

UNIDROIT 2003  
Study L – WP.13  
(English only)

UNIDROIT

International Institute for the Unification of Private Law

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WORKING GROUP FOR THE PREPARATION OF  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Meeting of the Drafting Group in Louvain-la-Neuve, 7-10 January 2003

CONCLUSIONS

(Prepared by the Secretariat)

Rome, February 2003

## **Conclusions of the meeting of the Drafting Group held in Louvain-la-Neuve (7-10 January 2003)**

### **1. Time table**

Reporters must have their drafts ready by the end of February when they have to be sent to the Co-Rapporteurs for comments/suggestions. These should then be taken into account in their final drafts which should be in the hands of UNIDROIT by the end of April for circulation to the Working Group (W.G.).

Bonell will prepare a Secretariat memorandum on open questions (in the light of discussion in Louvain-la-Neuve) for submission to the W.G. for its consideration at its session in June 2003.

French translation of black letter rules should be ready by June for revision by the francophone members of the W.G.

### **2. New edition of the Principles**

- Date of new edition should be given prominence, INCOTERMS example (Fontaine)
- Suggestion that new edition be given a new colour so as to identify it from the present red book (Furmston)
- Suggestion that some identifying mark such as a black stripe be made on the new edition (Farnsworth)
- Suggestion that something should be in the title to indicate that there is something new; new date not enough (Schlechtriem)
- Suggestion to stick to the red colour but include date (Spinosi)

Group decided that the date should be large and prominent.

- Suggestion to indicate additional chapters but not Parts I and II (Fontaine, Bonell)
- Suggestion to indicate Parts I and II (Schlechtriem)
- Suggestion to refer to edition (Fontaine, Bonell)
- Against “edition” and in favour of a date (Farnsworth, Furmston, Spinosi)
- Suggestion that the cover should be changed to distinguish it from the current red book (Farnsworth)
- Suggestion that it be white print on black ground (Bonell)

### **3. Decided amendments to Part I**

See document UNIDROIT 2003 - Study L - Doc. 85.

### **4. Open questions in Parts I and II**

## A. Black letter rules

- **Preamble**

Para. 1 – no change

Para. 2 – no change

Para. 3 – no change

Para. 4 – replace with Farnsworth's original 1994 proposal, but delete "also".

Para. 5 – delete last word "instruments"

Para. 6 – new

Para. 7 (ex 6) – no change

Para. 8 – new

Proposed text:

*(Purpose of the Principles)*

**These Principles set forth general rules for 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 provide a solution to an issue raised when the parties have not chosen any law to govern their contract, or when it proves impossible to establish the relevant rule of the applicable law.**

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

**They may be used to interpret or supplement domestic law.**

**They may serve as a model for national and international legislators.**

**They may serve as a model in drafting contracts.**

COMMENT

It was agreed that it would be mentioned in the Comments that this is not an exclusive list (Farnsworth).

- **Art. 1.2**

In the context of the discussion on unilateral acts the Group decided on new wording of Art. 1.2.

Proposed text:

*Article 1.2*  
(No form required)

**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.**

- **New Art. 1.11**

In the context of the discussion on “Date of expiry falling on a holiday”, Group agreed to delete para. 2 from Art. 2.8 and to add a new provision Art. 1.11. The Group agreed to deal only with the time fixed by the parties.

Proposed text:

- A. **Article 1.11**

*(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.**

COMMENT

It was agreed that the following should be indicated in the Comments:

- sometimes the 24 hours indicated, e.g. in an e-mail sent on Saturday, understood as 24 hours;
- reference to place of performance of contract.

- **Art. 2.7**

Group agreed that no change was necessary, the first sentence being flexible enough to cover e-commerce. Fontaine said to mention video conference in connection with oral communications.

- **Art. 2.8**

Group initially decided on a new wording of Art. 2.8. It subsequently decided to delete para. 2 and incorporate the contents of deleted para. 2 in new Art. 1.11.

Proposed text:

### **Article 2.8**

*(Acceptance within a fixed period of time)*

**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.**

### **Comment**

Bonell should prepare a comment along the lines of the following:

In the unlikely case that there is no time indicated on the letter, it would be the date on the envelope. The only exception would be telephone calls and that there would be a possibility to trace the call. Same is true of e-messages the dates of which can be traced. Face to face communications ... If the letter or fax indicates a date, prevale la data sulla lettera o sul fax, anche se spedita più tardi.

- **Art. 2.9** (not mentioned in WP.11)

Group agreed to replace “letter or other writing” by “communication” in the first sentence of para. 2.

Proposed text:

### **Article 2.9**

*(Late acceptance. Delay in transmission)*

**(1) A late acceptance is nevertheless effective as an acceptance if without undue delay the offeror so informs the offeree or gives notice to that effect.**

**(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.**

### **COMMENT**

The Group agreed that an explanation should be made in the Comments that “in writing” includes e-messages.

- *“Reliance” or “reasonable reliance”*

No decision taken by the Group on this matter. It should be suggested to the W.G. at its June 2003 session:

- to have it everywhere;
- to have it nowhere, but with a general provision which we do not have yet.

- *Chapter on Limitation Periods*

### **Article 9**

Group agreed.

- to change “a” to “the” in the title to align it with the title of Article 10;
- to delete para. 2 and put a reference in the Comments;
- to use “assert” instead of “invoke.

Proposed text:

*Article 9*  
*(Effect of Expiration of the Limitation Period)*

**(1) For the expiration of the limitation period to have effect, the obligor must assert it as a defence.**

#### COMMENT

The Group agreed that what was deleted from the black letter rule should be put in the Comments.

### **Article 10**

As the W.G. had not decided on Article 10 (see square brackets) it should be put to the W.G. in the Secretariat memorandum, that now that there is no retroactivity, perhaps we should follow PECL 14:503.

Proposed text:

*Article 10*  
*(Defences after Expiration of the Limitation Period)*

**(1) Notwithstanding the expiration of the limitation period for a right, the obligee may rely on its right as a defence**

**(2) The obligee may exercise the right of set-off unless the obligor has asserted the expiration of the limitation period as a defence.**

- *Chapter on Assignment*

**Question 1**

Group agrees to retain titles as proposed.

**Question 2**

Group agrees to delete everywhere, except in scope provisions, “in these Principles” and “for the purpose of this section” (e.g. also Art. 3 of Chapter on Third Party Rights).

**Question 3**

Re Article 1.9 on non-assignment clauses, the Group decided not to re-open discussion on this matter in Rome in June.

**Question 4**

Group agreed on new wording of Article 1.13 para. 1 to align it with Article 2.7 (only a drafting matter). No changes to Article 1.13 para. 2.

Proposed text:

Article 1.13  
(*Defences*)

**(1) The obligor may assert against the assignee all defences which the obligor could assert against the assignor.**

**(2) 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.**

**Question 5**

Re Article 2.3, Group agreed to change “an” to “the”.

Proposed text:

Article 2.3  
(*Requirement of obligee’s consent to transfer*)

**Transfer of an obligation by an agreement between the original obligor and the new obligor requires the consent of the obligee.**

**Question 6**

Re Article 2.7, Group agreed to move the words “except set-off” to the end of the sentence.

Proposed text:

**ARTICLE 2.7***(Defences)*

**(1) The new obligor may assert against the obligee all defences which the old obligor could assert against the obligee, except set-off.**

**Question 7**

Re Article 3.3, Group agreed to replace the word “request” in the title by “requirement”.

Proposed text:

## Article 3.3

*(Requirement of consent of the other party)*

**Assignment of a contract requires the consent of the other party.**

**Question 8**

Re Article 3.4, Group agreed to include the word “then” between “contract” and “becomes”.

Proposed text:

## Article 3.4

*(Advance consent of the other party)*

**(1) The other party may give its consent in advance.  
 (2) The assignment of the contract then becomes effective when notice of the assignment is given to the other party or when the other party acknowledges it.**

Fontaine’s own questions/suggestions :

In Article 1.14, Group agreed

- to replace “claim” by “right” in the title;
- to replace “claim” by “right” in lit. (a);
- to delete “such” and add “of the right assigned” at the end of lit (b).

Proposed text:

**ARTICLE 1.14***(Rights related to the right 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 right assigned, and**
- (b) all rights securing performance of the right assigned.**

Re Article 1.15: after lengthy discussion initiated by Furmston who felt that there should be language indicating that no claim has been asserted at the time of assignment, the Group agreed that Fontaine would mention in the Comments the time element. It also appears from my notes (p. 30) that nothing of this should be raised in Rome in June.

- **Chapter on Set-off**

**Article 1**

Text of black letter rule stands as in WP.10 . An additional Comment should be added to read as follows:

8. Set-off by agreement

The parties may achieve by agreement the effects of set-off even if the conditions of Art. 1 are not met. Likewise parties may agree that their mutual obligations are set off automatically either at a specific date or periodically. Also more than two parties may agree that their respective obligations may be discharged for example by netting.

**Article 4**

Para. 1 – as it stands;

Para. 2 – add “the” between “if” and “notice”;

Para. 3 – add “the” between “if” and “notice”.

**Article 5**

Text stands as set out in WP.10.

- **Authority of Agents**

Re Article 5: Group agrees to delete “and in good faith”.

Re Article 9: Proposal to re-open the question of ratification carries.

- **Third Party Rights**

Although Group did not discuss the Chapter on Third Party Rights, in connection with Question 2 on Assignment, it agreed that “For the purposes of this chapter” should be deleted from Article 3 of Chapter on Third Party Rights.

## **B. Comments**

- **Agreement to negotiation in good faith**

On Farnsworth’s suggestion the Group agreed that it should be indicated in Comments that in practice the duty to negotiate in good faith may be the subject of an express agreement between the parties, in which case remedies for breach of contract might be available.

- **Date of expiry**

Group decided to delete para. 2 from Art. 2.8 and have a new provision Art. 1.11 (see above).

- **Chapter on Authority of Agents: Comment 2 to Article 9**

Group agreed that a sentence should be added to the Comments stating that ratification, once brought to the attention of the third party, may no longer be revoked.

- **Chapter on Authority of Agents: Comment 4 to Article 10**

Group agrees that there should be a statement in the Comments but “mutatis mutandis” should not be used; “with appropriate modifications” or “accordingly” suggested.

## **5. New issues raised at Louvain**

### **Article 6.2.2 Comment 2**

Group agreed to delete the entire last sentence. Comment 2 would now read:  
Since the general principle is that a change in circumstances does not affect the obligation to perform (see Art. 6.2.1), it follows that hardship may not be invoked unless the alteration of the equilibrium of the contract is fundamental. Whether an alteration is "fundamental" in a given case will of course depend upon the circumstances.

Group also agreed that the reference in the Illustration to the German Democratic Republic be deleted. Farnsworth suggested the wording “import restrictions are abolished”.

### **Preface to new edition**

There should be something in the preface to indicate how the Principles have been revised/corrected.

Mention of Bonell's efficient chairmanship.

### **Structure and chapter numbering**

Group agreed that there should be no new number of chapters of present edition and that wherever appropriate existing chapters should be split into 2 sections.

Proposed structure:

Chapter 2: Formation

Section 1: Formation in general

Section 2: Authority of agents

Chapter 5: Content

Section 1: Content in general

Section 2: Third party rights

Chapter 8: Set-off

Chapter 9: Assignment

Chapter 10: Limitation periods

## **6. French translation**

French translation of at least the black letter rules must be prepared by the end of 2003.

Black letter rules on Authority of Agents have already been translated by Crépeau and revised by Fontaine and Spinosi.

Black letter rules on Assignment will be translated by Fontaine.

Black letter rules on Set-off will be translated by Spinosi.

Chapters on Third Party Rights and on Limitation Periods will be translated by Fontaine and Spinosi.

Translations must be ready by June for revision by the three francophone members of the W.G.

## **7. Round 3**

Suggested new topics for Round 3: plurality of parties, conditions, illegality, suretyship and guarantees, restitution after failure of contracts. The W.G. will be requested to put their ideas on new topics in writing.

The Group agreed that the 2 tiered structure (W.G. and Drafting Group) should be maintained.