



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

**Working Group for the preparation of
Principles of International Commercial Contracts (3rd)
Drafting Committee
Second session
Hamburg, 2 – 5 March 2009**

UNIDROIT 2009
Study L – WP.23
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**Minutes
of the Meeting of the Drafting Committee
(Hamburg, 2 - 5 March 2009)**

Working Group for the preparation of
Principles of International Commercial Contracts (3rd)
Drafting Committee
Second session
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**Session 1:
Plurality of Obligors and/or Obligees**

(UNIDROIT 2009 - Study L – WP. 19)
Reporter: Marcel Fontaine

Minutes

Present:

Prof. Michael Joachim Bonell
Prof. Bénédicte Fauvarque-Cosson (arrived at 5:40 p.m.)
Prof. Marcel Fontaine
Prof. Michael Furmston
Prof. Reinhard Zimmermann

Keeper of the Minutes: Jan Peter Schmidt

Afternoon, 2 March 2009

Item 1: Opening of Session and Adoption of Agenda

1. Bonell thanked Zimmermann for having invited the Committee once more to the Max-Planck-Institute and for having taken care of the technical arrangements. Zimmermann welcomed everybody and explained the details of the evening dinner and the keeping of the minutes. Bonell explained that Fauvarque-Cosson and the new Secretary General of UNIDROIT, Estrella Faria, would arrive later.

2. Agenda: Bonell explained that papers were to be discussed according to the order they had been sent in.

- 1) Examination of the Draft Chapter on Plurality of Obligors and/or Obligees (Unidroit 2009 - Study L – WP. 19)
- 2) Examination of the Position Paper on Unwinding of Failed Contracts (Unidroit 2009 - Study L – WP. 20)
- 3) Examination of the Draft Chapter on Illegality (Unidroit 2009 - Study L – WP. 21)
- 4) Examination of the Draft Chapter on Conditional Obligations (Unidroit 2009 - Study L – WP. 22)
- 5) Other business. Bonell explained that if time permitted the group might wish to examine Francois Dessemontet's draft on Termination of Long Term Contracts for Just Cause (Unidroit 2009 – Study L – Doc. 109).

3. Furmston asked about the general time-schedule of the Committee, in particular, if another meeting in Hamburg was envisaged, and about the concrete purpose of the present meeting. Zimmermann responded that the plan for this year's meeting in Rome was to present the black letter rules and the comments, so that in the final meeting in summer 2010 only minor drafting issues needed to be discussed. Bonell explained that thanks to last year's meeting in Hamburg the Committee had been able to submit black letter rules, which had then been debated in Rome, and that one of the main purposes of this year's meeting in Rome was to debate the comments. He reminded Furmston of the fact that he, Furmston, had promised to elaborate comments for the chapter on "illegality". Bonell expressed his surprise and disappointment about the fact that Furmston's paper for this meeting had hardly been developed compared to the Rome version; that the comments essentially still needed to be written, which could not be done during this meeting in Hamburg. The purpose of this meeting had been to discuss the comments.

4. Furmston responded that the Committee was quite close to agreeing on the black letter rules, which were different from the rules discussed last year in Hamburg because they had been modified in Rome. He had made an effort to put in more examples from the practice of international commerce, instead of the old fashioned examples from domestic law. He could not see why more explanations should be needed.

5. Bonell responded that the aim to conclude the work in 2010 was realistic, provided that all preparatory steps were met according to schedule. Zimmermann stressed that in this meeting the comments needed to be discussed in order to have the final product in 2010. Bonell explained that, as far as the structure of the comments was concerned, it was absolutely indispensable to have headings and subheadings, as the comments should guide the user, especially in the very complex topic of "illegality", where the black letter rules were very abstract. Fontaine added that the illustrations needed to be introduced. Generally, it was also felt that much more substance was needed in the comments.

6. Bonell summarized that everything that was expected to be done had not been done in the paper prepared by Furmston. He asked Furmston whether there had been a misunderstanding or whether Furmston had been too busy. Furmston replied that he seemed to have a serious conceptual problem of what was necessary to explain in the comments, but that he was ready to undertake another attempt. Bonell responded that the inadequacy of Furmston's papers had repeatedly been stressed. Furmston answered that the topic of "illegality" was very complex and that there were very few people in English law and in international practice who really understood it. Furmston added that he was confident to be better informed by Wednesday evening.

7. Bonell expressed the view that Furmston had a very hard task before him because between now and the meeting in May the comments practically needed to be prepared from scratch. The idea of this meeting had been to give further assistance. Now all the Committee members could do was to repeat the suggestions of last year's meeting in Rome. Zimmermann added that if new comments were drafted they needed to be discussed in the Working Group. Bonell pointed out the problem that there was little or no time left for an additional meeting. Fontaine brought up the possibility of circulating the paper among the members of the Drafting Committee before the Rome meeting. Furmston said that he would be happy to push the issue up in his schedule and commitments in order to circulate the paper by 10 April, so that it could be commented upon before the session in May. The existing defects could be pointed out in the present session.

Item 2: Plurality of Obligors and/or Obligees (Unidroit 2009 - Study L – WP. 19)

1. Fontaine explained that for the revised version of his draft all suggestions received in Rome had been taken into consideration and that further research had been conducted. Comments with illustrations had been added and were now presented for the first time. As regards the changes in the black letter rules, Fontaine explained that – unintentionally – some of them were apparent in the draft, while some were not.

2. Fontaine said that most provisions had been accepted in Rome. Difficulties were still existing as regards Articles 1.6 (release), 1.7 (settlement) and 1.12 (subrogation). The Committee decided to discuss the draft Article by Article.

3. **Article 1.1.:** Fontaine explained that, upon suggestions, under comment 2 the example of obligations transferred by agreement had been added. Zimmermann asked whether joint and several obligations could occur only where the obligors acted jointly or also where they acted independently from each other. Fontaine answered that in practice the obligors would usually act jointly but that this was not a necessary condition. Different contracts could also serve as a basis for the “same obligation”.

4. Furmston said that in the financial market obligors would usually act consequently, not jointly. Bonell pointed out the example of co-insurers covering the same risk, but concluding its own contract each, mentioned on page 3 of the draft. Furmston explained that in insurance practice things were often different, that one insurer covered the risk of another insurer. Bonell responded that in this case there were different obligations.

5. Fontaine explained that it was difficult to cover all situations of joint and several obligations. For that reason he had chosen a broad formula in Article 1.1, which included both possibilities mentioned by Zimmermann. Zimmermann said he would like to come back to this issue later.

6. Zimmermann then put forward the question whether the rules on joint and several obligations also applied to contractual damage claims, and if so, whether this should not be spelled out. Fontaine answered that obligations for performance or damages were equally included. Bonell wondered whether in this case the words “undertake” in the black letter rules of Article 1.1 and 1.2 should not be replaced by “have undertaken” or “are bound”. Zimmermann asked whether this would not contradict in some respect with the words “same obligation” in Article 1.1 and “share” in Article 1.1 (2). Furmston wondered whether problems could be avoided by using the word “transaction”. Bonell stated that the term “same obligation” had been considered a key concept after lengthy discussions and that in his view Zimmermann’s objection went conceptually too far. Zimmermann proposed the formula “... are under the same obligation”, but Bonell saw difficulties arising with the formulations in Article 1.1 (1) and (2). It was then agreed to replace “undertake” with “are bound by” in the black letter rules and to modify the comments respectively.

7. Zimmermann and Furmston still raised the question whether it was not a contradiction that someone who is bound by the “obligation” at the same time is only bound by a “share” of this obligation (as expressed in Article 1.1 (2)). Bonell answered that he did not see a problem. He added that PECL used the expression “are bound to render one and the same performance” (Article 10:101) and the DCFR the expression “are bound to perform one obligation” (Article III.- 4:101). Fontaine repeated that the difference between joint and several obligations on the one hand and separate obligations on the other hand not necessarily corresponded to the

existence of one or several contracts. In practice separate liability was often demonstrated by later separating the one contract initially concluded.

8. **Article 1.2:** Zimmermann asked about the nature of the obligations in illustration 3. Fontaine answered that it was a case of separate obligations. Furmston added that A und B were both liable for the complete amount. Fontaine explained that this depended on the circumstances. He stated that the illustration should be modified so that it was clear that A und B were separately bound for the complete amount. Furmston put the example of two guarantors for the same debt. If the guarantors knew of each other the obligations should be joint and several, if not, separate. Zimmermann objected that this did not fall into the definition of separate obligations in Article 1.1 (2), because there the obligors only responded for a share. Fontaine repeated that the illustration needed to be improved. Furmston said that in English law both obligors would be liable for the whole amount, without the possibility of recourse. Bonell agreed on that.

9. Zimmermann again brought up the question whether according to Article 1.1 for joint and several obligations it was necessary that the obligors had acted jointly. Furmston said that in insurance practice it was not uncommon that several insurers acted without knowing of each other. Bonell answered that in this case they were still bound by the “same obligation”. Zimmermann repeated his objection that this case of separate liability was not covered by Article 1.1 (2). Furmston put another example where two insurers were liable for the same car accident without having acted jointly. Fontaine repeated that he would change the illustration. Bonell stated that he did not see a problem with the formula in Article 1.1 (2) and that the discussion was leading too far.

10. Zimmermann then raised the question whether Article 1.2 also included the case of suretyship. Fontaine confirmed; the main debtor and his guarantor were bound by the same obligation, the liability was joint and several. Zimmermann answered that in this case suretyship should be mentioned in the comments, because, for instance, German law did not regard it as a case of joint and several liability. Fontaine agreed on that. Furmston said that an English lawyer would probably also deny that it was a case of joint and several liability because the obligation would not be the same. Bonell asked whether this had to do with the exceptions. Furmston answered that the surety would be regarded as a secondary obligation. Bonell said that this was further reason to illustrate the problem under Article 1.1.

11. **Article 1.3:** Bonell and Zimmermann stated that they found the words “or more” in Article 1.3 misleading, because they sounded as if the obligee could claim the whole amount from various obligors. The same went for illustration 1, because there the 15.000 could not be claimed from more than one of the obligors. Fontaine answered that the inclusion of the words “or more” had been suggested by Roy Goode, but that this question had hardly been discussed. Furmston said that he saw no problem with the words “or more” but that he would not have suggested them. Bonell said that, according to the minutes of the Rome meeting, the suggestions by Goode had not been formally decided upon. The Committee then agreed upon deleting the words “or more” from the black letter rules in Article 1.3, the words “from two of them or from all of them” in the third line of illustration 1 and the words “or from B and C” in the second line of illustration 2.

12. **Article 1.4:** Zimmermann raised a systematic objection concerning Article 1.4 and the following Articles. The general rule came first, followed by the special rules. He suggested that it was better to proceed the other way round, like in PECL. Fontaine answered that this was a matter of taste, but that the issue had been discussed earlier. Furmston said that in a

book he would start with the general rules. Zimmermann answered that in a book one would give concrete examples, but that a reader of Article 1.4. would not really know what this provision dealt with. Fontaine answered that there were examples given in the comments. Zimmermann wondered whether these situations were the most frequent ones. Zimmermann also asked why set-off was mentioned in Article 1.4.

13. Bonell raised the point that Article 1.4 and Article 1.5 had in fact different purposes: while Article 1.4 dealt with defences in general, Article 1.5. (and also the following Articles) dealt with the effects of these defences. Therefore the titles of the Articles were a bit misleading; it was not really a case of *lex generalis* and *lex specialis*. Fontaine agreed that this should be made clearer. Bonell also expressed his wish to delete the formula “it will be remembered” under comment 2 of Article 1.5, because in his view it did not correspond to the usual style of the PICC. Fontaine agreed.

14. Zimmerman raised the question whether the formula “that are personal to it” in Article 1.4 was not inaccurate or misleading. Furmston said that he did not see a problem. Zimmermann then asked what the defence in illustration 1 was. Fontaine answered that it was the mistake. Zimmermann suggested that under the PICC mistake gives rise to a right of avoidance and asked whether this would fall under the concept of “defence” and whether Article 1.4 should not be more specific. If the right of set-off was specified then why not the right of avoidance? Why was set-off the only case that was specified? Bonell answered that this matter had been discussed before.

15. Zimmermann said that in his view the last phrase of illustration 1 was technically incorrect. An example for a defence was performance; as regards the rights of set-off or avoidance things were less clear, because they needed to be exercised actively. Bonell wondered whether defects of a sold good gave the buyer a defence, mentioning also Article III.- 4:112 DCFR. Fontaine said that Article 10:111 PECL only mentioned “defences”, without specifying them. Zimmermann answered that an explanation in the comments was needed because a right was an active thing while a defence was of passive nature. Article 1.4 covered both but was mixing up a broad and a narrow concept of “defence”. Bonell explained that originally the term “defence” in Article 1.4 had been meant in a broad sense, but that later the issue of set-off had been raised. Fontaine said that set-off was of course a defence. He also mentioned that the implications with Article 9.1.13 PICC (“Defences and rights of set-off”) needed to be taken into consideration.

16. Zimmermann once more raised his doubts concerning the last phrase of illustration 1. The Committee discussed whether it should be modified by using the words “right of avoidance” instead of “mistake” (suggested by Fontaine) or by writing “A may rely on his mistake” (suggested by Furmston). Bonell found “right of avoidance” too technical, that is why he preferred the more colloquial approach suggested by Furmston. Bonell wondered whether another defence should be taken as an example. Fontaine answered that in any case it needed to be established how mistakes were to be dealt with. Zimmermann suggested the formula “A may invoke his mistake” and to delete the word “defence” from the same phrase. Fontaine agreed. Bonell suggested to delete the reference to Article 3.5 of the PICC. Fontaine objected and said that cross-references to the PICC were needed and useful. Furmston corroborated this point of view by saying that “relevant mistake” was a term of art. Zimmermann also supported this view. Fontaine said that he would try to find other examples.

17. Zimmermann suggested to incorporate illustration 2 into illustration 1, arguing that it was the same case, seen from a different angle. Only illustrations 3 and 4 dealt with other

situations. Fontaine agreed. Zimmermann also suggested to delete the term “defence” in all illustrations and use the expression “may invoke” instead of “may assert”. Fontaine explained that he had wanted to give examples of personal and of common defences. Bonell suggested to take examples from the following Articles. Zimmermann added that mistake should not be the only example mentioned. Fontaine agreed.

18. Bonell suggested to change the title of Article 1.4 to “Availability of defences and rights of set-off”, in order to avoid misunderstandings. Fontaine agreed.

19. **Article 1.5:** Fontaine distributed an additional paper with an “Addendum to page 24” and several “Corrigenda”. He explained that the linguistic changes that had been made were not visible in the black letter rules but mentioned in the draft. As regards the issue “merger of obligations”, it had been decided in Rome not to include it in the black letter rules but in the comments. Zimmermann suggested to delete the word “full” under comment 1. Bonell suggested to substitute the word “firm(s)” with “company(ies)” in the illustrations in order to be in line with the usual terminology of the PICC. Fontaine agreed.

20. Upon a suggestion of Bonell it was agreed to change the titles of Articles 1.5-1.8 by starting with the words “Effect of ...”. As regards the issue “merger of obligations”, Zimmermann pointed out that the comments of Article 10:107 PECL specified the case of insolvency and wondered whether in the PICC this issue should be mentioned at all. Upon a suggestion of Bonell the Committee agreed on changing the headline of comment 3 to “Other circumstances”, in order to mention the case of “merger” as one example and explain that it was not addressed by the PICC.

21. **Article 1.6:** Fontaine explained that the black letter rule in the draft corresponded to Variant 2 of the three Variants presented in Rome. Zimmermann wondered whether it should be made clear in the black letter rule that it was a default rule. Fontaine answered that this technique had not always been applied the PICC. Bonell added that this general point had often been the object of discussions. Zimmermann answered that, in view of the fact that the rule laid down in Article 1.6 had been so much disputed, stating that it was a default rule might ease its acceptance. Fontaine agreed and promised to provide an illustration.

22. Upon a suggestion by Zimmermann the Committee decided to delete the words “for that share” in Article 1.6 (2), as they were considered to be misleading. As regards comment 2, Zimmermann wondered whether the consequence explained could really be called “logical” as other legal systems dealt with this problem in a different manner. Bonell defended comment 2 by saying that Article 1.6 (2) was a logical consequence of the rule laid down in Article 1.6 (1). For the same reason the words “for that share” should be retained. The question then came up whether Article 1.6 covered only the complete release of one obligor or also a partial release. After some discussion it was agreed that Article 1.6 only covered the case of complete release. Fontaine argued that the comments needed to be more explicit on this point. Upon a suggestion by Fauvarque-Cosson it was agreed that the formula “unless the circumstances indicate otherwise” were to be included in Article 1.6 (2). The deletion of the words “for that share” in Article 1.6 (2) was confirmed.

23. **Article 1.7:** Fontaine explained that the part between square brackets had been a suggestion by Paul Finn. It had been the result of lengthy discussions that had been based on the different perceptions of what is meant by “settlement”. Fontaine explained why the reduction for the other obligors had to be full also in case where the settlement concerned an amount less than the respective obligor’s share (Article 1.7 lit. a). As Articles 1.6 and 1.7

provided identical solutions for release and settlement, Fontaine suggested to merge both Articles. The Committee agreed. Zimmermann suggested to delete the words “for that share” in Article 1.6 nevertheless and said that the numbering of the following articles needed to be adjusted. Fontaine agreed and said he would prepare combined comments for the new Article 1.6.

24. **Article 1.8:** Fontaine explained that Article 1.8 (2) was new and that it had been suggested by Fauvarque-Cosson. The opposite solution was equally possible and could be found, for instance, in the current reform project on the Swiss law of obligations. The rule in Article 1.8 (2) was more economic, because the obligee needed to initiate legal proceedings only against one obligor. Fauvarque-Cosson asked which solution was more coherent with Article 1.8 (1). Fontaine said that apparently this was the opposite solution of Article 1.8 (2), but that in fact Article 1.8 (1) and 1.8 (2) dealt with different situations: Article 1.8 (1) with the effect of the expiration of the limitation period, Article 1.8 (2) with the effect of initiating legal proceedings. That is why there was no contradiction.

25. Zimmermann said that he had checked whether Art. 1.8 (2) was coherent with the rules in Chapter 10 on limitation periods and had not found any problems. He added that he could see the justice of Article 1.8 (2) in case of jointly undertaken obligations, but wondered whether in case of separately undertaken obligations matters were not different.

26. **Article 1.9:** Fontaine explained that no interference with Article 1.8 (2) needed to be feared. Fauvarque-Cosson found the formulation in the introduction of Article 1.9 quite complicated and asked whether there was no shorter way of expressing the same idea. She also wondered whether the term “liability” was not too narrow in this case. Zimmermann answered that the PECL and the DCFR used the same expression and did not differ in substance from Article 1.9.

27. **Article 1.10:** Fontaine explained that the word “liable” had been replaced by “bound”.

28. **Article 1.11:** The Committee agreed that the words “all or” were to be deleted.

29. **Article 1.12:** Fontaine explained that in Rome there had been a vivid discussion on the issue of “subrogation”. The further research he had conducted thereafter had shown that it was very difficult to establish how “subrogation” was understood in the different legal systems, for instance, whether in the common law it worked only in case of full payment. Another controversial issue concerned the question whether the rights of the obligee enjoyed preference over the rights of the obligors.

30. Fontaine explained that he had prepared six different Variants: Variant 1 was to give no provision at all; Variant 2 to keep the old version, inspired from PECL; Variant 3 was in line with at least part of the common lawyers, because it required full performance. Furmston said that this issue had so far not been much debated in English law, but that there was a recent book on that matter. Zimmermann informed that there had been a similar discussion in the Lando-Commission. He explained that the English rule of requiring full payment aimed at protecting the obligee. In Civil Law this concern was taken care of by giving the obligee’s rights priority. This seemed to be the more subtle solution, as it allowed subrogation also in the case of partial payment. Roy Goode had been finally happy with the PECL-solution. Therefore Variant 4 should be acceptable for common lawyers.

31. Furmston agreed, but found the formulation in Variant 4 rather vague and obscure. He preferred Variant 6 and rejected the Dutch solution of giving no preference to the obligee's rights. Bonell found Variant 5 too open. The Committee agreed that the policy contained in Variants 4-6 was the one to be followed and that it only needed to be decided in which Variant it was expressed in the most satisfactory way. Zimmermann said that Variant 5 should be excluded because of the formulation "causes no harm". He was not sure whether Variant 6 (2) was clear and asked about the square brackets. Fontaine explained that they were owed to an objection raised by Hartkamp. Fauvarque-Cosson asked whether preference was not implied anyway. Fontaine denied, saying that this still needed to be decided. It was agreed that Variant 6 should be chosen and the square brackets deleted. Zimmermann said that he preferred Variant 4, but deemed Variant 6 to be politically more acceptable. Fontaine asked what he should prepare for Rome. Zimmermann suggested to present Variant 6 as black letter rule and to prepare an appendix where the current discussion was explained. Upon a suggestion of Fauvarque-Cosson it was decided to delete the words "all or any of".

32. **Article 1.13:** Fontaine explained that the illustrations again used the example of mistake and that he was going to review them. The Committee agreed.

33. **Article 1.14:** Fontaine explained that in illustration 1 all figures except the 6.000.000 EUR had to be multiplied by 10 and that in illustration 2 "A" and "B" had been mixed up. Zimmermann asked whether the liability between the remaining co-obligors was joint and several. Fontaine confirmed. Fauvarque-Cosson pointed out that while Article 1.14 demanded "all reasonable efforts", comment 2 and illustration 2 only spoke of "reasonable efforts". Bonell suggested that a cross-reference to Article 5.1.4 PICC should be included. Furmston said that "reasonable efforts" should be sufficient. He criticized illustration 2, saying the initiating legal proceedings was often too expensive and could therefore not be reasonably expected.

34. Zimmermann went back to **Article 1.12** and wondered whether it dealt with "subrogation" or rather *cessio legis*. He pointed out that there were different consequences as regards the non-accessory sureties. Fontaine explained that he had omitted the term "subrogation", because the understanding of this concept in the different legal systems was far from uniform. Zimmermann suggested then that the solution adopted by the Committee reflected the German solution of *cessio legis*. The Committee agreed.

35. Bonell ended the session (6.40 p.m.)

Session 2
Tuesday, 3 March, 9:15 a.m.

Present:

Prof. Michael Joachim Bonell

Prof. Bénédicte Fauvarque-Cosson

Prof. Marcel Fontaine

Prof. Michael Furmston

Prof. Reinhard Zimmermann

Secretary General of UNIDROIT José Angelo Estrella Faria

Keeper of the Minutes: Jan Peter Schmidt

Item 2: Plurality of Obligors and/or Obligees (continuation)

1. Bonell opened the session, thanking Zimmermann for the dinner the evening before. He welcomed the new Secretary General of UNIDROIT, Estrella Faria.

2. **Articles 2.1 and 2.2:** Fontaine opened the discussion on **Section 2** of his draft, “Plurality of obligees”. He explained that a major decision needed to be taken on the default rule in Article 2.2. The three possibilities were: 1. Separate claims; 2. Joint and several claims; 3. Communal (or joint) claims. Fontaine argued that the default rule should correspond to the most common solution in practice. The current version of the draft designated separate claims as the default rule (Article 2.2). Communal (or joint) claims were only mentioned in the comments. In Rome 2007 joint and several claims had been designated as the default rule, while in Hamburg 2008 a presumption for communal (or joint) claims had been suggested. In Rome 2008 many questions and doubts had been raised about this issue, and it had been decided to make further inquiries on commercial practice.

3. Fontaine said that, with the help of Prof. Christine Chappuis, he had tried to collect as much information as possible from the various sectors. His main source of information had been the “Working Group on International Contracts”. Especially helpful had been Prof. Harmathy from Hungary, but in general he had hoped to receive more answers. Fontaine explained that the arrangements that could be found in practice differed very much. For construction consortium agreements it was argued that there should be no default rule. Fontaine said that in practice several obligees would generally not think about the legal aspects of this issue, but designate an agent. In most cases the claims would be separate, as joint and several claims were often unfavourable for the obligees. Fontaine also mentioned the “Joint Venture Model Agreements” elaborated by the United Nations Conference on Trade and Development (UNCTAD) and the International Trade Centre. In case of three or more parties they recommended the creation of a management committee. In case of two parties, they suggested joint management, with the possibility to transfer the management to an agent.

4. Bonell expressed his gratitude to Fontaine and Chappuis for the impressive results and proposed to go directly to the rules. Furmston said that the tourist cases in some jurisdictions were solved by class-actions. Zimmermann made a plea for putting communal claims back into the black letter rules. While communal *obligations* did not occur very often in practice and were therefore correctly not laid down in the black letter rules, communal *claims* happened to be a very frequent constellation, at least in German practice, for example in cases of buying, renting, banking.

5. As regards the presumption in Article 2.2, Zimmermann said that he would not insist on making communal claims the default rule, but that as a compromise they should be mentioned in the black letter rules of Article 2.1. As joint and several claims contained many risks for the obligees, separate claims should be presumed. Fontaine said that communal claims were especially important in two types of situations: 1) when the obligees did not trust each other (e.g. in a consortium); 2) when the obligor needed to be protected. For example, when a bank account was held by several persons, the banks in their general conditions often had a clause where cases were enumerated in which the money could only be withdrawn jointly. Fontaine concluded that for these reasons communal claims were practically important – although not the most common case – and needed to be mentioned in the black letter rules. Zimmermann added that in case of communal claims the obligees not necessarily needed to go to court together; it was sufficient that one of them claimed performance to all of them.

6. Estrella Faria supported Zimmermann's view in that the simplest solution should also be the default rule. This was the general approach of the PICC. Bonell said that PECL and the DCFR dealt with communal claims in their black letter rules. It was agreed that communal claims were to be included in Article 2.1 (3) with the previous wording.

7. Zimmermann said that Comment 4 needed to be adjusted. The possibility that one obligee claimed performance to all obligees should be mentioned. Instead of "joint claims" the expression "communal claims" should be used. Bonell disagreed on the last point. He said that there had been a discussion on the terminology after which it had been decided to use the term "joint claims", as it was a frequent formula in international commercial practice. This was also in line with the general approach followed in the PICC, even if sometimes the internationally accepted terms had different meanings in different legal systems. Furmston suggested to use the term "communal claims", in order to avoid misunderstandings. Zimmermann said that "communal claims" was a neologism, which however was also used by PECL. Bonell said that the Rapporteur should have the last word in this matter. Fontaine answered that he would prepare a proposal for the meeting in May, where a final decision would be taken. Bonell said that the Committee should do its best to present a version as final as possible. It was agreed that the presumption of Article 2.2 should be retained.

8. Fontaine explained that the paper he distributed earlier contained a part of comment 1 under Article 2.1 that had unintentionally been omitted. Zimmermann and Bonell suggested to introduce illustration 2 under Article 2.2 with just one sentence instead of two. Fontaine agreed.

9. **Article 2.3:** Fontaine explained that after a major discussion in Rome the former Paragraph (3) had now been deleted. The issue remained unsolved, but was now mentioned in comment 4. This seemed to be the better solution, as a black letter rule would be too complicated. Bonell called comment 4 a masterpiece, the others agreed.

10. **Article 2.4:** Fontaine explained that Paragraph (1) had already been accepted. He suggested to change the title into "Availability of ...", as in Article 1.4. As regards release and settlement, no decision had been taken in Rome. As in this meeting it had been decided to give a single (merged) provision for release and settlement in case of joint and several obligations, the simplest solution would be to delete Paragraph (2) and include a reference to Article 1.6 in Paragraph (3).

11. Zimmermann said that the policy of Article 2.4 (2) needed to be discussed (release by just one of joint and several obligees has no effect on other obligees). Fontaine answered that the alternative was to regard the release effective towards the other obligees for the share of the releasing obligee, as expressed in Paragraph (2) on page 31. A reference to Article 1.6 was the simplest and most harmonious solution, but of course not the only possibility. Zimmermann asked to what extent it was right to draft the rules on joint and several claims as a “mirror image” of the rules on joint and several obligations. Bonell said that if Paragraph (2) on page 31 was adopted, then Article 2.4 (2) could be deleted and Article 1.6 needed to be inserted in Paragraph (3), which would then become Paragraph (2). Zimmermann said that the alternative was to retain Article 2.4 (2), which corresponded to the solution in PECL, and take out the reference to Article 1.7 in Paragraph (3). Upon question by Fauvarque-Cosson Fontaine once more explained the differences between the solution in Article 2.4 (2) and the alternative laid down in Paragraph (2) on page 31.

12. Upon a suggestion by Bonell it was agreed to delete the reference to Article 1.7 in Article 2.4 (3), as Article 1.7 was now contained in the new Article 1.6. Estrella Faria expressed his concern about the deletion of Article 2.4 (2). As for joint and several obligations the regime was much more detailed than for joint and several claims, it needed to be ensured that the cross reference to Article 1.6 did not go too far.

13. Zimmermann said that before drafting a rule its merit had to be analyzed. He asked whether Article 2.4 (2) did not seem to be the fairer solution. Fontaine answered that the rule in Article 2.4 (2), explained in illustration 3, might lead to an unfair enrichment of the remaining obligee, because in the end he should only have received his share, not the full amount. Other examples were discussed. Furmston said that the fairest solution of each case depended on the circumstances. It was agreed that both possible solutions were problematic in some way or another. Bonell said if it was not clear which was the correct solution, the one that was more in harmony with the remaining Articles should be chosen. This went also for settlement. The other members agreed. Estrella Faria repeated his concern about the extent of the cross reference to Article 1.6 and said that Article 2.5 must not be harmed.

14. **Article 2.5:** Fontaine explained that the opening words “as between themselves” had been added, while the reference to “joint claims” had been deleted. He asked whether it should be re-introduced. Zimmermann answered that this was not necessary, as Article 2.5 dealt only with joint and several claims. Bonell said that “communal claims” were now only mentioned in Article 2.1 (3), but not treated in other rules. Zimmermann answered that an explanation in the comments was quite sufficient.

15. Bonell ended the discussions on **Item 2** and thanked Fontaine for his excellent work (10.30 a.m.).

Working Group for the preparation of
Principles of International Commercial Contracts (3rd)
Drafting Committee
Second Session
Hamburg, 2-5 March 2009

**Session 2:
Unwinding of Failed Contracts**

(UNIDROIT 2009 Study L – WP.20)
Reporter: Reinhard Zimmermann

Minutes

Present:

Prof. Joachim Bonell
General Secretary José Angelo Estrella Faria
Prof. Bénédicte Fauvarque-Cosson
Prof. Marcel Fontaine
Prof. Michael Furmston
Prof. Reinhard Zimmermann

Keeper of the Minutes: Dr. Jens Kleinschmidt

Morning, March 3 2009

1. By way of introduction, Zimmermann reminds the group that most of the issues in the Draft Chapter have been settled at the 2008 plenary meeting in Rome, and that he will indicate the changes that he has made to the Draft Chapter since then.

Delimitation between Articles 1 and 2 in General

2. Zimmermann raises the question of how Articles 1 and 2 ought to be delineated. To sum up the discussion at the plenary meeting, one could say that where the price is to be paid in instalments, this is a case for Article 1, but where the delivery takes place in instalments, this is a case for Article 2. This delineation is already followed by the Draft Chapter and is also reflected in Comment 1 to Article 1 to which he has made no changes. In order to meet the concerns expressed at the plenary meeting regarding the scope of Article 2 (UNIDROIT 2008 Study L – Misc. 28 [“the Minutes”], nos. 74 and 75), Zimmermann has softened the wording of Comment 1 to Article 2. It now says “many construction contracts, contracts for services, and agency contracts”. The word “many” is supposed to refer also to “contracts for services” and to “agency contracts”.

3. However, Zimmermann thinks that the delimitation point could be made clearer either in the black-letter rules or in the comments. He suggests to use the concept of characteristic performance as it is known in private international law as a guidance for delimitation.

4. The group entirely agrees with Zimmermann’s summary of the discussion of the plenary meeting. It is thought that reference to the characteristic performance will be useful to express this idea. However, this point should not be addressed in the black-letter rule but only in the comments.

5. Bonell thinks that the word “many” in the revised Comment 1 to Article 2 is imprecise, especially in light of the concerns that certain types of contracts had raised at the plenary meeting. Several members of the group (Bonell; Furmston) reiterate that mere payment in instalments does not bring a case under Article 2. Estrella Faria and Furmston emphasize that, according to the reference to the characteristic performance, even turn-key contracts would fall under Article 1, because delivery is effected at one time. Bonell points out that this also takes care of concerns raised by Goode and Furmston at the plenary meeting (no. 77 of the Minutes) regarding turn-key contracts. Zimmermann stresses that it is the nature of the obligation that matters. Therefore, even construction contracts would generally fall under Article 1: Even though the work may stretch over a period of time, the contract requires that the result be handed over and until that point in time the risk is on the builder. Purchase of an airbus would qualify as a contract for sale and therefore also fall under Article 1. Only if delivery is continuous, does a case fall under Article 2, as Estrella Faria points out.

6. In accordance with this discussion, the group agrees on several changes to the Comments. Comment 1 to Article 1 should be rephrased in three respects: (i) The first sentence will be changed in order to refer to the concept of characteristic performance. Zimmermann will find a suitable phrase. (ii) The comment will include further examples after reference to the sales contract: “construction contracts, particularly turn-key contracts and ship-building contracts”. Bonell suggests a formulation along the lines of “covers not only the ordinary sales contract, but also...”, which should provoke the reader. (iii) Despite agreement in substance that what is called “instalment sales” in Comment 1 falls under Article 1, Furmston thinks that the expression might be misleading to an English common lawyer. Zimmermann will rephrase the sentence by leaving out the expression: “Contracts of sale where the purchase price is to be paid in instalments therefore fall under the present article.”

7. The examples given in Comment 1 to Article 2 will be modified. It is understood that they only give a non-exhaustive list of examples. The group agrees on the following formulation: “They include leases (such as equipment leases), contracts for services (such as distributorship, out-sourcing, franchising, licensing), and agency contracts.” Zimmermann, Bonnell and Fontaine think it is necessary to keep the reference to agency contracts. The qualification of leases as “complex” is deleted at the suggestion of Fontaine, because it does not add anything. The reference to leases is extended at the suggestion of Estrella Faria and Bonell, because there are many other commercially important types of leases and the reader should not be made to think that they are not covered. Even though there might be construction contracts that fall under Article 2, mention of them should only be made in the comments to Article 1 and not in the comments to Article 2 to avoid confusion on the part of the reader.

Article 1

a) Black-letter rule: Paragraph 4

8. In accordance with the decision taken at the 2008 plenary meeting to delete the second sentence of paragraph 4 and to keep the first sentence in its present wording (no. 72 of the Minutes), the second sentence which had dealt with luxury or useful expenses has been deleted by Zimmermann.

9. Estrella Faria asks whether it is sufficiently clear what is meant by the word “necessary” in the expression “necessary expenses linked to the performance”.

10. Zimmermann explains that the word “necessary” goes back to the distinction known in many civil law systems between necessary, useful and luxury expenses, which may now be less evident since the sentence referring to useful and luxury expenses has been deleted. A typical example of necessary expenses is given in Illustration 9, i.e. maintenance costs. It would seem difficult to go into more detail. Necessary implies an objective standard. It is quite different from a foreseeability test, which, as Bonell adds, does not make so much sense in the context of termination.

11. The group decides to supplant the word “necessary” in paragraph 4 by the word “reasonable”. In view of the fact that the distinction between necessary expenses on the one hand and useful and luxury expenses on the other hand has been deleted, this change is possible. It aims at accommodating the feeling expressed by several members of the group (Estrella Faria, Fontaine, Furmston) that lawyers, especially from a common law background, might find it problematic to determine which expenses are really necessary. To take up Illustration 9, a race horse, for example, would require more expenses for feeding than an ordinary horse. Although too high expenses for feeding would also qualify as luxury expenses, it nonetheless seems preferable to apply the flexible standard of reasonableness. Otherwise, the question of what is necessary might engender litigation.

b) Comment 2

12. Zimmermann explains that in accordance with a suggestion by Fontaine, he has added a reference to Art. 6.1.11 in Comment 2.

13. No objections are raised.

14. Fontaine raises the question whether Illustration 2 (which is taken from Art. 7.3.6) is a case of termination or a case of avoidance. Zimmermann will rephrase the illustration to clarify that it is the non-payment of the purchase price (i.e., termination) which gives rise to contract being unwound: “The facts are the same as in Illustration 1, the difference being that the painting was not a Constable but a copy.”

15. Furmston observes that maybe Constables are less valuable than Renoirs (Art. 7.3.6) so that the purchase price of 2,000,000 Euro might seem too high.

c) Comment 3

16. The sentence “The allowance will normally amount to the value of the performance received for the recipient” has been added by Zimmermann to the first paragraph of Comment 3. This addition is not reflected in the Minutes, but is based on Zimmermann’s private records of the plenary meeting. Accordingly, he has also added a new illustration, Illustration 3.

17. No objections are raised.

18. To the first paragraph on page 4, Zimmermann has added the sentence, “The standard, in that respect, is the same as under Art. 7.2.2(b)”. This inclusion goes back to an uncontroversial intervention by Chappuis in the plenary meeting.

19. No objections are raised.

20. Zimmermann has changed the type of goods referred to in Illustration 4. The illustration previously referred to avocados that had been sold on to a third party. Uchida had prompted to

him the idea that it might be problematic to refer to goods that are perishable. Also it was felt to be advisable to avoid problems involving transfer of property. The illustration now uses the example of silver-plated rings that cannot be rescued from a wrecked ship in order to meet these concerns.

21. No objections are raised.

22. At the suggestion of Fontaine and Furmston, Zimmermann will change the last sentence of Illustration 4 so that it reads "... measured by the true value of the rings". This change will show more clearly that A will receive the value of the rings and not only the purchase price paid.

d) Comment 4

23. Zimmermann has deleted the reference to a particular make of car (Lamborghini) in Illustration 6 and replaced it by reference to "a luxury car" because it had been expressed at the plenary meeting that no reference should be made to particular brand names.

24. No objections are raised.

25. In accordance with a request at the plenary meeting, Zimmermann has amended Illustration 7 in order to bring out the problem more clearly. It now explains that the car is destroyed by a tornado flooding the properties of both the seller and the purchaser.

26. No objections are raised.

27. The reference to Peugeot as a specific make of car has been deleted by Zimmermann in Illustration 8.

28. No objections are raised.

e) Comment 5

29. Zimmermann has changed the Comments on page 5 to reflect the deletion of the second sentence of paragraph 4 of the black-letter rules by adding a sentence to the effect that the "Principles do not take a position as far as expenses are concerned that are merely useful or constitute a luxury".

30. Another sentence has been added to the Comments on page 5 to the effect that the "Principles also do not take a position concerning fruits that have been derived from the performance, or interest that has been earned". This corresponds to the impression discussed at the plenary meeting that in a commercial context the parties on termination wanted to get back their performances but did not care about additional benefits.

31. A further consequential change is the deletion of the words "and improvements" in the first paragraph of Comment 5.

32. Bonell wonders whether the Comments should give a reason for not stating a rule on benefits. Zimmermann emphasizes that the real reason could not be the fact that in practice the parties frequently do not claim benefits, but only the fact that a rule on the restitution of benefits would most likely cause more problems than it would solve.

33. The group agrees that another sentence be added to the Comments: “After all, both parties in commercial practice have received a benefit and it would seem inconvenient to unravel that.” This sentence does not have the form of a reason for (“because”) but more of an explanation of (“after all”) the decision not to take a position.

34. In order to explain the newly introduced reasonableness standard, it is agreed that language should be added to the Comments to the effect that maintenance costs are the most important example of expenses incurred and that their reasonableness can vary with the object of the performance (race horse/ordinary horse).

35. At the suggestion of Fontaine and Furmston, it is agreed that the purchase of a horse is a good example of a commercial contract and that therefore the reference to a horse can be retained in Illustration 9.

36. However, the wording of Illustration 9 will be changed by Zimmermann in order to clarify that it is really a case of termination. The words “as it was supposed to be” (which might give the idea of the case being one of mistake) will be supplanted by the words “as it was promised to be”.

37. Moreover, it is agreed that the wording “of the object of the performance” can be kept in the first line of Comment 5. Possible unwanted connotations to the concept of *objet*, to which Fauvarque-Cosson draws attention, are regarded as acceptable, and no better phrase can be found. In particular, an alternative expression along the lines of “of what has been delivered” seems too narrow because the Article also deals with service contracts.

Article 2

a) Black-letter rule

38. No change has been made by Zimmermann to the black-letter rule.

39. The group agrees that no change to the black-letter rule is necessary. However, it is agreed that an addition should be made to the comments to explain why Article 2 does not have several paragraphs like Article 1. Article 2 is a special rule. As far as there is in fact restitution under Article 2, this restitution follows the rules under Article 1.

b) Comment 1

40. So far, the comments only have one sub-heading. This will be changed by introducing a second sub-heading for the clarification that the restitution rules of Article 1 apply.

41. The words “the object of the sale” in the last two lines on page 5 will be replaced by the words “the goods”.

42. Zimmermann has added the third paragraph on page 6 which is supposed (i) to clarify the relationship to damages and (ii) to introduce the following illustrations. These illustrations (Illustrations 2-4), which have originally been provided by Goode, have also been added.

43. In light of its previous discussion, the group thinks it is unfortunate that Illustration 3 deals with a construction contract which falls under Article 1. At the suggestion of Zimmermann, Illustration 3 will be deleted in order to avoid confusion. The question whether it could be replaced by an example of a turn-key contract will be dealt with when discussing Appendix A to the Draft.

44. Bonell reminds the group that it is a general policy of the PICC to avoid Latin expressions. Therefore, Zimmermann will replace the words “pro futuro” in the newly added paragraph with “for the future”.

45. Bonell draws attention to the fact that cross-references within the comments only give the number of the article, not followed by “PICC”. In Illustrations 2-4, the abbreviation “PICC” will be deleted at several instances.

46. Zimmermann has reformulated the comment on page 7 in order to meet difficulties of understanding expressed by von Bar at the plenary meeting. However, this is just a clarification and no change in substance.

47. No objections are raised.

48. Illustration 5 has been reworked to meet concerns expressed by Goode and Garro (nos. 83, 92 of the Minutes). The example now refers to paintings depicting one historical event and therefore make it clear that the contract is indivisible.

49. No objections are raised.

Article 3

a) Black-letter rule: Paragraph 4

50. Zimmermann has deleted the second sentence of paragraph 4 in accordance with the decision taken at the plenary meeting.

51. No objections are raised.

b) Comment 1

52. The last sentence on page 8 has been added.

53. No objections are raised.

c) Comment 2

54. Zimmermann has added the sentence “The allowance will normally amount to the value of the performance received for the recipient”.

55. No objections are raised.

56. Illustration 2 has been reformulated to make it clearer that fraud is involved (cf. the request stated in no. 96 of the Minutes).

57. No objections are raised.

58. In the third paragraph on page 9, a reference to Art. 7.2.2(b) has been added.

59. No objections are raised.

60. At the suggestion of Estrella Faria, Illustration 2 will receive a more commercial character: “A commissions B to paint his factory. B had bribed the procurement officer at A to conclude the contract. ...”

61. Illustration 3 has been modified by Zimmermann to have a more commercial character. It now deals with oil instead of the decoration of a bedroom.

62. At the suggestion of Fauvarque-Cosson, it is agreed that the illustration will be changed to deal with hand-woven carpets. This change is to accommodate concerns by Fontaine and Bonell that the reader might wonder whether it could be considered as restitution in kind if the seller purchases new oil on the market (although it is not, because the sale had been about the 100 barrels that had been specified) and what happens if the market price for oil has risen in the meantime (which is irrelevant, because an allowance has to be made according to the purchase price paid).

63. Illustration 4 has been changed to the decoration of a business centre instead of a bedroom suite to give it a more commercial character.

64. No objections are raised.

d) Comment 3

65. In Illustration 5, reference to “Jaguar” as the make of car has been left out.

66. Estrella Faria prefers, if reference is made to a truck instead of a car. Moreover, the illustration could read “A fraudulently induces an employee of B ...”. The illustration will be changed accordingly.

67. Bonell draws attention to the fact, that according to the terminology of the PICC, the second sentence of Illustration 5 should read “B can avoid the contract...”. The same holds true for the third line in Illustration 7. The wording will be changed.

68. Illustration 6 has been changed in the same way as the corresponding Illustration 7 to Article 1.

69. No objections are raised.

e) Comment 4

70. The last paragraph has been added as in the comments to Article 1, reflecting the deletion of the second sentence of paragraph four in the black-letter rules.

71. At the suggestion of Zimmermann, it is agreed to modify this paragraph in line with what has been agreed on termination.

Appendix

72. The Appendix contains an example of a turn-key contract which has been provided by Raeschke-Kessler and Gabriel. Examples of this type had elicited an intensive discussion at the plenary meeting. The group discusses (i) whether the example is useful, (ii) whether it should be included in the Principles, and, (iii) if so, where.

73. The group agrees to leave the example out of the Principles and ask Bonell as the Chairman to thank Raeschke-Kessler and Gabriel for their valuable contribution and explain the reasons for the decision of the group. The following aspects are touched upon in the course of the discussion about the example:

74. Furmston and Estrella Faria emphasize that the example as it stands rather calls for a damages remedy. Moreover, they explain that there is probably not even a breach because contracts with public authorities usually contain clauses to the effect that the authority may change its plans. As far as the change of plans amounts to hardship, it is (as of yet) not covered by the rules on termination. One would expect, as Bonell points out, that the contract takes care of this question. It would be hard to see how the public authority breaches the contract after a lawful change of plans. The example would need to be clarified on this point.

75. Estrella Faria adds that contracts with public authorities usually call for continued reception of part performances and it would be unlikely to be regarded as a turn-key contract. This, in turn, makes it difficult to decide whether it ought to be put under Article 1 or under Article 2. In light of the previous discussion, as a turn-key contract, one would expect it to fall under Article 1. If that is the case, clarification on the nature of the contract would be needed.

76. Furmston feels that the example is out of context and cannot see the point of including it into the Principles.

77. All attempts to redraft the example in order to accommodate these concerns prove to be fruitless. Zimmermann insists that the example would have to be one of breach of contract, which is hard to envision if a public authority is involved. But even if changed to a private setting, attempts at reformulation without overly complicating the illustration prove unsuccessful. However, the situation of turn-key contracts in general will be taken care of in the comments to Article 1.

Final Remarks

78. Zimmermann emphasizes that so far the group has agreed on Principles dealing with unwinding of failed contracts because of termination and because of restitution. In the discussions on illegality and on conditional obligations, two additional scenarios that can call for restitution will be dealt with. It will then have to be decided whether the Principles agreed upon so far fit in these scenarios and whether the PICC should contain a uniform restitution regime or have rules on restitution scattered in several chapters.

Working Group for the preparation of
Principles of International Commercial Contracts (3rd)
Drafting Committee
Hamburg, 2-5 March 2009

**Session 3:
Illegality**

(UNIDROIT 2009 Study L – WP.21)
Reporter: Michael Furmston

Minutes

Present:

General Secretary José Angelo Estrella Faria
Prof. Joachim Bonell
Prof. Bénédicte Fauvarque-Cosson
Prof. Marcel Fontaine
Prof. Michael Furmston
Prof. Reinhard Zimmermann

Keeper of the Minutes: Dr. Walter Doralt

Afternoon, Tuesday March 3 2009

1. Bonell opens the discussion on the paper prepared by Furmston. He refers to the concerns raised informally by the secretary general and gives the floor to Estrella Faria.
2. Estrella Faria first mentions that it is not his intention to engage in a general discussion on policy at this stage as the work is already under way. According to him, the more sensitive the rules, the more important the commentary will be. However, he has serious concerns about the commentary in this working paper as he feels the comments do not adequately explain the principles in a way as to make them understandable. He urges more work to be done on this point. That had already been agreed upon last year in May in Rome. However, the suggestions seem not to have been dealt with in the new draft. Estrella Faria regrets having to express these concerns at his first encounter with the group. Furmston encourages an open discussion as everybody present will want to try to improve the draft. Estrella Faria thanks Furmston then says he considers the chapter to be very important and that he is seriously concerned about the quality of the comments. Bonell mentions that those points were already raised with Furmston on Monday. He has promised to submit a revised draft taking into account what was said last year and the discussions of the current meeting. That should still be in time to enable the drafting committee to submit a version, including a new set of commentaries, more suitable for the assembly. Bonell underlines the relevance of timing as the new principles should be completed by the first half of 2010. The group has repeatedly expressed its wish to have more elaborated comments on the current paper. Bonell asks Furmston whether a revised version of comments would be ready by April 10.

3. Furmston says he cannot commit to an earlier date than 10 April 2009, but will certainly not exceed this deadline. Estrella Faria agrees to this deadline. He points out that the updated version would then imperatively have to be received by that date; a further delay would be impossible. Bonell takes note that the date for a revised version is settled with 10 April 2009.

4. Bonell opens the discussion on Art 1. He urges Furmston to include headings and more structure, so as to make the text more accessible to users. Bonell suggests to Furmston to go through the comments step by step in line with the black letter rule and make one heading for each part of the rule in the comments, and where necessary provide an example. Fontaine agrees and would also like to have headings included in the comments of this working paper. Bonell asks Furmston to use country “X” and “Y” instead of “Ruritania” and “Utopia” so as to have a uniform terminology, as already discussed on previous occasions. Furmston mentions he was not aware of it but will do so in the updated report.

5. Zimmermann mentions the example at the start of the comments in the working paper by Furmston on page 3 of the draft, in which Furmston makes the example of a contract to commit a murder and writes “such deals are often made...”. Zimmermann suggests deleting “often made”, as it is of no relevance. In the next sentence, where cases with higher relevance for arbitration are mentioned as being more sophisticated, Zimmermann asks for examples if those more sophisticated deals are to be mentioned. Furmston agrees to provide examples in the updated version.

6. Zimmermann points out a problem of Art 1 (1) regarding the wide scope of the fundamental rule mentioned in this article and the corresponding discussion in Rome last year. Bonell had said in Rome, that the principles referred to would not need to be universal, but could also be regionally important principles and nevertheless be of relevance under this Article. Zimmermann points out that this opinion, voiced last year in Rome by Bonell, is not reflected in the rule now. He asks whether it should not therefore be amended, as it may seem misleading otherwise. Bonell prefers to confine the discussion to the comments for the time being and mentions the comments as a possible place for clarification of this point. Furmston says it seems to be more complicated than the geographic relevance of a fundamental principle for parties of different areas, as differing views on principles may also be held in geographically close areas, and vice versa. Bonell says one could think about changing the term “area”.

7. Estrella Faria urges a different formulation for the first sentence of page 3 starting with “all developed legal systems”, as this will be an unacceptable formulation to some users and should therefore be avoided.

8. Zimmermann asks Furmston to include more examples on international conventions than the anti-corruption treaty. Estrella Faria points out one could, in the case of international conventions, give some importance to the number of signatories of a convention. Furmston thinks that perhaps even the mere fact that there is a convention, may be an expression of a principle by itself. He does, however, not think that would be right. But if Art 1 were only applicable for international conventions widely accepted, then the area of application would be very limited. Estrella Faria agrees, but thinks the opposite point of view might be taken as well. And in an example of eg the ban on certain types of landmines, it could in the context of a sales contract on those products also become relevant in an arbitration case. Bonell points out that indeed the issue had been discussed at length previously and that Art 1 was not limited to conventions widely accepted. Bonell then reminds Furmston to make use of the information given by Paul Finn in Rome; and conventions should be quoted with full title and

dates. Estrella Faria indicates to Furmston that through the ICC website he should look for the *global compact*, an initiative going back to Kofi Annan. It is a set of rules agreed upon by large businesses, to which one could safely refer. Zimmermann suggests where this initiative is quoted it could be safely combined with the next paragraph regarding money laundering etc.

9. Estrella Faria voices concerns about the sentence “Trading in goods at prices which can only be achieved by unacceptable labour practice” on page 3, as it is a highly contentious topic. Though everybody is in favour of good labour standards, the argument is sometimes also being abused for protectionist measures. Therefore, he urges Furmston to avoid these examples. Zimmermann also suggests leaving it out, as it is also very difficult to prove. Estrella Faria would replace it eg with drug trafficking, as a this is universally less controversial; Furmston points out that drug trafficking would not be likely to end up in arbitration. Estrella Faria says it could easily happen in the context of the sale of chemicals and equipment that is sold for the obvious purpose of producing or trafficking drugs.

10. Zimmermann points to partial invalidity and asks for it to be dealt with in more detail. The paragraph ending “the effect of the unacceptable part on the remainder will depend upon what is reasonable” on page 3 deviates from the rule, as the rule only gives a presumption. Also, an example would again be useful.

11. Estrella Faria and Bonell ask for the examples to be redistributed to the text exactly where the issues are dealt with in the comments and to include applicable headings. Furmston agrees to do so.

12. Bonell and Zimmermann then point to a paragraph which had already been discussed and criticised last year in Rome on the bottom of page 3 of the working paper starting with “National systems have another source of rules...”. He asks for this paragraph to be deleted as the same comments are also included at the beginning of the comments on Art 3.

13. Estrella Faria says he is troubled by d) on top of page 4 and makes the following example: A buys 15 tickets for the *Festspiele* in Salzburg through a ticket office, to use them to bribe the board of a large multinational company in order to make sure he gets awarded a contract. If it is sufficient, as the wording of d) indicates, that the intention of one party makes the contract illegal, this situation would be covered by the rule. Zimmermann replies that d) was rather meant for situations like the acquisition of a weapon when both parties know it will be used for a murder. Estrella Faria points out, that this would be different, as both parties then have knowledge, while under d) the knowledge of one party is sufficient.

14. Furmston refers to examples 5 and 13 on the sale of Semtex, which can be perfectly harmless, or used to make a bomb. In situations where the good is bought for illegal purposes, this affects the contract. In his view, in example 5 the contract is clearly illegal because both parties know about the illegal purpose. In 13, it is illegal as regards the purchaser. Estrella Faria disagrees, saying that if someone acquires a weapon to kill someone else, but the other party to the contract has no idea about those intentions, the contract is certainly not affected. Knowledge on both sides would be necessary to affect the contract. Zimmermann indicates that everybody agrees on example 5, but points out that the text under d) does not reflect the situation of example 5 and should be adapted accordingly. Bonell reminds Furmston that the examples need to go with the text and says the examples only add further confusion as they stand now.

15. Bonell is also concerned about e) on top of page 4. Zimmermann says this might be an Art 3 case. Furmston disagrees and says that if the contract had been illegally performed it

would have a different impact than illegality at the conclusion of the contract. Bonell, however, says that Art 3 refers to illegality of the terms, performance and otherwise. So it does fall under Art 3 as well. Furmston agrees that there is an overlap.

16. Estrella Faria suggests the speed limit in the example right after e) on top of page 4 of the working paper should be replaced with forced labour. Bonell agrees.

17. Estrella Faria indicates he is still troubled by the fact that the contract is qualified as “illegal” just because of the illegal intention of one party. Fontaine mentions that France distinguishes between illicit and illegal. Estrella Faria reiterates he can not see why all the contracts that fall under Art 2 (2) will be illegal because of the intention of one party. Furmston replies that the contract can be illegal for one party, not for the other party and refers to an article by Toni Honoré in the South Africa Law Journal about 50 years ago and suggests to the participants to have a look at it.

18. Bonell indicates that illegality may be dealt with separately from enforceability in some systems. The remedies may vary depending on whether or not both parties had knowledge. The example on top of page 4 right after e) with the lorry should be deleted and Estrella Faria adds the speed limit should be substituted with forced labour. Furmston says that under some circumstances the conclusion of the contract would be perfectly legal, while the performance would not, to which Zimmermann replies, he can still not see how this fits in here. Furmston says he will try to convince Zimmermann in his updated version.

19. Bonell then says the group should be careful about giving an example, as they may create confusion. Perhaps, it would be best to provide an example in the context where illegality will arise, and one where no illegality follows.

20. Zimmermann indicates that the principles refer to “illustrations” rather than “examples” and goes on to illustration 1. He asks about the illegality of the construction contract as opposed to the mentioned agency contract declared illegal in the example. Furmston replies that in some cases, the question is dealt with later on. The person bribed can not sue for the bribe. But the consequence for the person who concluded the contract is more complicated.

21. Bonell draws the participant’s attention to Paul Finns remark (139), where he suggested to have a look at the transparency international report to find examples. Bonell reminds Furmston to do so.

22. Zimmermann mentions that example 1 would need more detail and explanation and Furmston says that this example also relates to example 3. Zimmermann answers that according to Furmston example 3 refers to partial illegality, but that this is not accurate. Zimmermann thinks the contract is entirely illegal in spite of the fact that it has good effects. Furmston says that is the point that actually needs discussion, as some participants at the meeting in Rome did not think it is illegal, and have told him so, though Furmston himself agrees with Zimmermann. It is agreed that partial illegality refers to situations where only a part of the contract is illegal. Whether or the government has a functioning power plant is a question that is not relevant in this respect.

23. Furmston suggests deleting “only in part” in illustration 3. Bonell says the entire illustration is not very helpful. Furmston asks if it should go to Art 2? Zimmermann answers it should either be deleted or explained and Fontaine adds it should be dealt with together in illustration 1 and explained in more detail. Zimmermann says the problem is that there are five examples, but the group is not sure what each of them is supposed to illustrate. Furmston thinks that depends on the answer that the group gives to these cases. Estrella Faria suggests

amending the contract in the example as follows: Someone is bribed to raise the price in a contract that would have already otherwise been awarded – that would be an example for partial illegality in relation to the increase in price. Bonell finds the idea excellent as an illustration of Art 1 (2).

24. Zimmermann again mentions that it would be helpful for the reader to illustrate why the agency contract is illegal and not the construction contract. It should be explained in illustration 1. Furmston agrees to do so.

25. Fontaine asks why the agency contract, in the same illustration, is entirely illegal. Estrella Faria says the hiring of an intermediary may be altogether illegal in some contexts. Bonell says illustration 1 should be amended and include the following line “...in order to have this construction contract awarded”. From there the illegality follows. Then follows illustration 3.

26. Bonell opens the discussion on illustration 2 (page 4 of the working paper). Estrella Faria asks Furmston to make clear that in illustration 2 the supplier making use of forced labour only refers a specific contractor (not to a country). Bonell reminds Furmston to avoid names, to use A and B for persons and X and Y for countries.

27. Zimmermann asks what the relevance of the sentence “the convention has been ratified by Ruritania but not Utopia” is. Furmston says he just wanted to raise the point of illegality in connection with the convention. Zimmermann replies that it is not clearly phrased that it is illegal in spite of the lack of the ratification by Utopia” and finds the phrase, as it is, misleading. Estrella Faria suggests to make this point in the text and to take it out of the example. Fontaine asks what example 2 is illustrating and would like to know where it will fit.

28. Bonell opens the discussion on illustration 4. Estrella Faria makes an example in which a large Bank in a country X opens an account for funds of illegal origins. The bank knows the customer brings funds of illegal origin. Is the contract illegal? Bonell points out that the bank will be under a statutory duty not to accept the money, though it may breach this obligation. In any case everybody agrees that money laundering is a universally condemned practice. Furmston explains that illustration 4 had an earlier predecessor, in which the person selling the cars had not known about the origin of the funds. Furmston had previously thought that it would be *per se* suspicious to pay a million dollars in cash for cars, but Chinese members did not think so and mentioned it was standard practice in China. Therefore, the example had been amended as it is. Zimmermann asks again what the example is to illustrate. Fontaine thinks illustration 4 is an example for illegality under the heading of “otherwise”, as it would in general not be illegal to pay 1.000.000 for 10 Rolls Royce.

29. Estrella Faria asks how far the chain of knowledge is to go. Bonell thinks a reasonable wording in example 4 could be “knew or out to have known”. Furmston adds the answer will also depend on all the circumstances – eg in England if one turns up with a million in cash in a bank, everybody would assume the person has funds with illegal origins, but perhaps not so in Shanghai. Estrella Faria makes another example: I sell a house in Kitzbühel in Austria, to a very wealthy person and I can assume a large chunk of the money has not been legally earned, will the contract be illegal? What about the contract of the real estate agent? Would the seller need to inquire about the CV of the buyer? Bonell asks whether it were detrimental to subject the real estate agent to such a duty? Zimmermann says this can not be answered here. All that can be done now is to give an example and leave it at that and at how a reasonable arbitrator would apply it. He asks Estrella Faria if something should be said about “ought to know”, who declines this.

30. Bonell opens the discussion on Art 2. Zimmermann asks about the relationship between Art 2 (3) and Art 1 (2). If the contract is completely illegal under Art 1 (2), this is already covered by Art 2 (1) and (2). If it is valid, there is also normally no problem. A partially illegal contract is normally dealt with by striking out the illegal part and keeping the rest of it as it stands. Both parties can rely on it and have all the remedies under the contract. The only question that possibly needed to be dealt with was whether and to what extent the parties may rely on the illegal part of the contract. Therefore, Zimmermann asks whether Art 2 (3) is needed at all. A lengthy discussion ensues, as a result of which it is agreed that the relationship between Art 1 (2) and Art 2 (3) needs to be reconsidered. At any rate it is strange, that, if the entire contract is illegal, there is the differentiation set out in Art 2 (1) and (2) but not if only part of the contract is illegal. There is a dispute in the group whether the problem lies with Art 2 (3) (this is what Zimmermann thinks) or with Art 1 (2) (as Estrella Faria suggests). According to Zimmermann the rule in Art 1 (2) is essential no matter whether one finds the solution provided here (presumption that the remaining part of the contract is valid) convincing or not. He draws attention to the fact that the rule, in this respect, had been changed by the committee.

31. Bonell then moves on to illustration 6 and asks for the facts that are not relevant to be deleted. The example should be shorter. Furmston says that illustrations 6 and 7 were in the previous drafts. Numbers 8, 9, 10, 11, and 12, are from Professor Raeschke-Kessler while number 13 is his. He was reluctant to delete some of those examples, even though some examples overlap. Bonell strongly advises Furmston to revise and shorten the examples, especially 6, and to delete some. Fontaine also suggests giving fewer examples. Bonell again asks to apply them to the appropriate text sections and include headings, to which Furmston agrees.

32. Zimmermann points out that the comments should not contradict each other or the rules. He asks about page 5 where it is said one party knows not about the “key facts” – is the knowledge of “key” facts needed or just facts as set out in the rules?

33. Zimmermann then points to the last sentence of the second paragraph of the comments on page 5 and says that it is not an explanation of the black letter rule, from which it deviates.

34. In illustration 8 Zimmermann wonders whether everything is relevant; in 9 he says he does not know who is who, in 10 he asks why it is partly illegal. In illustration 11 Zimmermann asks what remedies are actually available.

35. Estrella Faria follows on from the remark of Zimmermann and asks what point is being made that is not already dealt with in Art 1? The question about which remedies are available should be elaborated. Bonell also asks for the examples in Art 2 to emphasise the remedies available under the contract.

36. Bonell points to illustration 9 and the claim for specific performance, where no remedy under the contract is permitted. Therefore he points out it is not exactly an illustration of Art 1. Fontaine suggests to say as a conclusion “C may not sue” or “may sue” for performance under the contract. Bonell asks Furmston if these points are sufficient as a guidance for updating his report. Furmston answers they are.

37. Bonell opens the discussion on Art 3. Zimmermann raises two points regarding the black letter rules in Art 3: The “also” in a “contract is also illegal” was taken out in Rome, but Zimmermann wonders, as we have illegality dealt with already before, whether it should not be reinserted again. He also asks if something is missing in (2) as the sentence seems incomplete to him. Furmston replies to the second point and asks if it would make more sense to Zimmermann if a comma were inserted after “and” and after “guidance”. Bonell reminds the group that Goode insisted on having the reference to mandatory rule in this sentence. Bonell suggests inserting “or otherwise” instead. Zimmermann says the mandatory rule may also give implied guidance. Bonell says that this would conflict with Art 4 (2). Zimmermann says what is really wanted are the criteria in Art 3, not a reference to Art 4 (2). Therefore better wording is needed. He suggests “will be determined by the mandatory rule”. Zimmermann says that hardly ever do mandatory rules deal with partial illegality. He therefore asks why there should not be a rule such as in Art 1 (2) in Art 3. Bonell says he is not satisfied with Art 3 (2), which goes back to Goode, who wanted to align Art 3 with Art 4. Bonell is not convinced about the solution found, because Art 4 deals with the consequences. Fontaine finds the interrelation between Art 4 and Art 3 is not satisfactory as they stand now.

38. Estrella Faria asks about a situation in which there is an arbitral award and a party invokes a violation of a mandatory rule in the process of enforcement in a country such as Brazil. He asks how far it is planned to create a self contained system or if those points would rather have to be left out and dealt with by the various legal systems on the level of the consequences.

39. Bonell explains that Goode had the following in mind: In case of partial illegality, the infringed rule should determine what happens with the rest of the contract. Then, if that does not give guidance, Art 4 (3) should determine it. Bonell does not agree with the second part of this reasoning. If there is nothing in the mandatory provisions, he would refer back to Art 1 (2). Zimmermann cautions and says that it is an extremely rare situation as all Codes have rules on invalidity and partial invalidity in general and that partial illegality and its consequences are not usually dealt with by the mandatory rules referred to in Art 3. Furmston says Art 3 (2) should read more like Art 1 (2) and now sees the contradiction. Bonell agrees.

40. Estrella Faria mentions another source of confusion. In Art 3 it says “the effect will be determined” and then again, in Art 4, “the effects of any infringement”. Bonell thinks the solution should be in Art 3 to go back to the wording of Art 1 (2) as the issues in Art 3 and Art 4 are different from each other. Furmston agrees.

41. Zimmermann asks if the reinsertion of “also” as mentioned in his opening question on the discussion of this Article has been agreed upon. Furmston, Bonell, Fontaine all reply positively.

42. Fontaine mentions that some examples had been given in Rome. Zimmermann reminds Furmston that Art 3 would also need examples, to which Furmston agrees.

43. Bonell opens the discussion on Art 4 and says that it is in essence the mirror image of the corresponding PECL rule and that the CFR and the Restatement are similar too. He suggests

to Furmston to consult these sources. Zimmermann asks again for headings, subheadings and more structure for each of the criteria.

44. Zimmermann asks what is meant by the comment on page 8 “It would be appropriate to take into account solutions arrived at by national case law”. He asks whether it is necessary to look at the mandatory rule only if it expressly provides a consequence and otherwise deal with the matter in the principles as a self-contained system. Bonell says it would need to be explained as it is currently not clear in the text.

45. Zimmermann asks about illustration 14 and says it seems to him to be an example for partial illegality, which however, is not to be dealt with in Art 4. Furmston asks what would follow after the change of Art 3. According to Zimmermann Art 3 (2) would deal with partial illegality. Furmston says the conclusion in illustration 14 that the rest of the contract is valid derives from the revised version of Art 3. Therefore, the example should then be under Art 3, not Art 4. Bonell agrees.

46. Bonell asks for comments on illustration 15. Estrella Faria would like to know what part of Art 4 is supposed to be illustrated by illustration 15. Furmston says he thinks it is the purpose of the rule (i.e. lit a). Estrella Faria replies this is not apparent to him and that it should be made clearer. Furmston agrees to do so.

47. Estrella Faria asks about illustration 16 and whether it is not sufficient to finish after “cannot sue for the price”. Furmston agrees to take out the rest of the example.

Wednesday, March 4 2009, morning meeting

48. Bonell opens the discussion on Art 5.

49. Furmston asks if there should be a reference to the part prepared by Zimmermann (or vice versa). Bonell says that after lengthy discussions it had been left open whether there should be a separate restitution chapter or whether each chapter should contain the corresponding provisions. For now, everyone had been asked to have them in the draft of their chapter, also Furmston. In addition Furmston, had been asked to see to what extent he might be able to rely on the rules in the Zimmermann chapter.

50. Zimmermann commences the discussion concerning restitution following illegality: It had been voiced that more flexibility was needed in this regard in Rome. Sometimes restitution is excluded in cases of illegality, when it produces unsuitable results. But there are also many cases where it seems right to grant restitution. That is why the *in pari turpitudine* rule is so much criticized in countries as Germany. If one looks at national systems when they grant restitution and when they do not, the key factor is the purpose of the rule infringed. In some cases other factors play a role, such as the seriousness of the infringement. Zimmermann therefore proposes to draft a rule either to say whether or not restitution will be made depends on the criteria set out in Art 4 (3), or to extend Art 4 to restitution which would be more elegant. Once that is done, all that is needed would be a rule such as: “concerning the details of restitution, the rules on termination following avoidance apply *mutatis mutandis*”. This would avoid undue repetition.

51. Bonell says one might also make a cross reference in the comments and says he is hesitant to implement a change in the black letter rules.

52. Furmston says the group certainly had the instruction to change the rule of Art 5. Bonell replies that this applied to (2). Furmston asks about inserting a new (2) in Art 5 giving guidance on what a reasonable result would be and what factors should be decisive. He does not think it would go against the instructions given in Rome. Bonell agrees. Zimmermann says that the rule on restitution concerning illegality had been on the agenda for the first time in Rome last year and the instructions were for the group to amend (2) of Art 5. The group now sees that further amendment is needed than that. Zimmermann therefore thinks this would be feasible. Estrella Faria says that while he is sensitive to Bonell's point regarding the mandate he agrees with Zimmermann. Estrella Faria says he is also inclined to have shorter, rather than repetitive texts.

53. Fontaine suggests a separate article for the criteria, as an Art 6 could lay out what factors decide reasonableness under Art 4 and Art 5. Bonell reminds the group that Art 5 has a broader scope than Art 4, and merging the two may therefore cause confusion.

54. Zimmermann thinks a rule is necessary that also covers immorality. But, he points out that the relevant criteria as set out in Art 4 (3) are also necessary. These should be applied *mutatis mutandis*. Some of these can even be applied directly. Zimmermann mentions that in Art 5 a paragraph is needed, saying when restitution is to take place as a first subsection. Then the criteria should be named or it should go on saying they apply *mutatis mutandis*. Furmston would prefer to spell it out. Bonell says he has sympathy for that, but he is also impressed by Zimmermann's suggestion to apply them *mutatis mutandis*. Furmston says he could produce two alternatives and will send both of them, as options, very soon.

55. Bonell suggests to try and to do it now, as time permits this now. The first alternative is to have a reference to Art 4 (3) in Art 5. The second alternative is to spell out the criteria in Art 5. Zimmermann suggests looking at Art 4 (3). Regarding a) a rule also covering Art 1 and 2 of Furmston's draft is needed. Fauvarque-Cosson suggests "...the purpose of the fundamental principle or rule which has been infringed...". Bonell suggests "...the purpose of the fundamental principle or the mandatory rule which has been infringed..."

56. Zimmermann suggests for c) "any sanction that may be imposed". Bonell thinks that gives less guidance. Zimmermann replies that the worst one can say is that it does not make much sense. That is why it would be more elegant to apply Art 4 (3) *mutatis mutandis*. If it is spelt out specifically, the group points to the problem. Bonell says he does not feel comfortable with such a reference. Fontaine thinks that Art 5 provides for the flexibility needed for contracts contrary to what Art 1 does. He asks if this flexibility is to be given for mandatory rules, as it may lead to a result inconsistent with the mandatory rule. Estrella Faria thinks that this is a problem and that regarding Art 5 the relationship of unjust enrichment and contract is uncertain. Zimmermann suggests going through Art 4 (3) step by step, to lay out the rules and then deal with the problem. He thinks that of the criteria of Art 4 (3), c) does not apply; d), e) clearly apply. Furmston could explain those in the comments with examples.

57. Zimmermann suggests looking at Art 5 (1) and thinks it should better say “Restitution is permitted where in the light of all the circumstances of the case this would be reasonable” instead of “reasonable result”.

58. Zimmermann then reminds the group of the point raised by Fontaine – as it still needs to be dealt with, regarding the consequence mentioned in the infringed mandatory rule. Bonell thinks this would be dealt with under criteria c). Fontaine and Zimmermann think that in such a situation c) would have to prevail, while currently, it is only one out of 5 criteria. Bonell replies he would read it as to prevail in any case. Zimmermann says that then the rule should spell out this preference. Estrella Faria asks if it should not be done the other way around: “Where there has been performance under an illegal contract, restitution may be granted, where not granting restitution would lead to an unreasonable result.” He admits it may be seen as a far reaching change. Zimmermann says such a wording would presume that normally there would be no restitution. However, the current result had been reached after discussion in Rome. Estrella Faria replies that the link to the mandatory law would be easier, as one could refer to the principle. Where the law specifically provides for restitution, he says, it would be reasonable too. Bonell prefers leaving it as it is for now, in the light of the discussion in Rome.

59. Zimmermann says he agrees with Estrella Faria, that the first test is reasonableness; then it should go on to c) and what the rule says. However, the rule should be applied without the criterion of seeing whether it is reasonableness. Furmston says that the discussion is about the unlikely situation of a mandatory rule expressly dealing with restitution. He concludes, however, that there seem no doubts about the results. Estrella Faria says the test in the current rule asks for a reasonable result, and the rule under c) is only one criterion named, that could go against overall reasonableness. That should not be the case. Bonell replies and asks if one could imagine a case in which an arbitrator comes across a mandatory international rule providing expressly for restitution, and the arbitrator deciding it thinks this is unreasonable. It seems very unlikely to him. Zimmermann says it could be solved by changing the wording, and then letting Art 5 take it from Art 4. Zimmermann suggests that Art 5 (1) is changed as follows “In determining what is reasonable, the following criteria are to be taken into account” and asks if this should be a separate subsection. Bonell and Fontaine agree.

60. Bonell reminds that the group had been asked to replace (2) by the rules of restitution in the context of avoidance. It should be decided whether to have a separate chapter on restitution or one section in each chapter. Zimmermann thinks this decision can only be taken once the complete set of drafts is available. Therefore, he suggests drafting those provisions for this chapter. Fontaine thinks the group should start with the provisions of Zimmermann’s draft and include them here.

61. Zimmermann says the first subsection of his draft would be complicated to reformulate under Art 5, as one cannot say “on illegality” instead of “on avoidance”. Also, the issue on concurrent restitution is difficult: In some cases under Art 5 only one person will have to make restitution, and so there cannot be concurrent restitution. That is why he preferred to apply the criteria *mutatis mutandis*. Bonell thinks that this would be difficult to pass in Rome. Fontaine thinks that after the change of Art 5 (1), and (2), Art 5 (3) should follow: “Where

either party may claim restitution of whatever it has supplied under the contract, or the part of it that is illegal, each party must provide restitution“. That would reflect the rule in the chapter prepared by Zimmermann. Zimmermann suggests: “Where either party may claim restitution of whatever it has supplied under the contract, or the part of it that is illegal, such party concurrently must make restitution of whatever it has received under the contract or the part of it that is illegal.” Fontaine and Furmston agree. Fauvarque-Cosson dislikes the reference to “such party”. Furmston says that “that” party would perhaps be better. Furmston asks if “concurrent” is needed. Bonell and Zimmermann want to leave it in.

62. Zimmermann mentions that (2) of his draft can be applied right away, (3) and (4) as well. Estrella Faria asks if that might be offensive in cases of illegality. Zimmermann replies he thinks it would not, as one is dealing only with situations where, according to Art 5 (1) and (2) (new) it had already been decided that the granting of restitution is appropriate.

63. Bonell thanks the participants and closes the discussion on this paper, after agreeing that Furmston will submit the revised version, with more structure, headings and the examples each provided together with the specific comments they illustrate by April 10th at the latest.

Working Group for the preparation of
Principles of International Commercial Contracts (3rd)
Drafting Committee
Hamburg, 2-5 March 2009

**Session 4:
Conditional Obligations**

(UNIDROIT 2009 Study L – WP.22)
Reporter: Bénédicte Fauvarque-Cosson

Minutes

Present:

Prof. Joachim Bonell
General Secretary José Angelo Estrella Faria
Prof. Bénédicte Fauvarque-Cosson
Prof. Marcel Fontaine
Prof. Michael Furmston
Prof. Reinhard Zimmermann

Keeper of the Minutes: Dr. Sebastian A.E. Martens

Morning, March 4 2009

1. Fauvarque-Cosson makes some introductory remarks. The black letter rules have not changed. She has adopted new examples from practice. As some of these examples come from a meeting on 31st of January, she could not circulate the paper earlier. In her draft she has tried to take account of all remarks made at previous sessions. She asks for guidance as to ‘closing’.
2. Bonell thanks Fauvarque-Cosson for her efforts to get comments from practitioners. Fauvarque-Cosson mentions that the word ‘condition’ is very widely used in practice. Bonell thinks that one should not care too much to the loose use of the term of ‘condition’ in practice. Fauvarque-Cosson thinks that it is surprising that it works in practice.
3. Zimmermann comments on Art. 1, Comments, section one, second sentence as to public permissions. He thinks that they are not conditions. Bonell thinks that the granting of permissions is a condition. Fontaine thinks that it should be made clear what the condition is. Zimmermann interprets Art. 6.1.14 differently from a condition. Fontaine thinks that Art. 6.1.17 should be amended as to its terminology. ‘Void’ would not be correct. Fauvarque-Cosson doubts whether a reference to Art. 6.1.14 is necessary. Zimmermann distinguishes two situations. Either the permission is a condition by law but not a condition in the sense of the present chapter or it is made a real contractual condition by the parties. Estrella Faria says that condition by law is often made a condition precedent. The condition precedent makes the condition by law a condition of the contract.
4. Furmston says that if there is a contractual condition that an export license must be obtained and the license is not got, then the contract falls away. Bonell thinks that obtaining the license is generally part of seller’s obligation in these cases. To avoid this, it is made

conditional and the seller needs only to use his best efforts. Bonell says that if a condition by law is not made a contractual condition it is part of the obligation (e.g. obtaining an export license) and the party assumes the risk.

5. Zimmermann says that ‘condition’ is only used for contractual conditions. Public law requirements should not be called ‘conditions’. It is free for the parties to decide what the effect of such public law requirements should be. Bonell proposes the formulation: ‘it does not deal with what is sometimes referred to as conditions imposed by law’.

6. Zimmermann asks whether Art. 6.1.17 should be addressed now, especially the use of ‘void’. Bonell thinks this should not be discussed now but kept in mind for later revisions.

7. Fauvarque-Cosson mentions ‘conditions imposed by court’. She has not dealt with it.

8. Fauvarque-Cosson turns to section two, ‘the notion of conditional obligation’. Zimmermann refers to the last paragraph on page four and the term ‘precise event’. Reference to the Olympic Games in 2012 would not be a term but a condition. He asks what is meant by ‘precise events’. Many precise events would be conditions. Estrella Faria says that ‘precise event’ would mean an event which is certain to happen. Zimmermann proposes ‘an event that is bound to happen’. He asks whether this would not always be a term then. Fauvarque-Cosson refers to illustration two.

9. Bonell refers to paragraph two of section two. He thinks that ‘condition’ is defined in this chapter and it is not only an invention or an arbitrary use of the word. Furmston states that the account of the Common law is oversimplified, because the word ‘condition’ may be used to describe a real condition or to describe essential contract clauses. Furmston proposes to state that ‘conditions’ may have many different meanings in the general use and that the PICC use only one. Estrella Faria proposes to say that ‘condition’ may have a broad meaning in practice. Zimmermann agrees. He argues that generally there are no references to common law and civil law. Fauvarque-Cosson agrees to drop the reference to common law and condition/warranty.

10. Fauvarque-Cosson draws attention to the fact that sometimes the formulation ‘conditional obligation’ is used and sometimes ‘condition’. The others do not think that that is a problem as long as the terms are consistently used. Fauvarque-Cosson agrees to change the heading of section two. (‘Notion of ‘condition’’).

11. Zimmermann proposes to drop the reference in the third paragraph to civil law. The others disagree. Estrella Faria says that the distinction between condition and term is peculiar to civil law. Bonell proposes to distinguish ‘condition’ within the chapter from ‘what is called in civil law countries a ‘term’’.

12. Zimmermann asks about the point of the fourth paragraph. Bonell says that ‘term’ should be dropped in this paragraph and only ‘time limit’ be used. Fauvarque-Cosson thinks that a condition and time limit may be combined and that they usually are combined. Fontaine thinks that it might be confusing to mention the combination. Estrella Faria thinks that it is right to say that the combination of time limit and condition leaves the condition a condition. Zimmermann agrees and states that this is the intellectual link between the third and fourth paragraph. Furmston thinks that the distinction between condition and term is irrelevant to common lawyers. Zimmermann agrees, but since the distinction exists in civil law countries, it had to be mentioned, but made clear that this is only important for civil lawyers.

13. Zimmermann draws attention to illustration two. This illustration is taken from the PECL. This would raise the question of how far the Unidroit PICC should copy from the PECL. Fauvarque-Cosson wants to drop the illustration. Bonell also proposes to delete illustration two. Fontaine thinks that it is unproblematic to have a simple illustration of a time limit as illustration one. Bonell thinks that the first illustration should be of a condition not of a term. Fontaine agrees.

14. It is discovered that an explanation of suspensive and resolutive conditions is missing. Fauvarque-Cosson says that it was given under section seven, but got dropped in the drafting process. She will provide a copy of section seven for the afternoon session.

15. Furmston thinks that illustration three is a borderline case as this is a case of a past event but the parties do not know it yet. Fauvarque-Cosson wants to drop illustration three. Zimmermann thinks that she should keep it to illustrate that past events are not conditions. The others do not agree and want to drop the illustration.

16. Zimmermann thinks that as illustration two has been dropped, the last sentence of the previous paragraph of the comments should be dropped as well.

17. Estrella Faria proposes an example for an illustration one, based on an option for stock purchases. Bonell thinks that the second illustration should be a slight variation of illustration one, e.g. the stocks have to be bought back at a certain date.

18. Fauvarque-Cosson says that illustration four should go. Bonell disagrees. Fauvarque-Cosson thinks that the illustration should go, but the comment should be kept. Zimmermann agrees to drop illustration four. Bonell wants to have an illustration for the last paragraph on page five.

19. Zimmermann thinks that the doctrinal explanation in the paragraph beginning 'sometimes...' is confusing: many things that we expect to happen are "uncertain future events". Estrella Faria thinks that the paragraph should end with 'performance is due'. Zimmermann disagrees and thinks that it should be said that this is a normal case of breach of contract.

20. Fauvarque-Cosson draws attention to section three of the comments. Estrella Faria thinks that the discussion is very civilian. Fauvarque-Cosson thinks that it is the other way round. For civilian lawyers would expect a text on impossible and unlawful conditions, and section three is to address their concerns.

21. Zimmermann draws attention to paragraph three (supervening impossibility). This would be unnecessary, because subsequent impossibility is not a problem. Only initial impossibility would be a problem. Furmston says that the cases discussed in the common law are cases where the parties do not know about the initial impossibility. Zimmermann wants to drop most of paragraph three. Only a comment and an example for initial impossibility should be given. As there is no uncertainty in these cases, there is no condition.

22. Bonell says that the group did not want a black letter rule on impossible and unlawful conditions. Fauvarque-Cosson says that the group wanted to have it in the comments. Zimmermann thinks that it is fine to have something in the comments. There would be a valid point to mention initial impossibility. Bonell thinks that there is no stopping point as to where

to end then. But unlawful conditions would be very problematic as it is a policy question. Zimmermann proposes to refer to the chapter on illegality concerning unlawful conditions. The group agrees to mention initial and supervening impossibility. Zimmermann says that in case of supervening impossibility, only the logical consequences flowing from the definition of conditions should be stated: the event upon which the coming into existence of the obligation depends, can no longer occur.

23. Estrella Faria thinks that the language of ‘illegal condition’ is problematic. Furmston thinks that illustration one is not a case of an unlawful condition. Zimmermann thinks that the illustration is problematic because it is not straightforward. He thinks that illustration two is good to illustrate initial impossibility. Estrella Faria proposes a new illustration two: the performance of a party is due upon issuance of a guarantee of a bank that went bankrupt yesterday.

24. The group turns to section four. Fauvarque-Cosson asks whether it should be dropped as it is very civilian. Zimmermann thinks that it should be kept. He refers to ‘Wollensbedingungen’ as opposed to other cases of potestative conditions. He thinks that the language in section four is too wide. Furmston refers to credit card contracts where the issuer may change the credit rate. Estrella Faria thinks that this is no case of a condition. Bonell thinks that sales upon approval are a relevant case. Furmston thinks that the parties would regard the contract as valid. Zimmermann says that that was his initial point. It would be too broad to say that a contract is always invalid if fulfillment of the condition depends on the will of one party. Sometimes one will come to the conclusion that that party does not really want to be bound, and sometimes there is a perfectly valid contract (sale on approval). Estrella Faria wonders whether the statements in section four would really be acceptable to all legal systems.

25. Furmston gives an example: A buys land from B subject to getting a satisfactory mortgage. It would depend on the parties’ intention what the consequences are, i.e. whether or not there is an obligation. Bonell and Zimmermann agree.

26. Zimmermann says that the heading of section four should be changed: ‘A condition cannot depend on the will of a party’. Zimmermann proposes to make a clear statement that a condition can be framed in such a way that there is no contract and it can be framed so that there is a contract in cases of discretion of a party.

Afternoon, March 4 2009

27. Fauvarque-Cosson proposes to deal with section six and seven before section five. She is not sure whether there should be a section on renunciation at all. She asks whether the group wants to mention renunciation, and if so, do the others agree to the current draft section. Fontaine asks what is meant with ‘renunciation of the benefit of a condition’. Zimmermann asks whether ‘I renounce to the benefit of the condition’ means ‘I renounce the condition’. Furmston says there are cases in the common law where it is disputed whether or not the condition is only for the benefit of one party. Zimmermann moots whether a condition might not be sometimes for the benefit of one party and sometimes for the benefit of the other. Fauvarque-Cosson agrees to drop section six.

28. The group turns to section seven. Bonell does not want any reference to the DCFR. He thinks that ‘suspensive’ and ‘resolutive’ is not just a question of terminology. Fauvarque-Cosson agrees to drop the references to PECL and DCFR. Zimmermann proposes to state ‘a

suspensive condition works like...’, ‘a resolutive condition works ...’. It should first be explained how the conditions work.

29. Fauvarque-Cosson found it difficult to find new illustrations, so she used the ones from the DCFR. The group agrees that there should be one example each for suspensive and resolutive conditions.

30. Fontaine asks why Fauvarque-Cosson thinks that the suspensive condition is more important. Fauvarque-Cosson says that that is what she has heard from practitioners. Zimmermann thinks that the last paragraph of section seven is too theoretical if the group cannot find an illustration of when there is a difficulty to distinguish. Estrella Faria argues that the last sentence of that paragraph should be dropped, because of the mentioning of interest which would offend Arabic countries.

31. Fauvarque-Cosson turns to section five, illustration one, letter a). It is not a condition if the seller has the discretion to approve. Bonell thinks that this would be a good illustration for section four. Furmston thinks not so, because there is no contract. Estrella Faria thinks that it would be difficult to use the conditions precedent as an illustration because it will be difficult to explain each letter separately. The group wonders what is meant by ‘seller holding’. Zimmermann says that if the seller company is meant, it is a “Wollensbedingung” and there is no contract, but if the seller holding company is a separate company it is a condition. The others agree.

32. Bonell argues that the loose use of the term ‘condition’ in ‘conditions precedent’ should be mentioned in the last paragraph on suspensive conditions. There should not be a separate heading.

33. Estrella Faria thinks that illustration one, letter b) would be a good illustration for non-interference. c) would be a good example of suspensive condition.

34. Fauvarque-Cosson proposes to put d) at the very beginning of the comments to Art. 1 as an example for the non-occurrence of an event. Fauvarque-Cosson says that illustration two is very frequent in practice. Bonell agrees and asks to reconsider to have something in the comments about renunciation.

35. Fauvarque-Cosson says that there should be a specific paragraph on ‘closing’ and some conditions precedent should be reproduced there. Furmston says that with a lot of the conditions precedent you cannot tell without further information whether or not there is actually a contract. Estrella Faria says that sometimes a condition precedent is not really a condition precedent but a warranty, but the party wants it a condition precedent so that it can pull out of the transaction if it is not met.

36. Fontaine proposes that something about ‘closing’ should be in the chapter about formation of the contract. Bonell proposes to postpone the discussion of ‘closing’ until later. The others agree.

37. They turn to the list of conditions precedent on page nine. Bonell proposes to turn to the discussion of ‘closing’ now. Fauvarque-Cosson says that closing to her understanding is the date at which all papers are on the table. Bonell says that it is the date when the contract comes into existence. Estrella Faria agrees that this is the date of formation of the contract. The full-fledged obligations of the parties would come into existence. Bonell says that it is a

case of Art. 2.1.13 (subject to contract). Fontaine says that he has spoken with practitioners who believe that the contract exists even before closing but it is subject to conditions precedent. He thinks that the group should be very careful as to which article of the formation chapter they make a reference. Furmston says that in a lot of transactions it is not clear whether or not there is a contract yet. Estrella Faria says that it also depends on the kind of contract whether or not there is a contract at which time.

38. Fontaine thinks that it depends on the obligations as to which of them come into existence at which time.

39. Zimmermann asks what should be the gist of the comment on ‘closing’. Bonell says that they should describe the procedure and say that there is no clear cut legal rule as to whether or not there is a contract before closing. The procedure is usually drafted as a suspensive condition, but it is not always really a suspensive condition. It depends on the intention of the parties. Zimmermann says that they should give three or four examples (not yet a contract, real condition, etc.).

40. Estrella Faria says that some clauses might be conditions, others might not. Bonell thinks that the share capital increase case is a good example for there being a contract subject to conditions, while in other situations it might be that there is no contract yet. The group agrees that there should be a separate paragraph on ‘closing’ in the comments on Art. 1.

41. Fauvarque-Cosson draws attention to the Material Adverse Change (MAC) clause on page ten. Estrella Faria thinks that the impact depends on the definition of MAC.

42. Bonell wants to keep illustration two for the ‘closing’-paragraph.

43. Fauvarque-Cosson turns to Art. 2. Zimmermann has two reservations as to the wording of the black letter rule. ‘retroactive effect’ is a language not used in the principles. And he thinks that the language is too defensive (‘No retroactive effect’). They should formulate more positively: E.g. ‘Effect of conditions’. He proposes: ‘Upon fulfillment of the condition the contract comes into effect, unless...’ (suspensive effect) ‘Upon ... the contract comes to an end, unless’ (resolutive effect). Fauvarque-Cosson asks whether they want to copy the PECL. Zimmermann affirms this.

44. Zimmermann moots whether there are too many comparative references in section one. Bonell wants to delete the last bit ‘The justification for this...’. The others agree.

45. Bonell proposes that it should be stated in paragraph one that parties would be well advised to make an explicit statement if they want to deviate from the general rule.

46. Bonell turns to section two. He proposes to start section two in a way that paragraph two of section one could be dropped. Fauvarque-Cosson agrees.

47. Furmston thinks that the discussion has been about cases of many suspensive conditions until now and that such combinations of suspensive conditions should be addressed (‘until the last suspensive condition has been fulfilled’).

48. Zimmermann is unhappy with sentence two of the first paragraph. ‘Interest’ should be deleted; ‘his due’ means performance. An explanation that both obligations can be under the

same condition should be given under section two in the comments to Art. 1. A condition can suspend a single obligation, but it can also suspend two obligations or the contract as a whole.

49. Estrella Faria thinks that ‘condition occurred’ is wrong, it should be ‘condition fulfilled’. He asks about the commencement of the limitation period. Fontaine thinks that there should be a reference to Art. 10.2. Furmston points out that a limitation period begins only if there is a claim. Fauvarque-Cosson agrees to delete the sentence as to the limitation period.

50. Fontaine turns to the resolutive conditions. He does not understand the second sentence very well. Zimmermann says that what the group probably wants to say is that if a resolutive condition is fulfilled the contract remains valid and fully effective with regard to the time before. All obligations which existed at that moment continue to exist. The restitutionary obligations are dealt with under Art. 5.

51. Bonell wonders whether the illustration taken from the DCFR should be discussed. Estrella Faria proposes an example where somebody leases some building while renovations are going on at his own premises.

52. The group turns to section three. Fontaine thinks that ‘required’ should be used instead of ‘demanded’. Bonell says that no references are made to specific performance in the Principles; it should only be ‘performance’.

53. The group turns to Art. 3. Zimmermann is not happy with the solution which deviates from the civilian solution. He does not like ‘may not rely on the non-fulfillment’ and would prefer ‘is deemed to be fulfilled’. But it may be too late to change that.

54. Fauvarque-Cosson turns to section one. It should be ‘of the general PRINCIPLE of good faith’ and she wants to delete the reference to PECL and DCFR. Zimmermann says that the comments should start with a general remark as to good faith, then they should state that this is a specific example, etc. He thinks that there should be separate headings for the different situations. And there should be two examples each for suspensive and for resolutive conditions, as Art. 3(1) might apply to both as might Art. 3(2). This should also be the way how to structure the comments. Bonell says that this is partly the way section two works already.

55. Bonell says that the heading of section one is not appropriate. It is not normal style of the Principles to provide justifications for their rules.

56. Zimmermann says that in section two, the two possible legal consequences should be mentioned (‘deemed fulfilled’; ‘may not rely on’) and it should be said that the Principles have chosen the one. Fontaine does not want to compare the adopted version to other possible versions. Bonell proposes to add a sentence that ‘may not rely’ implies that Art. 3 applies only to the person in whose favor the condition works.

57. Zimmermann wants a subheading ‘suspensive condition’ and a subheading ‘resolutive condition’ under one. The others agree.

58. Fontaine thinks that the first illustration is problematic. Estrella Faria says that the consequence in the examples should be ‘he may not rely on the non-fulfillment as a defense against the claim for damages’. He gives the example of construction works where a

favourable report by an engineer is made a condition and then the work of the engineer is interfered with. He draws notice to FIDIC and to UCP.

59. Fauvarque-Cosson asks whether section four is needed. Estrella Faria thinks that the distinction between positive and negative interference should previously be mentioned.

60. The group turns to Art. 4. Zimmermann thinks that an example of international commercial contracts is needed. Estrella Faria thinks that the comment of the practitioner on page fifteen is a good example and only has to be fleshed out. Bonell agrees.

61. Zimmermann draws attention to an example given by Fauvarque-Cosson in her last paper and the objections Roy Goode made about it. Fontaine says that there is a difference between suspensive and resolutive conditions. In case of a resolutive condition which might last over a long time, a rule such as in Art. 4 would go too far. Estrella Faria thinks that it might be problematic with property, but there might also be cases where it makes sense. Bonell thinks that Art. 4 is problematic as a default rule and that the example on page fifteen is not that good either, because there the parties have provided for the situation.

62. Zimmermann thinks that there are certain situations when Art. 4 is problematic, but it is difficult to define them. Art. 4 also would irritate common lawyers. Estrella Faria proposes to have a comment on this topic explaining the practice if they do not want a black letter rule. Zimmermann proposes to have this comment under the comment to Art. 1. There a state of pendency is mentioned, and a comment such as now under Art. 4 would address the problems raised by such a state of pendency. If the parties do not provide for the problem then everything does depend on the principle of good faith. Bonell says that it was the result of Rome to have a black letter rule, but they should keep Zimmermann's idea as an exit strategy.

63. Zimmermann says that if they want to keep the rule, they must draft it more carefully. He proposes: 'Pending fulfillment of the condition, a party may not act so as to prejudice the other party's rights in case of fulfillment of the condition contrary to the duties of good faith and fair dealing'. Bonell thinks that this would not change the substance. Fauvarque-Cosson proposes to deal with it in a black letter rule, but have a footnote with the idea of a comment to Art. 1.

64. The group turns to Art. 5. Zimmermann states that so far there are no rules about restitution. So there are two solutions: Either there should be a comprehensive restitution regime here, or the reference must be more specific than simply to the 'rules on restitution'. Bonell thinks that the rules on termination rather than avoidance should be referred to. Zimmermann proposes to look at Art. 3 of his paper.

65. Fauvarque-Cosson asks whether it will not become very bottom-headed if restitution is comprehensively regulated here. Bonell thinks that it was strange that Zimmermann proposes to look at Art. 3 rather than Art. 1 of his paper although there is no retroactive effect. Furmston puts the example of a note of 25.000 Euros under which a bank will pay interest over five years. The transaction will come to an end if Lehmann Bros go bankrupt. Furmston thinks here the contract has to be unwound. One should keep the benefit accrued, but get no future interest. The others agree.

66. The group decides to look at Art. 1 of Zimmermann's paper on unwinding of contracts (RZ) because in the present context a distinction should also be drawn between contracts to be performed at one time and long term contracts. Zimmermann proposes: 'on fulfillment of a

resolutive condition contained in a contract to be performed at one time ...' (all analogous to Art. 1 RZ). Fontaine proposes that Art. 1 (1) RZ would become Art. 5(1), Art. 2(1) RZ would become Art. 5(2); Art. 1(2) RZ would become Art. 5 (3); Art. 1(3) RZ would become Art. 5(4) etc. Zimmermann says that this was not in conformity with the solution adopted with regard to his paper.

67. Bonell proposes to copy Art. 1 and 2 RZ for the time being. The others agree.

68. Zimmermann states that Art. 2 RZ may be adopted either as Art. 5(5) or as Art. 6. Bonell thinks that the solution with Art. 6 would be better. Zimmermann agrees with Bonell. Fauvarque-Cosson disagrees because that would mean that there are too many articles on restitution in her chapter.

69. Zimmermann proposes to look into the question of the scattered restitution rules, as the chapter on conditions is settled now. Zimmermann sums up the current state. He says that hardship may be another case where restitution rules are required. Bonell mentions Art. 2.1.14 as another case. Zimmermann thinks that the appropriate regime for hardship cases would be the one for avoidance. Fontaine thinks the regime for termination would be better. Bonell agrees. Furmston thinks that the general area where parties head for a contract but do not reach it and yet exchange goods is a big area that might better be left untouched. Zimmermann agrees.

70. Furmston relates the facts on *Yeoman's Row Management Limited and Another v Cobbe* [2008] UKHL 55. His point is that everybody thinks that the disappointed potential buyer should get something, although there was no contract. Zimmermann thinks that this type of cases should be left out. He asks what should be proposed in Rome in order to clear the principles from the scattered restitution rules.

71. Zimmermann says that one option is to have no special chapter on restitution but add the rules for restitution following avoidance and termination in the respective chapters, and references to these rules at the other places (illegality, resolutive conditions, hardship). The second option would be a separate chapter with restitutionary regimes for avoidance and termination and a last article which states which of the two regimes applies to the different other situations. Fontaine prefers option one. Bonell agrees with this and asks Zimmermann to prepare this scheme. Zimmermann agrees and proposes to have an appendix in his chapter describing the option one just agreed upon. Bonell asks him to prepare a position paper describing the different possible solutions, rather than a mere appendix. Zimmermann agrees to this.

72. The group turns to the paper on 'Termination of long term contracts for just cause'. Bonell makes a number of introductory remarks. He thinks that the paper is still very provisional. The others agree and think that it is impossible to discuss the paper without the author being present.