9.3.7*(Rights transferred with the contract)*

- (1) To the extent that assignment of a contract involves an assignment of rights, article 1.14 applies accordingly.
- (2) To the extent that assignment of a contract involves a transfer of obligations, article 2.8 applies accordingly.

CHAPTER 10: LIMITATION PERIODSArticle 10.1*(Scope of the chapter)*

- (1) The exercise of rights governed by these Principles is barred by expiration of a period of time, referred to as “limitation period”, according to the rules of this chapter.
- (2) This chapter does not govern the time within which one party is required under these Principles, as a condition for the acquisition or exercise of its right, to give notice to the other party or perform any act other than the institution of legal proceedings.

Article 10.2*(Limitation periods)*

- (1) The general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee’s right can be exercised.
- (2) In any event, the maximum limitation period is ten years beginning on the day after the day the right can be exercised.

Article 10.3*(Modification of Limitation Periods by the Parties)*

- (1) The parties may modify the limitation periods.
- (2) However they may not
 - (a) shorten the general limitation period to less than one year;
 - (b) shorten the maximum limitation period to less than 4 years;

- (c) extend the maximum limitation period to more than 15 years.

Article 10.4

(New Limitation Period by Acknowledgement)

- (1) Where the obligor, before the expiration of the general limitation period, acknowledges the right of the obligee, a new general limitation period begins on the day after the day of the acknowledgement.
- (2) The maximum limitation period does not begin to run again, but may be exceeded by the beginning of a new general limitation period under Art. 2 (1).

Article 10.5

(Suspension by Judicial Proceedings)

- (1) The running of the limitation period is suspended
- (a) when the obligee performs any act, by commencing judicial proceedings or in judicial proceedings already instituted, that is recognised by the law of the court as asserting the obligee's right against the obligor;
 - (b) in the case of the obligor's insolvency when the obligee has asserted its rights in the insolvency proceedings; or
 - (c) in the case of proceedings for dissolution of the entity which is the obligor when the obligee has asserted its rights in the dissolution proceedings.
- (2) Suspension lasts until the proceedings have been terminated by a final decision of the court or otherwise.

Article 10.6

(Suspension by Arbitral Proceedings)

- (1) The running of the limitation period is suspended when the obligee performs any act, by commencing arbitral proceedings or in arbitral proceedings already instituted, that is recognised by the law of the arbitral tribunal as asserting the obligee's right against the obligor. In the absence of regulations for arbitral proceedings or provisions determining the exact date of the commencement of arbitral proceedings, the proceedings are deemed to commence on the date on which a request that the right in dispute should be adjudicated reaches the obligor.
- (2) Suspension lasts until the proceedings have been terminated by a binding decision of the arbitral tribunal or otherwise.

Article 10.7

(Alternative Dispute Resolution)

The provisions of Arts. 5 and 6 apply with appropriate modifications to other proceedings whereby parties request a third person to assist them in their attempt to reach an amicable settlement of their dispute.

Article 10.8

(Suspension in case of force majeure, death or incapacity)

- (1) Where the obligee has been prevented by an impediment that is beyond its control and that it could neither avoid nor overcome, from causing a limitation period to cease to run under the preceding articles, the general limitation period is suspended so as not to expire before one year after the relevant impediment has ceased to exist.
- (2) Where the impediment consists of the incapacity or death of the obligee or obligor, suspension ceases when a representative for the incapacitated or deceased party or its estate has been appointed or a successor inherited the respective party's position; the additional one-year period under para. 1 applies respectively.

Article 10.9

(The Effects of Expiration of Limitation Period)

- (1) The expiration of the limitation period does not extinguish the right.
- (2) For the expiration of the limitation period to have effect, the obligor must assert it as a defence.
- (3) A right may still be relied on as a defence even though the expiration of the limitation period for that right has been asserted.

Article 10.10

(Exercise of Set-Off after Expiration of the Limitation Period)

The obligee may exercise the right of set-off until the obligor has asserted the expiration of the limitation period.

Article 10.11

(Restitution)

Where there has been performance in order to discharge an obligation, there is no right to restitution merely because the period of limitation had expired.

**WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS**

(Sixth Session, Rome, 2 – 6 June 2003)

LIST OF PARTICIPANTS

MEMBERS

Mr M. Joachim BONELL (Chairman)	Professor of Law University of Rome I “La Sapienza” Consultant UNIDROIT Rome (Italy)
Mr Samuel Kofi DATE BAH	Supreme Court Accra (Ghana)
Mr Adolfo DI MAJO	Professor of Law University of Rome I “La Sapienza” Rome (Italy)
Mr E. Allan FARNSWORTH	McCormack Professor of Law School of Law Columbia University in the City of New York New York, N.Y. (U.S.A.)
Mr Paul FINN	Judge of the Federal Court Canberra A.C.T. (Australia)
Mr Marcel FONTAINE	Professor of Law University of Louvain Centre de droit des obligations Louvain-la-Neuve (Belgium)
Mr Michael FURMSTON	Professor of Law Faculty of Law University of Bristol Bristol (United Kingdom)
Mr Arthur HARTKAMP	Procureur-Général at the Supreme Court of The Netherlands Professor of Law University of Amsterdam

Postbus 20303
's-Gravenhage (The Netherlands)

Ms Camille JAUFFRET-SPINOSI

Professor of Law
University of Paris II
Paris (France)

Mr Alexander KOMAROV

Professor of Law
Head of Private Law Department
Russian Academy of Foreign Trade
Moscow (Russian Federation)

Mr Ole LANDO

Professor of Law (emeritus)
Holte (Denmark)

Mr Peter SCHLECHTRIEM

Professor of Law (emeritus)
University of Freiburg
Freiburg (Germany)

Mr Takashi UCHIDA

Professor of Law
The University of Tokyo
Faculty of Law
Tokyo (Japan)

OBSERVERS

Mr Andrea CARLEVARIS

Counsel
International Court of Arbitration
International Chamber of Commerce
Paris (France)

Mr Alejandro GARRO

Professor of Law
School of Law
Columbia University in the
City of New York
New York, N.Y. (U.S.A.)

Mr Emmanuel JOLIVET

General Counsel
International Court of Arbitration
International Chamber of Commerce
Paris (France) (emeritus)

Mr Giorgio SCHIAVONI

Vice President
Milan National and International Arbitration
Chamber
Milan (Italy)

Mr Hiroo SONO

Associate Professor of Law
Kyushu University
Faculty of Law

Fukuoka (Japan)

UNIDROIT

Mr Herbert KRONKE

Professor of Law
Secretary-General

Ms Lena PETERS

Research Officer
Acting Secretary to the Working Group

Ms Marina SCHNEIDER

Research Officer