



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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**Working Group for the preparation of
Principles of International Commercial Contracts (3rd)
Drafting Committee
Third session
Hamburg, 25 – 28 January 2010**

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**Minutes
of the Meeting of the Drafting Committee
(Hamburg, 25 - 28 January 2010)**

Working Group for the preparation of
Principles of International Commercial Contracts (3rd)
Drafting Committee
Third Session
Hamburg, 25-28 January 2010

Item 2:

Draft Rules on Restitution

(UNIDROIT 2009 Study L – WP.27)
Reporter: Reinhard Zimmermann

Minutes

Present:

Prof. Joachim Bonell
Prof. Bénédicte Fauvarque-Cosson
Prof. Marcel Fontaine
Prof. Henry Gabriel
Prof. Roy Goode
Prof. Reinhard Zimmermann

Keeper of the Minutes: Dr. Jens Kleinschmidt

1. Also on behalf of General Secretary Estrella Faria, Bonell thanks Zimmermann and the Max-Planck-Institute for hosting this meeting of the Drafting Committee, and presents this meeting's agenda for adoption by the group. The agenda is unanimously adopted.

2. By way of introduction, Zimmermann reminds the group that most of the issues in the Draft Chapter have been settled at the previous plenary meetings in Rome. In particular, it has been decided that there should be no separate chapter on restitution or unwinding of failed contracts in the PICC, but rather two amendments to the existing text. One amendment is to be inserted in the context of the rules on avoidance, the other in the context of the rules on termination. References to these rules could be inserted where appropriate (e.g., but without prejudice to the discussion about the other working papers, in the context of conditional obligations and illegality). This decision is reflected in the minutes of the 2009 plenary meeting (UNIDROIT 2009 Study L – Misc. 29 ["the Minutes"], nos. 76 ff.). Zimmermann restates the reasons for this decision: It was felt that this approach would disrupt the present structure of the PICC as little as possible. Moreover, even in the draft for a uniform approach readers could easily think that there are in fact two regimes because of the special rule for

contracts to be performed over a period of time in the case of termination. Under the present approach, it will also be easier for users of the PICC to find the substance of the relevant rules in the two main places where they would expect such rules and, again without prejudice to the discussions about the other topics, references in chapters where restitution does not play such a prominent role.

3. In accordance with this decision, Zimmermann has changed the numbering and the headings of the articles to integrate them into the respective chapters. He explains that he will indicate all other changes that he has made to the Draft Chapter since the last plenary meeting in Rome.

Article 7.3.6

a) Black-letter rule

4. The black-letter rule has already been adopted by the working group and – apart from the numbering and the heading – no changes have been made.

5. No objections are raised.

b) Comment 1

6. Zimmermann and Bonell recall the delimitation between Art. 7.3.6 and Art. 7.3.7 according to the criterion of characteristic performance, a concept borrowed from private international law. This delimitation has been agreed upon by the working group. However, it has also been decided by the working group to explain this criterion in the comments because it was felt to be too complicated to express it in the black-letter text.

7. Goode suggests a clarification in the second paragraph of Comment 1 as the reader might be led to think that any contract of sale where the purchase price is to be paid in instalments falls under Art. 7.3.6 even if delivery (i.e., the characteristic performance) also takes place in instalments. The group decides to make an addition to the last sentence of Comment 1: “... will fall under the present article, provided the seller’s performance is to be made at one time”.

8. No other objections are raised to Comment 1. The following minor linguistic changes will be made: (i) In line 1, “refers only” will be replaced by “only refers”. (ii) In line 8, the word “practically” will be deleted. (iii) In line 10, “characteristic for” will be replaced by “characteristic of”.

9. Upon discussion, further linguistic changes that are suggested are not taken over by the group: (i) In line 2, the word “regime” will not be replaced by the word “rule”. (ii) In line 4, the word “ordinary” will not be deleted. (iii) In lines 4 and 11, the word “where” will not be replaced by “if”.

c) Comment 2

10. At the suggestion of Fauvarque-Cosson, the group agrees to modify the heading of Comment 2: “Right of parties to restitution on termination”, as the term “right” will be easier to understand and translate into French.¹

11. The facts of Illustrations 1 and 2 have been adapted by Zimmermann to conform with a remark by Fontaine at the plenary meeting (no. 20 of the Minutes).

12. However, the group thinks that in Illustration 1 an example concerning an intangible object of sale would be suitable and therefore suggests to redraft Illustration 1 along the following lines: In the context of the takeover of a company, controlling shareholder A agrees to sell and transfer to B shares for 100,000 Euro to be paid by instalments. B pays three instalments and then stops his payments.

13. Illustration 2, which so far refers to the facts of Illustration 1, will have to be changed accordingly by deleting the reference and instead stating the relevant facts. It is agreed that Illustration 2 is to remain an example on the sale of a painting which is claimed to be a Constable and in reality is not a Constable but a copy.

14. No other objections are raised. The group decides to make one minor linguistic change: “property, services, etc. which ... or which is defective” will be replaced by “property, services, or other performances which ... or which are defective”.

d) Comment 3

15. The words “in kind” have been added by Zimmermann to the heading of Comment 3 following a request in the plenary meeting.

16. No objections are raised.

17. Zimmermann explains that he has reformulated Illustration 3 because the previous version had led to misunderstandings at the plenary meeting. In addition, the modification intends to give it a more commercial character.

¹ Remark by the Keeper of the minutes: Although this point has not been discussed, it seems that the same change will be necessary in the corresponding heading to Comment 1 under Art. 3.18 which then would read: „Right of parties to restitution on avoidance“.

18. No objections are raised.

19. Furthermore, Zimmermann has included a new illustration, Illustration 4. Although one might wonder what is added by this illustration, Zimmermann has decided to include it since he had been requested by Finn and others to give yet another example of how restitution works in the context of a service contract and it had explicitly been suggested to use the premature cancellation of a cruise as an example.

20. Despite the fact that the facts of the illustration had been suggested at the plenary meeting, Bonell calls the commercial character of the example into question. In his view, it rather appears to be a classic example of a consumer contract. Goode agrees and suggests to change the illustration so that a company charters a ship for a company cruise for its employees. This suggestion is adopted by the group.

21. Goode and Bonell wonder whether the reference to damages in the last sentence of Illustration 4 should be less concrete so that also loss of enjoyment and other possible heads of damage are covered. The group decides to write: “In addition, he can claim damages for the loss suffered as a consequence (see Art. 7.3.5 (2)).”

22. Fauvarque-Cosson suggests to include in Illustrations 3 and 4 a reference not only to Art. 7.3.5 (2) but also to Art. 7.4.1 ff. Heeding to Bonell’s reply that the reference to Art. 7.3.5 (2) was specifically requested by Finn and that it implies a reference to Art. 7.4.1. ff., the group decides to leave the reference as it stands.

23. Goode remarks that Illustration 5 might surprise a lawyer with a common law background, since the common law would not allow termination of a sale after property and possession have been transferred.

24. As a reaction, Zimmermann points out that the illustration is merely an application of the existing rules of the PICC on termination (Art. 7.3.1 ff.). Under German law, termination would be possible even after ownership has passed. Fauvarque-Cosson adds that French law would also allow a termination of the contract. Bonell explains that the PICC generally are not concerned with proprietary effects of the contract. In this respect, they follow the model of the CISG that has the same rule on termination.

25. Goode continues that if one assumed that the parties in the illustrations act in a commercially reasonable manner, the seller in Illustration 5 would not terminate the contract but sue for payment of the purchase price.

26. Zimmermann replies that, of course, the seller in Illustration 5 had an option to stick to the contract or to terminate it. However, the illustration presupposes that the seller had a good reason for termination. In fact, it can be perfectly reasonable to terminate the contract if the seller finds out that he has made a bad bargain and is therefore interested in getting the value of the goods. As a consequence, both performances have to be re-transferred: The seller A has to repay the advance on the purchase price and the buyer B has to return the rings. Since it would not be appropriate to return the rings, B has to make an allowance. This is, after all, the purpose of Art. 7.3.6 (2) and it reflects the decision of the PICC not to limit the seller's right to termination in this respect, even if (as Goode and Gabriel submit) common law jurisdictions would not allow a seller to get out of a bad bargain by termination of the contract.

27. In light of this discussion, Goode expresses that his objections seem to be not so much concerned with Illustration 5 but with the PICC rule on termination in general. He suggests that this rule be revisited at some point but for the time being he does not object to Illustration 5 that is built on the existing rules of the PICC.

28. Consequently, the group agrees not to change Illustration 5.

29. At the request of Fauvarque-Cosson, Zimmermann explains that he was specifically asked to include Illustration 6 and the accompanying text to clarify that one has to distinguish two different cases: (i) Restitution in kind may be not appropriate. This case is dealt with by Illustration 5 where the buyer has to pay an allowance. (ii) It may well be that an allowance would have to be paid because restitution in kind is not possible or appropriate, but payment of an allowance is not reasonable. This case is dealt with by Illustration 6 which therefore serves quite a different purpose than Illustration 5.

30. No other objections are raised.

e) Comment 4

31. Zimmermann states that, in accordance with suggestions at the last plenary meeting, he has replaced reference to a tornado by reference to a hurricane in Illustration 7 and added the thunderstorm in Illustration 9.

32. It is agreed to modify the second sentence of Illustration 7 for clarification: "The car has defective brakes. Due to the defect, it crashes into another car ...".

33. Goode asks for an explanation of the difference between Illustrations 7 and 8. Zimmermann draws attention to the fact that in Illustration 7 the fault on the part of the seller did cause the destruction of the car whereas in Illustration 8 it did not.

34. Goode then suggests a clarification at the end of Illustration 8. It is agreed that the last sentence of the illustration will be modified to read: "... an allowance for the value of the car prior to its destruction."

35. At the suggestion of Goode, the group discusses the question whether Illustrations 7 and 8 could be replaced or supplemented by hypothetical cases that involve the commercially important transfer of intangible assets such as shares in a company. However, such a modification proves to be impossible if Illustrations 7 and 8 are to illustrate the comment on the allocation of risk: it seems unlikely to envisage a comparable event of destruction or deterioration in the case of a share purchase agreement. The group therefore agrees to retain both illustrations in their present state and only slightly to modify Illustration 7 which should involve a sale from manufacturer A to company B.

36. Concerning Illustration 8, Gabriel asks for a clarification that the car has not been used by the buyer after the transfer. Had the car been used, the hypothetical case would not reflect how the case would come out in court because a court would factor in the value of the use and not grant the buyer repayment of the full purchase price.

37. Zimmermann explains that this would not be the solution under the PICC. In accordance with the decisions taken by the entire working group, the proposed rules on restitution do not take a stand on the question of benefits (cf. Comment 6). Hence, the value of the use would arguably not be deducted under the PICC and it would seem dangerous to amend Illustration 8 in a way that could suggest the opposite. However, in order to avoid confusion on the part of users who – based on their national legal systems – would expect a deduction, the group agrees to replace the word "subsequently" in the first line of Illustration 8 by the word "then".

38. Bonell reminds the group that so far the use of italics has been avoided in the PICC, and that this rule should also be adhered to in the current project. Therefore, the words "before" and "after" in the second paragraph on p. 9 will not be put in italics.

39. At the request of Bonell, the words "force majeure" on p. 9 will be deleted because it is sufficient to refer to the number of the article.

40. In line 4 of Illustration 9, the word "totally" will be inserted before "destroyed" as Gabriel suggests this clarification may be necessary to avoid misunderstandings.

41. Prompted by Goode to explain why Art. 7.3.6 (2) does not apply in Illustration 9, Zimmermann remarks that Art. 7.3.6 (2) and (3) do apply only if impossibility arises before termination. As Bonell confirms, the PICC – unlike the CISG – do not restrict termination even if restitution in kind is impossible but instead provide that the value of the performance received has to be given back. In order to address questions by the working group about impossibility after termination, Zimmermann has included Illustration 9. This example is to illustrate that after termination it is not Art. 7.3.6 (2) but the normal rules on non-performance that apply: termination causes an obligation to return the performance received; at the moment this obligation becomes impossible or the obligor fails to fulfil his obligations, the existing rules on non-performance govern the case. These rules include the provision on force majeure in Art. 7.1.7.

42. Goode draws attention to the fact that the definition of “non-performance” in Art. 7.1.1 speaks of an obligation “under the contract” and it could be doubtful whether the obligation to make restitution in kind is an obligation “under the contract”. However, Zimmermann and Bonell point out that this concerns mainly a question of qualification that has already been discussed at length in previous meetings and is now settled. Even if one could argue that the obligation is not an obligation under the contract *stricto sensu* it should be treated thus. This would indeed be the approach to be found, for instance, in German law.

43. No other objections are raised to Comment 4.

f) Comment 5

44. Zimmermann explains that he has changed Illustration 10 to conform with a suggestion at a previous meeting to include the example of the sale of a race horse.

45. At the suggestion of Goode, Illustration 10 will – like some other illustrations – include a reference to damages because many readers will also have this remedy in mind. It is agreed that a sentence to this effect (“There may also be a right to damages under Art. ...”) will be added to the illustration.

46. Gabriel remarks that there may have been other expenses than just feeding the horse. It is agreed to modify Illustration 10 to read: “... that he has incurred in feeding and caring for the horse”.

47. Fauvarque-Cosson is surprised that the word “unwound” is used in this comment for the first time. As Zimmermann points out, this terminology derives from the earlier conception of the draft as a separate chapter on the unwinding of failed contracts and appears to be suitable

here because unwinding comes after termination. However, the group feels that this is merely a matter of language and that “is unwound” should be replaced by “has been terminated” since this replacement will be easier to understand and translate for lawyers from a number of jurisdictions including France and Italy.

48. The group agrees to replace “appears to be” in line 2 by “is”.

49. No other objections are raised to Comment 5.

g) Comment 6

50. No changes have been made to Comment 6.

51. No objections are raised.

h) Comment 7

52. No changes have been made to Comment 7.

53. No objections are raised.

Article 7.3.7

a) Black-letter rule

54. Zimmermann points out that – apart from changing the number and the heading of the article – he has added a second paragraph as a result of the discussion in Rome that goes back to a suggestion by Fontaine. However, he raises the question whether the reference should be to paragraphs (2) to (4) of Art. 7.3.6 or whether the reference should also cover paragraph (1) of Art. 7.3.6. This could, for instance, be necessary to capture that restitution has to be made concurrently.

55. The group decides that Art. 7.3.7 (2) should read: “As far as a restitution has to be made, the rules of Art. 7.3.6 apply.”

b) Comment 1

56. The group decides to rephrase the last sentence of Illustration 2: “... together with whatever damages for breach he has sustained ...”. Although Goode thinks that the existing reference to damages in Illustration 2 is too vague as damages would most likely represent the present value of the future rental, Bonell points out that it has so far been the policy of the

working group not to be too specific about damages in the comments on restitution and the reference therefore should be generic.

57. In reply to a question by Fauvarque-Cosson, Fontaine and Bonell remark that the concept of an indivisible contract used in Comment 1 (text accompanying Illustration 4) is well known to the PICC.

58. A linguistic change will be made in line 4 of Comment 1: “(e.g. equipment leases) and contracts for services (e.g. involving distributorship, ...”.

59. No other objections are raised to Comment 1.

c) Comment 2

60. No changes have been made to Comment 2.

61. No objections are raised to Comment 2.

Article 3.18

a) Black-letter rule

62. Apart from the changed number and heading, no changes have been made to the black-letter rule.

63. No objections are raised.

b) Comment 1

64. Zimmermann explains that he had changed Illustration 1 after the meeting in Rome, and is now willing to change it again to the sale of shares in conformity with the newly adopted Illustration 1 to Art. 7.3.6 (supra no. 12.) to deal with the “fraudulent misstatement as to the profits the company was earning”. The group agrees with the suggested change.

65. No other objections are raised.

c) Comment 2

66. Zimmermann points out that he has added the words “in kind” to the heading of Comment 2.

67. No objections are raised.

68. In the last sentence of Illustration 2 the word “house” will have to be replaced by “factory”.

69. In reply to a question by Goode why B in Illustration 3 is not excused under Art. 7.1.7 PICC, Zimmermann points out that the distinction discussed at length in the context of termination also applies here: Art. 7.1.7 PICC could apply if the goods were destroyed after B had avoided the contract. In Illustration 3, however, the ship has sunk before avoidance. The illustration thus emphasizes that B can still avoid the contract even if restitution in kind is inappropriate.

70. Bonell suggests that this clear distinction should also appear here. Although Zimmermann thinks that it does not come up with the same vigour in the context of avoidance, he will be happy to add a clarification either in the comment or at the end of Illustration 3.

71. Gabriel wonders whether the example in Illustration 3 is really one of inappropriateness since hand-woven carpets will most likely be destroyed by the water, rendering restitution in kind not only inappropriate but impossible. The group agrees that this inference should be avoided and therefore – although reference to hand-woven carpets goes back to an intervention at a previous plenary meeting – the object of sale should be a collection of gold coins.

72. The wording of the fourth sentence in Illustration 3 will be changed as follows: “B subsequently discovers the fraud and avoids the contract.”

73. No other objections are raised.

d) Comment 3

74. In Illustration 5, the group agrees to delete the words “an employee of” because this complication does not add anything to the illustration.

75. Zimmermann raises the question whether the group thinks that Illustration 5 would also work if the ground for avoidance were not fraud but a relevant mistake. The group believes that this is indeed the case.

76. In Illustration 6, Zimmermann has replaced – at a suggestion prompted to him in the plenary meeting – reference to a car as the object of sale by reference to a caterpillar. Since Gabriel doubts that all readers will immediately know what a caterpillar is, the illustration will be modified again. The beginning of the illustration should read: “Company A sells and transfers earth-moving equipment to company B. It is subsequently destroyed ...”. The last

sentence should read: "... has to make an allowance for the value of the earth-moving equipment".

77. Moreover, Zimmermann has replaced the tornado in the previous draft of Illustration 6 by a hurricane.

78. No objections are raised.

79. The group agrees on a number of linguistic changes: (i) The expression "make good" will be replaced by "pay" throughout the draft. (ii) The reference to a relevant mistake in Illustration 6 should mention the relevant provision in the PICC: "The purchaser avoids the contract because of a relevant mistake under Art. 3.5." (iii) The reference "Art. 3.8 PICC (fraud)" in the last paragraph of Comment 3 should read "Art. 3.8 of these Principles". (iv) The expression "wants to make sure" will be replaced by "merely aims at". (v) The last sentence of Comment 3 will be deleted.

80. No other objections are raised.

e) Comment 4

81. Illustration 8 has been changed by Zimmermann to take up the suggestion of including an example dealing with a race horse.

82. At the suggestion of Fauvarque-Cosson, Zimmermann is asked to modify Illustration 8 in accordance with the decisions on the corresponding Illustration 10 to Art. 7.3.6 (supra nos. 45. f.).

83. In line 2 of Comment 4, the word "him" will be replaced by "the recipient".

84. No other objections are raised.

f) Comment 5

85. No changes have been made to Comment 5.

86. No objections are raised.

Reference in Art. 6.2.3

87. Zimmermann points out that so far there has been no decision on whether Art. 6.2.3 on the effects of hardship should be amended by a reference to the new rules on restitution. The question has come up in the context of the restructuring of the draft on restitution at the last plenary meeting. Zimmermann thinks that it is not advisable to amend Art. 6.2.3 since a judge

who terminates the contract will arguably make the appropriate orders for restitution according to paragraph (4) of this provision.

88. Bonell agrees with this reading of Art. 6.2.3 (4) and reminds the group that Art. 6.2.3 has deliberately been drafted in a flexible way. Fontaine emphasizes that this interpretation is confirmed by Comment 7 to Art. 6.2.3.

89. The group agrees that no amendment should be made to Art. 6.2.3.

General stylistic remarks

90. A few typing slips will be corrected throughout the document. In particular, references to “Art. 1” or “Art. 2” that stem from previous drafts for a coherent chapter on restitution will be replaced by references to “Art. 7.3.6” or “Art. 7.3.7” respectively, or, as the case may be, by “the present article”.

91. Gabriel enquires about the rules for the use of pronouns in comments and illustrations. Bonell explains that the wording of the PICC intends to be gender-neutral. Apart from this general rule, one has to distinguish between the text of the comments and illustrations. As far as the text of the comments is concerned, the PICC do not follow a hard-and-fast rule and it is left to the drafting from case to case whether to use a pronoun or write “this party”/“that party” or repeat the name/role of the party in question. Illustrations, on the other hand, ought to be as clear and specific as possible. It is therefore agreed that all pronouns in the illustrations given in the draft under discussion will be replaced by the respective names of the parties or their roles (e.g. seller, purchaser).

92. Bonell recalls that references in the comments to other articles within the PICC are always to be accompanied by a word or an expression introducing the reference. Accordingly, Zimmermann will insert the word “see” in front of all references in brackets, e.g. “(see Art. 7.3.5 (2))”.

93. As the plural of “Euro” is in fact “Euro”, no change in the draft is required.

Further illustrations

94. Goode announces that he will submit additional examples taken from commercial practice to Zimmermann by e-mail for consideration. Zimmermann thanks him for this offer and will be happy to discuss and include examples that address the specific points that the comments want to make.

Working Group for the preparation of
Principles of International Commercial Contracts (3rd)
Drafting Committee
Hamburg, 25-28 January 2010

**Item 3:
Illegality / Infringement of Mandatory Rules**

(Unidroit 2009 Study L – WP.25)
Reporter: Michael Furmston

Minutes

Present:

Prof. Joachim Bonell
Prof. Bénédicte Fauvarque-Cosson
Prof. Marcel Fontaine
Prof. Herny Gabriel
Prof. Roy Goode
Prof. Reinhard Zimmermann

Keeper of the Minutes: Dr. Walter Doralt

Monday January 25, 17:30

1. Bonell opens the discussion and sums up the previous developments regarding WP 25 2010, referring to the concerns raised on the black letter rules of the draft article 1 (violation of worldwide recognised fundamental principles). It had been decided to delete the suggested rules on illegality, so as not to have a reference to contracts in violation of fundamental principles; the article dealing with contracts violating mandatory rules (article 1.4.) had been considered as sufficient (covering the most important situations envisaged by article 1 and through a wide interpretation also public policy issues that were unwritten principles). The compromise had therefore been to broaden article 3 and assume a broader understanding of article 1.4. The black letter rules of article 1 and article 2 had been adapted by the working group and now the comments have to be discussed. However, comments on article 1.4 should be examined first (WP 24, 2009) and once these are approved, the discussion on WP 25 will be much easier.

2. Bonell then opens the discussion on article 1.4 (WP 24, 2009) and explains comment 1 only has “cosmetic” changes, comment 2 contains some new issues, adapting it to the “new” understanding of the rule. Bonell also explains the differentiations that have to be made between cases brought to the attention of courts and cases in arbitration, as it has

been before. A reference has been included to transnational public policy, which gives arbitration more flexibility than courts in this respect.

3. Goode, Fauvarque-Cosson and Gabriel would suggest to rephrase the last sentence in 3 (page 4). It is agreed, that the sentence will now be phrased as follows: "...Moreover, the mandatory rules of the forum State, and possibly of other countries, will also apply, provided the mandatory rules claim application..."

Tuesday January 26, 9:15

4. Bonell opens discussion on WP 25. The black letter rules have been agreed upon in Rome. Therefore, the focus will be on the comments.

5. Zimmermann discusses comment 3 and suggests adding another example to be added for comment 3. Goode is concerned about the illustrations of comment 3 as they contain cases that he finds rather self evident. Gabriel has a similar concern. Zimmermann suggests to keep only illustration 1 and 2, but to leave out illustration 3 and 4. Goode would suggest dealing more into the question of the effects this has on the contract. Zimmermann suggests adding in the illustration: "for the effects see xx". This is accepted.

6. Bonell comes back to article 1 illustration 3 and 4: should they be deleted as Zimmermann suggested? Goode thinks these are not necessary. Fontaine suggests using the facts of illustration 3 and 4 somewhere else. This is accepted and the two illustrations on page 4 will be deleted.

7. Gabriel mentions that the conflict of law should be dealt with in the illustrations, to first decide which law is applicable for example in illustration 1; Goode replies that in the illustration, corruption is illegal in both countries, therefore it does not matter which law is applicable.

8. Gabriel suggests that in comment 1 first sentence "unconstrained" should be changed into "without constraints". This is accepted.

9. Bonell suggests including more currencies in the illustrations, for instance Chinese and Japanese currencies. This is accepted.

10. Goode points to illustration 5 (page 5) and asks if the result is right. Bonell replies the issue has been discussed at length. Zimmermann asks whether there is a difference

between the contract between the retailer knowing about the child labour and between contracts that later in the sales chain are about the sale of those goods. Gabriel thinks that while, universally, these contracts are against public policy, the issue is ignored in practice. Fontaine thinks the example is relevant, but that it is not a problem of the group to deal with the consumer contract implication. Fauvarque-Cosson thinks that from a criminal law point of view it would even imply consequences for consumers. Fontaine mentions that these consequences, all agree upon them, but they are not an issue to be dealt with here.

11. Goode goes to illustration 7 and asks whether it makes a difference if the principal is informed about the fee being paid to the agent in terms of the example. Bonell replies the emphasis in the example on “ought to have known” covering the case. Goode suggests to leave out the knowledge D indicated through “...D, which is aware of this payment...”. Zimmermann suggests looking at it from the point of view of what the contract is supposed to illustrate; for illustration 8, it deals with infringement by the purpose of the contract, but not so in illustration 7. Goode goes back to the example and says the commission payment to an agent is not per se illegal. Gabriel replies the example clearly states it is a bribe. Bonell says a commission in that context would always be against current practice on public procurement laws. Zimmermann asks whether the illustration should perhaps be left out. Bonell thinks it is necessary to have an example for this situation. Fontaine agrees that this illustration is of central importance and should stay in. It could be rephrased if necessary. Gabriel agrees and suggests clarifications on why it is an infringement. Bonell says it should include: “The contract violates the statutory rules by the way in which it was formed.” This is accepted.

12. Zimmermann suggests that illustration 8 should mention: “The contract violates the statutory rules by its purpose.” This is accepted.

13. Gabriel suggests adding in example 5 “manufactured by child labourers”. This is accepted.

14. Goode suggests in example 5 “Sales” to be replaced by “Manufacturing”. This is agreed.

15. In illustration 11 a change is to be made, to “The achievement of the purpose...”.

16. Zimmermann points to illustration 14 and the issue of partial invalidity and says there should either be a rule on it, unless that is out of the question because of previous discussions in Rome; otherwise, there should not be an example on it, as there would be no rule to illustrate. Goode mentions the PECL also have a specific rule on partial invalidity and finds it unfortunate not to have a rule. Zimmermann points to the minutes of the Rome meeting and says no formal decision had been taken there. Fauvarque-Cosson, Goode and Zimmermann suggest providing a rule which could be accepted or rejected in Rome. Goode says that the suggestion provided by Zimmermann should be used for this purpose. Bonell is reluctant to change the situation now. Goode suggests adding in Article 1 (3) the discussed criterion of purpose as (h) and partial invalidity as (i). Bonell is reluctant to change the rule by adding (h) and (i). It is agreed, however, to add those points as additional illustrations, which will also indicate that the list in Article 1 (3) is not exhaustive.

17. Goode suggests including another heading after e), on the knowledge of the improper purpose. Gabriel suggests to put it at the end of the comments and to include a statement saying the criteria are not exhaustive and to include as a criterion “whether the other party was aware of the purpose”. Bonell suggests amending illustration 8 in a way, so that the other party is not aware of the unlawful purpose, then the contract would be OK – however, there would be no infringement. Bonell suggests adding another illustration as a number 18 based on illustration 9, but in that example having the goods already delivered to terrorists. Goode asks what happens if only one party has the plan to use the goods for illegal purposes, and the other party does not know about it; what are the consequences for the enforcement contract? Bonell states that the mere motivation of one party to use the goods for illegal purposes while the other party does not know about it, is irrelevant. Zimmermann agrees. Goode believes the person wanting to use the goods for illegal purposes could, for instance, not have a claim if they were defective (e.g. the semtex has been damaged and does not work). A lengthy discussion follows in which, at the end, Bonell, Fontaine, Fauvarque-Cosson, Zimmermann and Gabriel disagree with Goode. Zimmermann suggests leaving illustration 8 as it is and making up a different example in the section on effects. It is agreed to leave illustration 8 as it is. Bonell suggests not dealing with this matter and moving, alternatively to make a different example. Fontaine points to e) on page 8 and suggests elaborating it there. Goode suggests a distinct heading mentioning that the “innocent” party can enforce the contract and simply not mentioning the issue of whether the other party can enforce.

18. Fontaine suggests to mention arbitration and to have a cross reference to Article 1.8 in g). This is accepted.

19. Zimmermann points to illustration 13 in relation to illustration 16. Bonell thinks the parties have no remedies in that situation and this even relates to restitution. Zimmermann suggests finding an example in which the purpose of the rule will require that the parties have a remedy, and one in which they do not; another example under f) would be useful.

20. Zimmermann suggests placing illustration 16 next to illustration 13. This is accepted. As a consequence, Goode asks for another illustration to be provided under f). This is accepted.

21. Goode suggests as a third criterion the repentance of a planned illegal purpose before it is carried out, therefore giving a right to a remedy. This is accepted.

22. Bonell opens the discussion on article 2. Goode suggests that article 2 should start with “whether restitution will be granted depends on whether the infringed rule expressly provides so” and then move on to the current content. Bonell points to comment 4 of article 1. Goode suggests adding it in the commentary. Fauvarque-Cosson agrees and asks for a clarification on the situation in which the mandatory rules say something about whether or not restitution is to be granted; should these national mandatory rules then be applicable or not? Fontaine suggests to elaborate this in the comments on article 2 and to refer to article (1) 1. This is agreed.

23. Zimmermann wants to discuss the result of illustration 1, where restitution is granted and the contract is treated as if it were valid. Zimmermann suggests a different solution should be adopted in the light of the fight against corruption, making it clear to the parties, that if they engage in corruption, they would risk not having a claim. Goode and Gabriel have doubts about that suggestion and find it unequitable not to grant any payment for work already performed; also, Goode is concerned that one party could manipulate to outcome to its advantage by waiting until the project is completed or close to completion and only then refusing payment because of corruption, thus leading to a windfall profit of a power plant at no costs. Bonell also disagrees with Zimmermann. Therefore, illustration 1 will remain as it is.

24. Zimmermann asks why in illustration 2 a payment would be made in the same amount as under the contract. Bonell and Goode explain the payment will only cover out of pocket

expenses, ie only the incurred costs in providing the services. A clarification is agreed upon and will be added. Gabriel has difficulties whether this claim for costs is a damages claim or restitution and points to the different approach in illustration 1. Goode mentions that illustration 1 deals with corruption and the payment includes the partial price of the power plant, while illustration 2 deals with a less serious case and there, only a payment for the expenses is included. Therefore, a change will be made in illustration 2 as to granting a payment corresponding to the value (“a right to recover the value”).

25. Zimmermann points to illustration 4 where restitution is excluded. It should mention, whether the animals have already been paid for. Gabriel suggests adding, at the end of illustration 2, “for whatever performances that have been exchanged”. This amendment is accepted.

26. A further amendment to illustration 4 will be made: “A should not be granted a restitutionary remedy.” Zimmermann, as a consequence, points to the difference in result compared to illustration 1, where, because of equity considerations, it was said that a reasonable payment needed to be made. Zimmermann and Gabriel suggest adding a sentence in the illustration why payments are granted in 1 and why not in 4. No decision to add those explanations or to change those inconsistencies is taken.

27. Bonell opens the discussion on WP 25 Add. (December 2009). Zimmermann suggests not to plan a separate chapter but to add the contents to chapter 3 because it is a question of validity. It is agreed to build those rules into chapter 3. Bonell sums up that a separate section in chapter 3 will be made and discusses what title the new section should have. Bonell suggests using the title “Illegality”. Goode suggests “Illegality and Mandatory Rules”. Bonell and Zimmermann prefer using “Illegality” and explaining in the two paragraphs that follow what is meant, just as done in the PECL. It is agreed to call this subsection in chapter 3 “Illegality”.

28. Bonell opens the discussion of this paper on page 4 and on the points he raised under 2.3. Article 3.1 will be amended because of illegality. Bonell asks if lack of capacity needs to be in that article. Gabriel wants to keep it in because he finds capacity an important issue in international commercial contracts. Bonell thinks it could be part of a general section or it could be taken out altogether.

29. Goode suggests having examples without the breach of criminal law and without the breach of administrative law but nevertheless a breach of mandatory law. It is agreed to

include an additional illustration under 3 of article 1 (page 4) and to include the possibility of those infringements in the comments on article 1.

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30. Bonell opens the discussion on the “scope provision”. Fontaine, Fauvarque-Cosson, Gabriel and Goode think there should be a rule on scope. Zimmermann believes a rule on scope would not be necessary. Zimmermann and Fontaine think it should in any event be moved to the “formation chapter”. Gabriel would rather not move it as it has always been where it is now. Zimmermann points out that in English textbooks it is dealt with under formation. Bonell sums up that it will not be moved into the formation chapter and asks where in chapter 3 it should stay – in the general introductory section which includes the scope provision, in the section with the defects of consent or in the section on illegality. Fauvarque-Cosson, Fontaine, Gabriel and Bonell all agree it has to be in section 1 of chapter 3. Current article 3.3 would also have to go into that section.

31. Bonell moves to the discussion of article 3.19 and points to the example of II.-7:215 of the CFR. Goode, Fontaine and Fauvarque-Cosson point to a situation in which the parties would deviate from the mandatory rules in so far as they perhaps just opt into the provisions that they like. The mandatory rules, as Bonell explains, are, however, mandatory when a choice of law is made and not just an incorporation of certain rules. Bonell asks if a reference to illegality should be made. Gabriel thinks illegality should be mandatory and included. Fauvarque-Cosson disagrees. Fontaine points to article 1 and says that remedies can only be exercised under some restraints. Goode asks whether every element of the mandatory rules should be binding – article 1 and article 2 should be mandatory according to Bonell. Fauvarque-Cosson expresses doubts about too many mandatory provisions, as contracting parties usually do not like them. Goode points to the question about the consequences of the mandatory rules and asks why the parties should not be able to adjust the effects of those rules. Gabriel, Fontaine, Zimmermann and Bonell are in favour of making the mandatory rules indeed mandatory. Bonell asks how 3.19 should then be phrased. Fauvarque-Cosson asks about the possibility of rephrasing it and to structure it inversely from how it is currently structure. Zimmermann agrees and underlines that it would be better to express what is mandatory instead of saying what is not: “The rules on fraud, threat and gross disparity are mandatory.” This is accepted. Bonell suggests 3.19 will remain where it is at the end of section 2 in chapter 3.

32. Bonell comes back to the point of titles of the section and asks what the title of the new section 2 should be (presently the provisions dealing with defects of consent). Zimmermann suggests “defect of consent”. This is accepted.

33. Bonell asks about the overall title of chapter 3 and says it could remain validity, or invalidity as in the CFR. Zimmermann suggests validity. This is accepted.

34. Gabriel suggests the defects of consent in the comments are referred to as “failure of assent” as a common law reader would associate it with the topic. Goode and Zimmermann would rather leave it at consent.

35. Bonell opens the discussion on the present 3.17 and his suggestion on WP 25 Add page 4. It is accepted to keep it as one paragraph.

36. Bonell moves to point 4 of his suggestions in WP 25 Add page 4. Goode objects to the rule and suggests amending it so as to only grant damages when the contract is avoided. This is accepted. Article 3.18 will be rephrased along the lines of Art. 4.417 PECL.

37. Bonell asks if a damages claim should be made for illegality along the lines of II.-7:304 CFR. Fauvarque-Cosson agrees. Bonell thinks there should be no provision for damages as this situation is already covered by the provision saying remedies are available as under the contract. Zimmermann thinks it makes little sense to be very technical here, as generally this is not done regarding the remedies and that it should be spelt out more clearly in the comments. Bonell prefers not to touch upon the issue.

38. Zimmermann asks about the numbering and whether the numbering will be shifted for the following rules. It is agreed that the numbering will change to 3.1.1, 3.1.2 and 3.2.1 etc. Bonell will however first present the suggestions in Rome and then the numbering will be adapted if need be.

39. Zimmermann asks about where the restitutions provision is to go – before or after the damages provision. It is accepted that a new 3.18 (restitution) and a new 3.19 (damages) will be made, so that as a consequence the “old” 3.19 will then become the new 3.20.

**Working Group for the preparation of
Principles of International Commercial Contracts (3rd)
Drafting Committee
Third session
Hamburg, 25-28 January 2010**

**Session 2
Tuesday, January 26, 4 p.m.**

Present:

Prof. Michael Joachim Bonell
Prof. Bénédicte Fauvarque-Cosson
Prof. Marcel Fontaine
Prof. Henry Gabriel
Prof. Roy Goode
Prof. Reinhard Zimmermann

Keeper of the Minutes: Dr. Jan Peter Schmidt

Item 4: Plurality of Obligors and/or Obligees (UNIDROIT 2010 - Study L – WP. 26)

1. Fontaine introduces item 4 by saying that the revised version of the draft contains only minor changes, in the majority concerning the comments and illustrations. However, as regards articles 1.8 and 2.2 there were considerable discussions in Rome also on matters of substance.

2. **Article 1.1:** The following linguistic amendments are agreed upon:

- to insert the words “which is” before “the more common situation” in line 3 of the introduction to the comments;
- to substitute the words “stem out of” by “arise from” or “arise out of” in the last paragraph of Comment 2;
- to delete the word “and” in Illustration 4 line 1;
- to substitute the word “ruled” by “governed” in the last paragraph of Comment 2;
- to add the words “of obligations” to the heading of Comment 3.

3. As regards the last sentence of Comment 4, Zimmermann suggests to delete it, as the treatment of “joint” or “communal” obligations is actually not clear. Goode is not sure whether the example in Illustration 4 is really a case of co-obligors, as it could also be a case of suretyship. It is agreed to rephrase the second sentence in the following way: “Parent Company A agrees to bind itself together with Company A for reimbursement of the loan.”

4. Goode asks whether the order of the comments is logical and whether Comment 3 should not be moved to Comment 1. Zimmermann replies that the comments follow the order of the black letter rules, the decisive element being the “same obligation”. Fontaine explains that Illustrations 1-4 are not prejudging the question whether the liability of the co-obligors is joint and several or separate. Goode wonders whether the case of a syndicate loan should not be given as an example for separate liability. Bonell points out that this purpose is served by Illustration 2 of article 1.2. with the example of co-insurers. Fontaine explains that the chosen order seems logical: first the concept of co-obligors is explained, and then question is dealt

with whether the liability is joint and several or separate. Bonell agrees. Zimmermann suggests adding a sentence to Comment 3 which says that in any of the illustrations the liability could be joint and several or separate, with a reference to article 1.2. Bonell wonders whether this should not even be stated already in Comment 1, but leaves this matter for Fontaine to decide.

4. **Article 1.2:** Zimmermann wonders whether in the black letter rule the word “bound” should not be replaced by “liable”, but Fontaine denies, saying that this has been discussed before. He explains that in the black letter rule the words “the same” have been deleted once, in order to avoid their repetition. On Gabriel’s suggestion it is agreed to substitute the words “will usually” by “may” in Illustration 2 and the words “is to cover” by “may be to cover” in Illustration 3, as it is actually not clear what the commercial usages are.

5. **Article 1.3:** It is agreed that in Illustration 2 it should be spelled out that after the first payment X can still claim the remaining USD 15.000 also from A and that after the second payment he can still claim the remaining USD 5.000 also from A and B.

6. **Article 1.4.:** Fontaine explains that Illustration 2 is new and that he decided to include it after there had been a great discussion in Rome. The question debated was whether B and C still have to pay the full price after A has asserted his right to avoid the contract on the basis of his mistake. Fontaine argues that two different stages need to be distinguished: 1) before the avoidance only A make invoke his mistake as defence; 2) after the avoidance B and C are also discharged. The opposite result, i.e. that B and C would have to pay the full price, was regarded as “shocking” in Rome. Goode objects and says that in this case B and C should still be bound. Bonell wonders whether it should really make a difference whether the contract has already been avoided or not. Goode says that B and C should be liable in any case, as the creditor is not getting any benefit from A’s avoidance. Fontaine disagrees, saying that the contract has been affected in its substance. Zimmermann says that this is not a case of partial avoidance under article 3.16, as not the individual terms of a contract are affected by the avoidance, but the parties. Fontaine disagrees. Gabriel also sees the contract affected as a whole. Goode wonders whether it matters if X knew of A’s mistake. Bonell replies that under the Principles in general a mistake only gives rise to a right of avoidance if the other party knew it. Goode says that in this case it might be unjust to put the burden on B and C. In any event he regards the example of mistake as too complicated and suggests using the example of a warranty that was just given to A, but not to B and C. It is agreed to leave Illustration 2 out and to replace the example of mistake in Illustration 1 by a warranty as a personal defence. To Fontaine’s concern that the problem dealt with in Illustration 2 then remains unsolved, Zimmermann answers that it is no problem, as the Principles in general do not attempt to provide answers for all eventualities.

7. Zimmermann asks whether it would not be more logical to deal first with specific defences, such as prescription, and only then proceed to the general rule. Bonell replies that this has already been discussed. Fontaine adds that the order is logical, as first the availability of defences are dealt with and then their effects.

8. Zimmermann puts forward the question how the term “defences” is exactly used and whether it also includes defences that need to be exercised actively, such as a right of avoidance. In German terminology the question is whether “defences” only include “Einreden” or also “Gestaltungrechte” that have not yet been exercised. It is agreed that “defences” is to be understood in a broad, comprehensive way.

9. Fontaine asks whether in Illustration 3 the term “illegal” is adequate. Goode answers that illegality not necessarily leads to the nullification of the contract. Fauvarque-Cosson proposes to just put “prohibiting the purchase”. Gabriel points out that only the performance of the contract has *become* illegal. It is then agreed to replace the words “rendering the purchase illegal” by “rendering performance unlawful”, as the term “illegal” is avoided also in other contexts.

10. **Article 1.5:** Zimmermann says that paragraph 2 of Comment 3 gives the impression that merger of obligations is the only example, although in paragraph 1 it is stated that there are other cases, too. Fontaine agrees and proposes to delete paragraph 2. Zimmermann wonders whether article 1.5 should apply by analogy to the other circumstances referred to in Comment 3. He also asks what other cases there are except merger. Fontaine replies that they need to be thought about. Finally, it is agreed that Comment 3 should either be deleted or moved to another place. Zimmermann and Goode point out that in any event the word “other” in line 1 of Comment 3 needs to be deleted, as it is not related to the context.

11. **Article 1.6:** Fontaine explains that the rules on the effects of release and settlement have been merged into one provision. Goode and Zimmermann suggest to replace the words “have no more” in article 1.6 (2) by “cease to have” or “have no longer”. Zimmermann asks whether everyone agrees with Illustration 6. Fontaine explains that it was proposed by the members of the Working Group Brödermann and Chappuis. Zimmermann says that usually the Principles do not deal with exceptional cases and Bonell adds that the principle of good faith and fair dealing might theoretically interfere everywhere. Goode and Gabriel say that they are not totally convinced by the example anyway. It is then agreed to delete Illustration 6 and also the sentence that introduces it.

12. **Article 1.7:** At Zimmermann’s request, Fontaine explains that between article 1.7 (1) and 1.7 (2), which extends the effects of suspension, there is only an apparent contradiction, since different effects are concerned, as explained in Comment 2. Bonell and Fauvarque-Cosson suggest rephrasing this part in way that it sounds less defensive, by starting the word “Indeed”, for example. As regards linguistic amendments in Comment 2, it is agreed:

- to replace “corresponds to a different approach” by “adopts a different approach”;
- to replace “the solution retained” by “the solution adopted”;
- to replace “of avoiding the necessity to” by “saving the expenses involved at initiating”.

13. Zimmermann asks whether it is actually right to suspend the limitation period also to the disadvantage of the other co-obligors; their interests need to be taken into account, too. Fauvarque-Cosson answers that this solution has the general advantage of reducing litigation costs, as it is not necessary to initiate proceedings against all co-obligors. Goode and Gabriel argue that the rule in article 1.7 (2) is clearly wrong: if X wants to avoid prescription, he needs to sue all co-obligors. Fontaine, Fauvarque-Cosson and Bonell disagree. Bonell says that the decision taken in Rome concerning article 1.7 (2) cannot be reverted.

14. **Article 1.8:** Fontaine explains that during the last meeting in Rome, quite surprisingly, many issues of the rule were discussed very controversially. Instead of two alternative versions that were requested he now is presenting an amended version of the preceding text. Further research on the matter has shown that many civil codes do not deal with the problem at all. The solution adopted by the PECL and the DCFR, that is, to give no effect to the judgement in relation to the other co-obligors, is rather isolated. The opposite solution could be found in the Spanish Civil Code, but it seems to have been abrogated in 2000. The solution of the BGB allows for differentiations. The new proposal in article 1.8 (2) is inspired by the

provisions to be found in the Civil Codes of Italy and Portugal. According to these, the other co-obligors may choose whether the judgement has effect for them or not, except if the decision is based on grounds personal to the co-obligor. The new proposal is explained in Comment 3 and Illustration 4.

15. Goode says that it should be made clear that the rule does not only concern the size of the obligation, but also the defences. Hence, in Illustration 2 Company B is not bound as regards the defectiveness of the performance. Zimmermann asks why an exception is only made for the debtors and not also for the creditor. Fontaine and Gabriel respond that the creditor has the possibility to sue all co-obligors. Bonell points out that as regards personal defences, for instance a warranty, the proposal departs from the Italian model and wonders whether this is right. Zimmermann agrees that the Italian solution should be adopted wholeheartedly. Besides, he points out that the proposal clashes with the policy that was adopted as regards the extension of the suspension of limitation periods (article 1.7 (2)). It is agreed to add the exception for personal defences to article 1.8 (2) and to put the rule in square brackets.

17. Several linguistic amendments are agreed upon:

- heading of Comment 1: to replace “of” by “on”;
- Illustration 1: to replace “the court condemns” by “the court orders”;
- Illustration 3, sentence 3: to replace the first “B” by “A”;
- Comment 3, sentence 1: to replace “find their interest in relying” by “find it in their interest to rely”;
- article 1.8 (2) and Comment 3 sentence 2: to replace “avail themselves” by “rely on such a decision”;

18. Bonell ends session 2 (5:35 p.m.)

Session 3
Wednesday, 27 January, 9:05 a.m.

Present:

Prof. Michael Joachim Bonell
Prof. Bénédicte Fauvarque-Cosson
Prof. Marcel Fontaine
Prof. Henry Gabriel
Prof. Roy Goode
Prof. Reinhard Zimmermann

Keeper of the Minutes: Dr. Jan Peter Schmidt

Item 4: Plurality of Obligors and/or Obligees (continuation)

1. Bonell opens the session, thanking Zimmermann for the evening at the opera.

2. **Article 1.9:** On Gabriel's proposals it is agreed to replace "as between themselves" by "as among themselves" in the black letter rule, as "between" only refers to the situation of two parties. In Illustration 2 it is agreed to not to repeat the facts of Illustration 1, but to introduce the changes by the word "except...", in accordance with the technique usually employed. In any case it would not be Bank "W" but Band "Y". Goode wonders whether in Illustration 2 the allocation of 75% to 25% in the acquisition would necessarily lead to the same percentage in the liability as among A and B. Thereupon it is agreed to change the formulation using the words "presumed" or "there will be a presumption".

4. Goode and Gabriel wonder whether there should not be a straightforward example of suretyship, as it might make things clearer. It is agreed to add an example of suretyship in the Comments to article 1.2 as a case where "circumstances indicate otherwise", for instance a demand guarantee ("Bürgschaft auf erstes Anfordern"), and to include a cross-reference in the comments to article 1.9. On Gabriel's request it is agreed to make Illustration 3 more explicit by including the phrase: "As between the two Companies, it is understood that B only serves as a guarantor."

5. **Article 1.10:** Fontaine explains that a cross reference to articles 1.6 (2), 1.7 (1) (b) and 1.8 (b) has been added. The following linguistic amendments are agreed upon:

- to start Illustration 1 directly with "Companies A and B ...";
- to replace "acquisition of shares" by "acquisition of stocks" in Illustration 1;
- to replace "A's share in" by "A's share is" in Illustration 3;
- to replace "Bank W" by "Bank X" in Illustration 3.

7. **Art. 1.11:** Goode argues that the rule adopted in article 1.11 (2) is entirely wrong as it might damage the interests of the obligee. Only in case of full performance a co-obligor should have the possibility to recover the excess from all or any other of the other obligors. Bonell replies that this matter has already been extensively discussed and that the black letter rule cannot be changed now, except if it can be shown that the Rapporteur has not fulfilled his task correctly. He encourages Goode to bring up the point in Rome. Gabriel asks if the strong sentiments against the rule could be flagged out in order to streamline the discussion in Rome. Fauvarque-Cosson points out that the discussion is to be found in the minutes. Goode announces that he intends to prepare a special paper on this issue for the Rome meeting.

8. Fontaine explains that the bold letters at the end of Comment 1 were not intended. In Illustration 1 it is agreed to replace the word “guaranteed” by “secured”.

9. **Art. 1.12:** Fontaine explains that he has not followed the suggestion of Widmer and Chappuis to replace “co-obligor” by “obligor” in line 4 of the black letter rule, as this might cause confusion. The others agree. Bonell has doubts whether the last line of the black letter rule might not be formulated in a more elegant manner, but it is decided to leave it as it is.

10. Gabriel and Goode have several doubts about Illustration 1, one concerning the term “know-how licence”, the other relating to the question whether it is really a case of a relevant mistake. It is therefore agreed to change Illustration 1 and to say that Licensor X “undertakes a commitment to guarantee” or “promises” that the technology is fit for A and B.

11. Goode and Gabriel express concerns about the correctness of Illustration 2, as A may have assumed the risk to obtain the import licence. It is agreed to change Illustration 2 and to give a case in which A was induced to enter into the agreement by fraud as an example for a personal defence. Furthermore it is agreed to prepare also an Illustration involving set-off. Fauvarque-Cosson asks whether it needs to be distinguished between personal defence and purely personal defences.

12. **Article 1.13:** No comments are made.

13. **Article 2.1:** Goode wonders why the rules in this section only deal with joint and several claims. Zimmermann and Bonell point out that in Comment 3 of article 2.1 and Comment 3 of article 2.2 separate claims and joint claims are also mentioned.

14. **Article 2.2:** Fontaine explains that the default rule has been the main object of discussions. In the last meeting of the Working Group the presumption was once again changed from separate claims to joint and several claims. Commercial practice seems to be very varied. Joint and several claims are more convenient for the obligor, but the obligees may often be in a position strong enough to achieve a deviation from the default rule. Fontaine states that personally he would prefer to have separate claims as the default rule, even if the Principles do not contain further provisions for this case.

15. Bonell explains that the current solution was especially favoured by the representatives of the so to say less developed legal systems, who argued that joint and several claims were easier to handle for a less sophisticated lawyer and that they put the obligor in a safer position. Fontaine and Zimmermann express their surprise as they regard separate claims as the solution that is easier to handle. Zimmermann emphasizes that clearly the wrong solution has been adopted, as in most cases it is not in accordance with the presumptive will of the parties. The question is whether this point should be discussed now or in Rome. Bonell invites everyone to have another look at the minutes; all the arguments have been presented and it was one of the few matters where there was a clear point of view. He also stresses that the next meeting will be the last one and that there are still many other issues to be discussed. Zimmermann and also Goode (referring to article 1.11 (2)) are asked not to submit special papers, as then endless discussion will be unavoidable. Fauvarque-Cosson asks whether the feelings for article 2.2 were really that strong, as in the minutes this does not show. Bonell confirms what he said earlier. Zimmermann then asks whether it would be a problem if he makes a personal statement in Rome which at least will be recorded in the minutes. Bonell replies that this will not be a problem at all.

16. Upon Gabriel's proposal it is agreed to explain more explicitly in the comments how the default rules works, in order to encourage parties to think about it. Bonell suggests to state even that "parties may be well advised to deviate from the rule." Goode proposes to provide another illustration where "circumstances indicate otherwise", using the example of a bondage debt where each bond-holder has a separate claim.

17. As regards Comment 3, Zimmermann points out that an agent might be appointed in all situations, not just in case of separate claims. In Illustration 6 it is agreed that the word "the" should be inserted at the beginning of line 4.

18. **Article 2.3:** Fontaine explains that in Illustrations 2 and 3 it should be added that the facts are the same as in Illustration 1. Zimmermann points out that article 2.3 (1) is a repetition of article 2.1 (2), and that in the parallel article 1.3 this repetition has deliberately been omitted. After lengthy discussions it is agreed to delete article 2.3 (1) and to adapt article 2.3 (2) to the opening language of article 1.3; also the comments shall be revised correspondingly. As regards Comment 4, Zimmermann asks whether the kind of advice given there was also to be found in other parts of the Principles. Bonell confirms.

21. **Article 2.4:** Fontaine explains that Illustration 3 is new, but as Illustrations 1 and 3 again use mistake as an example, he intends to prepare a revised version, also because the issue of partial avoidance is controversial.

22. Upon Goode's request Fontaine agrees to change Illustration 5 insofar as X can assert his right of set-off only against A, but not against B and C, as it is a personal defence. As regards the effect of judgement, Zimmermann asks whether it is correct that according to the cross-reference in article 2.4 (2) now the creditors have the choice. Fontaine says that he will revise this point in accordance to what was discussed in relation to article 1.8 (2).

24. Goode asks whether in Illustration 6 full or only partial release is meant. The term "release" would suggest a total discharge. Fontaine will make this point clearer. It is then discussed whether in Comment 2 the various defences should be presented in a list at the beginning or treated one after the other. The latter solution is agreed upon, but the defences shall not just be mentioned, but also be briefly explained in a *chapeau*.

26. The following linguistic amendments are agreed upon:

- to replace "engaged into" by "engaged in" in Illustration 1;
- to delete "massive use of" in Illustration 2;
- to delete the cross-reference to the chapter on illegality in Illustration 2;
- to replace "contained" by "contains" in the first line in Comment 2;
- to delete the phrase "Some examples will be given" in the first paragraph of Comment 2, as it does not correspond to the usual style;
- to change the second phrase of Illustration 4 into: "If Company B or C still claim reimbursement, Borrower X may assert that it has fully performed in favour of company A.";
- to begin Illustration 5 with the words "The facts are the same as in illustration 4 ...";
- to insert the words "the right of" before "set-off" in line 3 of Illustration 5;
- to replace the word "of" in line 3 of Illustration 6 by the word "from";
- to rephrase sentence 2 in Illustration 7 in the following way: "The joint and several claims of Companies B and C against X are reduced ...".

27. **Article 2.5:** In the black letter rule of article 2.5 (1) and in line 2 of Comment 1 the word "between" is to be replaced by the word "among" (as done in article 1.9).

28. Finally it is discussed where the chapter on “Plurality of Obligor and/or Obligees” should be placed. Everyone agrees that it is too big to be included in an existing chapter, also, that it should not become Chapter 11, as the chapter on limitation periods should be the last. Zimmermann argues that from a systematic point of view, the chapter under discussion should be placed between Chapters 5 and 6, as it was related most closely to the content of a contract. Bonell and Gabriel reply that the existing structure of the Principles should be changed as little possible, as the 2004 version is now widely distributed and has been translated into many languages. Especially Chapter 7 as the most referred to should not have to be renumbered. To Goode’s remark that like in PECL one shouldn’t worry too much about a systematic order of the chapters, Zimmermann replies that the order of the PECL was not meant to be definite. After discussing the various alternatives, it is finally agreed that in order to disrupt the existing order of the Principles as little as possible, but also to avoid the pure “stopgap-solution” of putting it in Chapter 10, “Plurality of Obligor and/or Obligees” shall become the new Chapter 9.

29. As regards the provisions on “Conditional Obligations”, after some discussion it is agreed to insert them as a new section into Chapter 5 (“Content and Third Party Rights”), which shall be re-structured in the following manner:

Section 1: Content in general.

Section 2: Conditions.

Section 3: Third Party Rights.

The title of Chapter 5 shall remain unchanged

30. Bonell ends the discussions on **Item 4** (11:30 a.m.).

Working Group for the preparation of
Principles of International Commercial Contracts (3rd)
Drafting Committee
Hamburg, 25-28 January 2010

**Session 4:
Conditional Obligations**

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

Minutes

Present:

Prof. Joachim Bonell
Prof. Bénédicte Fauvarque-Cosson
Prof. Marcel Fontaine
Prof. Henry Gabriel
Prof. Roy Goode
Prof. Reinhard Zimmermann

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

Morning, January 26 2010

1. Fauvarque-Cosson makes some introductory remarks. She has tried to take account of all remarks made at the meeting in Rome. The black letter rules have not changed. But she has worked on the comments; especially on the comments on Art. 1. She says that Hartkamp opposes the idea that incorporating a condition imposed by law in a contract makes it a contractual condition.

2. Bonell asks whether there really have not been any changes of the black letter rules. Fauvarque-Cosson says that Art. 5 has changed. Zimmermann suggests a change in Art. 1: “the occurrence of a future uncertain event” instead of “the occurrence of an uncertain future event”. The others agree. Fauvarque-Cosson wants to change the sub-title of Art. 1 into “Types of conditions”. The others agree.

3. Goode thinks that the third sentence of comment one should go. The others agree. Zimmermann suggests: “Contractual parties can make their contractual obligations conditional...”. Goode distinguishes conditions of the contract becoming effective and conditions which are terms of the contract. He thinks that only the latter are dealt with.

4. Zimmermann suggests: “Parties to a contract may make their rights and obligation dependent on the occurrence or non-occurrence of a future uncertain event”. He thinks that the second sentence is superfluous. “Or something else” in third sentence would be wrong. The others agree.

5. Fontaine suggests a linking sentence: “This is called a condition”. Bonell thinks that that does not work. Zimmermann suggests putting “condition” as a definition in brackets at the

end of the sentence: “(condition)”. Goode suggests: “A stipulation to this effect is termed a condition”. Zimmermann does not like “a stipulation”. They agree on “a provision”.

6. Bonell wants: “A condition may refer to a natural event or to an act of a third party”. Gabriel does not want to limit the categories of condition. Gabriel wants to give examples only. Zimmermann thinks it useful to refer to natural events and acts of third parties due to historical developments and possible misunderstandings. Fauvarque-Cosson suggests: “A condition may refer to a range of events, including natural events or acts of a third party”. The others agree.

7. Zimmermann turns to the questions concerning conditions imposed by law. He distinguishes three situations: Conditions imposed by law, such conditions being merely referred to by the parties in the contract, such conditions being made real contractual conditions by the parties. He asks whether the others agree. Fauvarque-Cosson does not agree and thinks that the difference between the latter two categories is too subtle. Zimmermann explains that there is a great discussion in civilian systems about conditions imposed by law. He thinks that the former formulation “This chapter does not deal with what sometimes is referred to as conditions imposed by law” was better than the present text. Gabriel suggests: “A condition may be imposed by law. This chapter does not deal with these situations unless the parties...”.

8. Goode says that something imposed by law and not incorporated as a condition in the contract cannot possibly amount to a breach of contract. He thinks that the fifth paragraph is wrong. Bonell agrees and wants only a reference to 6.1.14. Fauvarque-Cosson wants to keep the first part of the sentence. Goode suggests: “If a public permission requirement is imposed by law”.

9. Zimmermann returns to paragraph four. He suggests: “Requirements imposed by law are not conditions in the terms of this section unless they are incorporated in the contract”.

10. Bonell returns to paragraph three: “This chapter only deals with conditions which are of a contractual origin”. He then wants the next sentence to be: “Requirements imposed by law...”.

11. Goode wants “Public requirements”. He thinks that “imposed by law” is ambiguous in view of the Common Law. Bonell does not want “requirement” and prefers “condition”. Goode thinks that “condition” in this context means something else.

12. Gabriel wants to stress that the condition which they are dealing with are what the parties *choose* to make a condition. There would also be external conditions by law which they are not dealing with. He wants to add “incorporated by the parties”. The others agree.

13. Bonell suggests: “... are not covered by this chapter”. The others agree.

14. Bonell suggests: “Thus, a public permission requirement imposed by law is outside the scope of this chapter but may be governed by Art. 6.1.14. However, if parties incorporate such a condition in their contract ...” The others agree.

15. Bonell turns to comment two. He suggests deleting the first three paragraphs. Zimmermann wants to delete or to change the second sentence. He says that it is not the event

but the clause referring to the event that is the condition. He thinks that what they want to say is that a condition does not refer to a future *certain* event.

16. Goode gives an example of what he thinks is not a condition in the sense of this chapter: Where the contract itself does not come into existence until... Fontaine thinks that in such a case there is a preliminary contract. Goode agrees, but he says that it is not a condition of the contract. Bonell thinks that even the whole contract can be made conditional. They agree that this has not yet been made clear. They turn to the black letter rule and want to include “condition for the existence of the contract”.

17. Goode thinks that if the contract is made conditional itself it cannot be a contractual condition. Goode wants something in the comments that makes clear that the Article covers conditions which apply to the existence of the contract. Goode thinks that they have to distinguish conditions for obligations and conditions for the existence of the contract and he wants to state clearly that the Article covers both. Zimmermann does not want “A contract or a contractual obligation”. But the others think differently. Goode suggests that they make a reference in the comments to a condition for the existence of the contract.

18. Goode mentions conditions referring to signatures by the parties. Gabriel says that he thought they are dealing with signatures by third parties only. Goode explains that they want to make clear that they are not concerned with cases where the existence of the contract is entirely dependent on the will of the parties.

19. Zimmermann thinks that a condition cannot be freely floating but must be based on the contract.

20. They agree upon the black letter rule: “A contract or an obligation arising under it...”.

21. Zimmermann suggests for the second paragraph of comment two: “A provision can also be made dependent upon a future certain event”. Bonell wants a reference to “which is called a term in some jurisdictions”. Fontaine thinks this is not necessary.

22. They turn to the third paragraph of comment two. Zimmermann thinks that it is misleading. Bonell thinks that what is meant is not “time of occurrence” in the sense of Art. 6.1.1. Bonell thinks that they should delete the paragraph and refer to “time of occurrence” on page five as it is dealt with there already. Goode thinks that the reference to Art. 6.1.16 on page five is wrong. Bonell thinks that the reference to Art. 6.1.16 is only a reference to the case of an implication of a time by law and not referring to the case of a condition.

23. Fauvarque-Cosson suggests deleting the text on “time of occurrence” altogether as it was meant only to illustrate the difference between conditions and “terms”. Fontaine suggests deleting the third paragraph. They agree upon that.

24. Fontaine thinks that the first two illustrations are too abstract and that they are not really illustrations at all. Zimmermann thinks that they should not use the language of “suspensive conditions” until they have introduced the notion of “suspensive conditions”, i.e. until comment three.

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25. Zimmermann asks what the state would be with their discussion concerning “time of occurrence”. Fauvarque-Cosson says that they have not decided upon anything yet. Fontaine thinks that they should delete the third paragraph and suggests a new sub-title for “time of occurrence”. Zimmermann asks what they want to say.

26. Bonell explains that *per se* a condition does not refer to any time limit within which the future uncertain event has to have occurred. But the parties may agree upon such a time limit. However, the interesting question would be what should be the rule if the parties have not set such a time limit. Bonell thinks that Fauvarque-Cosson is right that in such cases one has to look what they would have agreed upon. If this does not solve the problem then one has to infer a time limit that a reasonable person would have agreed upon. He suggests: “If after a reasonable time...”

27. Zimmermann suggests: “The parties may state in their condition that the event must have occurred by a certain time”. He thinks that they should give two examples then.

28. Goode thinks that in long term contracts no reasonable time limit might exist. He gives an example: “I will buy a house if planning permission is granted (case of reasonable time limit)”.

29. Zimmermann suggests that they should write something like: “The parties may set a time limit within which an event should have occurred (or not occurred)”.

30. Zimmermann wants to look at illustration three. He thinks that this example illustrates a term and should not be in this position.

31. Goode suggests drawing a distinction between fixed term contracts and contracts without a fixed term.

32. Bonell does not want a separate heading for time limits. Zimmermann agrees with Bonell.

33. Fauvarque-Cosson thinks that the third paragraph on page five concerning performance being made conditional on counter-performance (*Synallagma*) should move up in the text. The others agree.

34. Zimmermann suggests the following order for comment two: First sentence, different use of conditions (including *Synallagma*), distinction condition/term, finally time limit because this is related to the condition/term issue.

35. Bonell turns to comment three. Zimmermann asks about illustration seven and suggests: “A and B conclude a contract. B is under obligation only if ... occurs”. Zimmermann does not want to explain condition by “condition”. The others agree.

36. Goode wants another example where one party assumes the risk of obtaining the permission. Goode gives an example: A seller knows that he needs an export license but the contract says nothing about it. The seller bears the risk of obtaining the license.

37. Bonell distinguishes “seller is to obtain export license” which is an obligation and “subject to export license” which is a condition. Fauvarque-Cosson thinks that this should come under comment two “notion of condition”.

38. Zimmermann turns to the sentence concerning “resolutive condition”. He thinks that it would be better to say: “... where a contractual obligation comes to an end provided that a future uncertain event occurs”. The others agree.

39. Bonell suggests: “is often called” instead of “is often named”. The others agree.

40. Zimmermann turns to illustration eight. He wants to avoid the connotation of termination (by a party). They agree upon: “comes to an end”. Gabriel says that it may not be the entire contract that comes to an end. The others agree that this should be made clear.

41. Bonell turns to the second paragraph. He thinks that it would be problematic to flag out the problem without giving a concrete example. Goode suggests that a condition might be a suspensive and a resolutive condition at the same time. Zimmermann thinks that the example should be of a condition which might be interpreted differently both as a suspensive and a resolutive condition. It should not be an example of a condition that is actually both a suspensive and a resolutive condition.

42. Gabriel suggests that as they do not generally go into problems of interpretations they should not do here. They decide to delete the whole paragraph.

43. Zimmermann wonders how the next paragraph does fit in. They agree that it should not be at the current place. Fauvarque-Cosson says that there had been a black letter rule which has been dropped and that now the paragraph is awkward at the current place.

44. They turn to comment four. Zimmermann asks why they deal only with impossible *suspensive* conditions. They agree to deal with impossible conditions generally and to state in a single sentence that impossible resolutive conditions cause no particular problems.

45. Zimmermann asks whether they are happy with illustration ten. They agree to drop the last sentence and to formulate the sentence before that: “The contract cannot take effect”.

46. They turn to illustration eleven. Gabriel thinks that this is a case where the condition cannot be met. Zimmermann agrees that this is a case where the condition “drops out”. Zimmermann does not want to go into the issue of supervening impossibility. They agree to drop the example. Zimmermann suggests also deleting the next sentence.

47. Goode asks why they drop illustration eleven. Zimmermann and Gabriel think that it is a normal case of an unfulfilled condition.

48. Bonell summarizes that they agreed to change the heading and to delete the second sentence of comment four.

49. Zimmermann asks whether comment four does not contradict Art. 3.3. He thinks that Art. 3.3 states that initial impossibility is not a question of invalidity but of common mistake. He wonders whether the same logic would not apply here.

50. Gabriel thinks that they can have two different solutions in the PICC, because the parties can make it a condition. Goode thinks that this leaves the contradiction with Art. 3.5. He would rather deal neither with impossibility nor with mistake. Bonell agrees with Gabriel.

51. Fauvarque-Cosson is still worried about the relation with Art. 3.3. Fontaine would keep comment four and illustration nine and ten and have a reference to Art. 3.3 stating that it is a special case. Bonell agrees with Fauvarque-Cosson that it might still cause confusion. Zimmermann thinks that they would get into very deep water as they have not analyzed the situations properly. He thinks that therefore, they should drop the whole comment four. Gabriel and Goode agree. Fontaine thinks that if they say nothing about impossibility the solution would be naturally that the condition has not been fulfilled.

52. They look into the DCFR and the PECL.

53. They turn to comment five. Zimmermann thinks that they need to distinguish between cases where the obligation is conditional entirely upon the will of the obligor and cases where the obligation is conditional entirely upon the will of the obligee. The only case they want to deal with would be where it is dependent on the will of the obligor. They agree to change the title.

54. Zimmermann suggests: "Sometimes a contract is made dependent on the will of the obligor. Here the question arises whether he wants to be bound at all. This is a problem of interpretation".

55. Fontaine turns to illustration twelve. He wants to change "there is no conditional obligation..." into "there is no contract..." The others agree.

56. They turn to sales on approval. Gabriel thinks that this is a sub-category of contracts subject to satisfaction. Goode thinks that there is a contractual obligation either to return the goods or pay the price within a certain time. Bonell thinks this is not a sale on approval. Goode thinks that it has the same effects: Either way the buyer commits herself somehow.

57. Gabriel thinks that "power not to conclude the contract" is wrong as there is a contract. Zimmermann says that he would write something like: Sometimes the parties refer to the will of a party. If they refer to the obligee this is not problem. If they refer to the obligor this might mean that he does not want to be bound at all. Then they could give examples of when he is bound (sale on approval).

58. Gabriel thinks that unfettered choice is inconsistent with the idea of an obligation. There would have to be some restriction.

59. Goode suggests "... has the choice either not to conclude the contract or to incur another obligation". Gabriel would not analyze sale on approval as a condition. Fontaine would neither.

60. Zimmermann still wants to be less specific and refer to sale on approval only as an example. Gabriel thinks this is confusing and asks where the condition would be in the case of a sale on approval. They agree to drop any reference to sale on approval.

61. Bonell summarizes: They drop sales on approval and they also drop illustration thirteen but they should keep illustration fourteen as an example of the exception.

62. They turn to comment six. Fauvarque-Cosson says she has not changed much on the comment. Bonell recalls the discussion in Rome. The illustration was considered to be too detailed. But Bonell thinks that the example is actually taken from a real contract and should be kept. Goode agrees, but says that one could shorten the comment. He suggests dropping the last paragraph. They agree to keep the illustration.

63. Goode thinks that they should not give legal advice as they do in the last paragraph. They should not advise parties as to their transaction. They agree to drop the last paragraph.

64. Zimmermann corrects illustration 15a: “accuracy of representations”.

65. Fontaine suggests “considered” instead of “intended” in the second line on page eight. The others agree.

66. Fontaine suggests for the second paragraph: ““Conditions precedent” often mix categories...” the others agree.

67. Gabriel wants to specify the “it” and “its” at the end of the second paragraph and suggests putting “that party” and “that party’s” in its place.

68. Goode suggests dropping the whole paragraph as it would be difficult to understand and would only be scholarly analysis.

69. Gabriel thinks that “closing” is a very specialized area which will not be impacted by the PICC anyway. Bonell thinks that closing is not limited to securities transactions but rather very common in commercial practice. Gabriel agrees, but the comment should be general and not get into specifics of the model transaction. Zimmermann says that they should rewrite comment six under the perspective of their topic, i.e. conditions. It should not read like a dissertation on “closing” but tell what “closing” adds to the law of condition.

70. Fontaine wants to keep something on closing. Fauvarque-Cosson thinks that the part on closing is the only innovative part in the comments to Art. 1 and that they should not cut it down too much.

71. Goode suggests cutting down the illustration 15d and not listing all the closing documents.

72. They agree to shorten comment six. Bonell summarizes: They drop the last paragraph and shorten 15d. The others agree. Goode thinks that there is some duplication between the top and the bottom of page eight. Bonell suggests dropping the second last paragraph. Fontaine thinks that some kind of analysis following the illustration would be helpful. Bonell does not want to be too specific and rather wants to keep the general part. They agree, however, to shorten the general part.

73. They turn to Art. 2. Zimmermann thinks that the first sentence is too defensive and he wants to formulate it positively (“merely has prospective effect”). The others agree.

74. Goode wants to drop Art. 2 altogether. Bonell explains that in a number of jurisdictions a condition has retroactive effect. They agree to keep Art. 2.

75. Zimmermann suggests a new formulation of the end of comment one: “retroactivity or prospectivity of the condition”. The others agree.

76. Zimmermann wants to change the title of comment two. Bonell draws attention to the parallel problem with (non-)retroactivity concerning set-off. He suggests using the same terminology.

77. They agree upon “No retroactive effect” as title.

78. They agree to delete the opening sentence of comment two.

79. Goode puts forward the problem of a condition that suspends an obligation (a “suspensory” condition as he terms it). Fontaine thinks it is a combination of a suspensive and a resolutive condition.

80. Goode suggests stating in the commentary that the list of conditions is not exhaustive.

81. Fontaine suggests dropping the last part of illustration two (“at the moment...”). The others agree.

82. Goode agrees with Hartkamp’s view concerning illustration three. They agree to change the illustration from sale to lease.

83. Zimmermann returns to illustration one. He suggests: “An international share purchase agreement is concluded subject to the receipt of all necessary antitrust clearance from the European Commission.”

84. Zimmermann suggests: “The contract becomes effective as from the time when the necessary clearance documents are received”. The others agree.

85. Gabriel suggests as to illustration three: “A factory is leased with a resolutive condition that there is no preexisting condition of pollution detected in the future”.

86. Goode thinks that the change from sale to lease does not solve the proprietary problem. They agree on a licensing agreement instead: “A patent license agreement is concluded under the resolutive condition that the patent is not invalidated”.

87. Goode says that Art. 5 should be worded: “Unless the parties otherwise agreed...”. The others agree. He suggests moving illustration three to Art. 5. Bonell agrees. Gabriel does not want to move it. He wants to make a reference to Art. 5. They agree to move the illustration.

88. They turn to Art. 3. Zimmermann makes remarks as to the illustrations. He says that there would be four different cases (prevention of a suspensive condition; prevention of a resolutive condition; bringing about of a suspensive condition; bringing about of a resolutive condition). He thinks that they need examples for all four cases. Each example should be introduced by a short chapeau. They should follow the model of the PECL and the DFCR.

89. Fontaine wants to review the first paragraph of comment one and to have only “good faith and fair dealing (art. 1.7, art. 1.8)”. He wants to delete the third paragraph. The others agree.

90. Bonell suggests keeping the last paragraph and insert “(see ...)” after the end of the quotation “practicable”.

91. Zimmermann wonders whether there should be a special comment on “remedies”.

92. Goode suggests splitting Art. 3 and have two articles instead. Zimmermann thinks that it would work as it is if one uses a broad notion of interference. Goode does not agree.

93. They agree to formulate in the last paragraph “parties may expressly state the principle of good faith or may even go further...”.

94. Zimmermann turns to illustration one and thinks that they should drop “C then reckons...”. He thinks that the last sentence confusing. They should state what the effects of Art. 3 are. They should use the example as a general example and not as an example of remedies.

95. Zimmermann turns to illustration two. They should change A and B in the first sentence. He also suggests: “B may not invoke the fact that the condition is fulfilled with the effect that the obligations do not come into existence”.

96. Zimmermann suggests dropping the last illustration. The others agree that they do not need a third illustration on suspensive conditions. They agree to have four illustrations and have them in the order of the black letter rule.

97. Fauvarque-Cosson asks for help with illustrations of resolutive conditions. They look into PECL and DCFR and agree to change horse for racing-horse or some machine.

98. Gabriel turns to Art. 4. He suggests a rephrasing and moving “contrary to the duty ...” up after the initial comma behind “condition”. The others agree.

99. Bonell suggests deleting “pendente conditione”. The others agree.

100. Zimmermann turns to illustration one. He asks what the point would be of the illustration. He asks whether one could put it clearer because “ordinary” would have the connotation of a standard of care. Goode suggests: “may not incur any new onerous obligation”. They agree to keep the example as it is.

101. Gabriel turns to the last paragraph. They agree to delete the last paragraph on page twelve and the first on page thirteen.

102. They turn to Art. 5 and agree again to change the black letter rule (cf. above no. 87). Zimmermann says that the first sentence of the comment has to be changed. Zimmermann suggests beginning the comment with a slightly modified second paragraph: “When a contract is subject to a resolutive condition and comes to an end, often there has been performance...”.

103. Zimmermann suggests changing the black letter rule to “the relevant rules on restitution apply” and explaining in the comments which rules on restitution apply: if the parties agree upon retroactive effect it is those on avoidance, otherwise those termination.

104. They agree to delete the last paragraph.