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Unidroit  
International Institute for the Unification of Private Law

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WORKING GROUP FOR THE PREPARATION OF  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

SUMMARY RECORDS

of

THE MEETING HELD IN BOLZANO/BOZEN

FROM 22 to 26 FEBRUARY 1999

(Prepared by the Secretariat of Unidroit)

Rome, June 1999

1. The second meeting of the Working Group for the preparation of a second enlarged edition of the Principles of International Commercial Contracts was held from 22 to 26 February 1999 at the University of Bolzano/Bozen. The list of participants is attached as Annex 1.

2. The President of UNIDROIT, L. Ferrari Bravo, opened the meeting and stressed that the success of the first edition of the Principles had led to the need for a new, enlarged edition of the Principles. He expressed his appreciation for those who had prepared position papers and emphasised that the Governing Council wished to assist in the preparation of the second edition of the Principles. Moreover, the Governing Council regarded this project as one of highest priority, especially as friends and competitors engaged in similar projects were advancing with considerable speed. He thanked Bonell for his efforts in preparing for the meeting, and the University of Bolzano/Bozen and the School of Economics for hosting the meeting and for their substantial financial contribution. He expressed his regret that other commitments prevented him from attending the meeting and wished the Group a successful session.

3. Bonell welcomed the Secretary General of UNIDROIT, Kronke. He also introduced Grigera Naón, who had been invited to participate as an observer for the International Court of Arbitration of the International Chamber of Commerce, and Schiavoni, representing the National and International Chamber of Arbitration at Milan. Bonell recalled that the latter had made a financial contribution to the project, in particular to the setting up of a database of case-law and bibliography relating to the Principles, and expressed, also on behalf of Unidroit, his deep appreciation for this generous gesture. Bonell regretted that Baptista and Herrmann were unable to attend.

#### I. DRAFT MODEL CLAUSE FOR INCORPORATION OF THE PRINCIPLES IN THE CONTRACT

4. In presenting the Draft Model Clause (UNIDROIT 1998 Study L – Doc.57) he had prepared, Farnsworth explained that such a clause would assist parties wishing to incorporate the Principles into their contract. He suggested that the model clause, once approved by the Group and the Governing Council, be added as a footnote to paragraph 2 of the Preamble.

5. Di Majo expressed his discomfort with positioning the model clause in a footnote to the Preamble. The Preamble dealt with general principles and the model clause which expressed the intention of the parties would be far too particular to be included as a footnote to the Preamble. Bonell observed that the footnote related to paragraph 2 of the Preamble and that paragraph 2 stated that the Principles applied when the contract so provided. Farnsworth too thought it unlikely that he could find a better place for the model clause, unless a suggestion was made.

6. El Kholy commented on the notion of “contract” in the model clause by referring to the Rapporteur’s Note. He suggested that the words “validity, interpretation, performance etc.” be added so that the Principles would apply to a contract incorporating the model clause even if it was unclear whether or not such a contract was valid. Komarov expressed support for El Kholy’s request. Also arbitration clauses are more and more often being drafted in such an analytical manner. Consequently it would be desirable for the Group to take the same approach.

7. Bonell pointed out that the addition of “etc.” introduced a good deal of uncertainty and that, on the other hand, the express reference to “interpretation, performance, validity” did not constitute a complete list of matters falling within the scope of the Principles. While it would seem extremely difficult to provide a complete list, he recalled that both the Rome Convention and the Inter-American Convention on the Law Applicable to International Contracts contained an indication of the scope of the *lex contractus*.

8. Fontaine stated that as arbitration clauses were often analytical, a broad and therefore short formula (i.e. no reference to “validity, interpretation, performance etc.”) of the model clause would reduce the risk of a conflict between the model clause and such arbitration clauses. Date-Bah also expressed his preference for the short formula by arguing that the concerns of El Kholy were mostly met by the application of municipal law (most contracts would apply municipal law as the underlying law even when applying the Principles). Furmston agreed. Kronke, Finn and Crépeau also expressed a preference for the short form.

9. El Kholy suggested that it may be a compromise to state that the contract should be governed “in all respects” by the Principles. Alternatively, the wording “in all respects, but not limited to” could be used. Kronke suggested the wording “in all respects, including its validity”. Farnsworth stressed his preference for the short form and Komarov too was now ready to accept it. It was agreed that the words “validity, interpretation, performance etc.” should not be added.

10. Lando stated that the Principles of European Contract Law expressly provided that the validity of the parties’ agreement to adopt the European Principles was governed by the European Principles (Article 1:104) and that the termination of a contract did not effect the validity of, for example, an arbitration or jurisdiction clause (Article 9:305(2)). It was agreed that any such provision or footnote should be discussed in a different context.

11. Farnsworth explained that although the model clause was not an arbitration clause it would in many instances be used in the context of arbitration. He suggested adding the following words at the end of the footnote: “*Parties who have included an arbitration clause should be careful that the two clauses are consistent*”.

12. Date Bah expressed his preference for such a suggestion and Bonell concluded that agreement had been reached to add such a wording.

13. With reference to the second draft model clause suggested by Farnsworth, El Kholy wondered whether municipal laws were the only possible complementary source to the Principles. In view of the fact that the Principles have been heavily inspired by trade usages, he favoured a solution whereby the parties refer to trade usages as the complementary source. In practice a combined application of the Principles and a particular municipal law might give rise to difficulties.

14. Schlechtriem also expressed some reservations as to the second model clause as it presupposed unlimited party autonomy which the rules of private international law of the forum may not grant. Crépeau expressed his concern that the formulation may go beyond the content of paragraph 2 of the Preamble.

15. Date Bah, Lando, Hartkamp and Jauffret-Spinosi were in favour of the draft as proposed by Farnsworth.

16. El Kholy wondered whether the parties may choose a particular municipal law as the law governing their contract and refer to the Principles only as a complementary source. Bonell pointed out that such a possibility was not envisaged in the Preamble and should therefore not be discussed in the present context. He proposed that this point could be discussed in relation to the rewording of the Preamble for the second edition.

17. The Group finally agreed on the following wording of the a footnote to be added to Paragraph 2 of the Preamble:

Parties wishing to provide that their agreement be governed by the Principles might use the following words, adding any desired exceptions or modifications:

*“This contract shall be governed by the UNIDROIT Principles (1994) [except as to Articles...]”*

Parties wishing to provide in addition for the application of the law of a particular jurisdiction might use the following words:

*“This contract shall be governed by the UNIDROIT Principles (1994) [except as to Articles...], supplemented when necessary by the law of [jurisdiction X]”.*

If such a clause is used together with an arbitration clause, the parties should take care to ensure that the two clauses are not incompatible.

## II. DRAFT CHAPTER ON AUTHORITY OF AGENTS (FIRST READING)

18. Bonell asked Hartkamp to take the chair. Hartkamp accepted.

19. Hartkamp asked Bonell to introduce his draft chapter on authority of agents (UNIDROIT 1998 Study L – Doc. 56). Bonell recalled the Group's decision to base the draft on the 1983 Geneva Convention on Agency in the International Sale of Goods subject to the necessary amendments due to the fact that the Principles apply to contracts in general and that a number of issues dealt with in the Geneva Convention, such as Articles 5,6,7,8,10,11 and 13(7), have already been addressed in the Principles. He then drew attention to Articles 3 and 4 of the Geneva Convention on the relationship between agency law and company law and pointed out that in his view companies acting through their authorised agents, which after all is the most common scenario in international contract practice, should not be excluded from the scope of the chapter on authority of agents. While it was true that in most domestic laws, the authority of a company's organ to act on the company's behalf was governed by mandatory rules, which as such obviously prevailed over the Principles, nothing should prevent the Principles from applying in those cases in which they did not conflict with such mandatory rules. Furthermore, he recalled the decision taken at the Group's first session to deal only with the external relationship, i.e. the relationship between the agent/principal and the third party, and not the internal relationship, i.e. the relationship between the principal and the agent. Articles 7 and 8 of the draft had been taken literally from the European Principles. Finally he mentioned that a number of paragraphs in the draft appeared in square brackets because he felt they should be deleted.

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

*Article 1(1): "This chapter governs the authority of an agent to bind its principal in relation to a contract with a third party."*

21. Fontaine asked why there was no definition of "agent". Bearing in mind the different concepts of 'agent' in different legal traditions it would be helpful to offer a definition. He emphasised that he found the approach taken in the Geneva Convention helpful where it was stated that: "This Convention applies where one person, the agent, has authority or purports to have authority on behalf of another person, the principal, to conclude a contract of sale of goods with a third party." Farnsworth agreed with Fontaine.

22. Finn pointed out that the European Principles referred to "an agent or other intermediary to bind its principal in relation to a contract with a third party" (Article 3:101) and asked what the term "other intermediary" meant.

23. Bonell explained that the term "intermediary" in the European Principles referred to the so-called indirect agency, i.e. where the agent acts in its own name and

has no authority to bind directly the principal. The Civil Law distinction between direct and indirect representation is unknown in Common Law countries and has not been followed in the Geneva Convention either which indeed takes a unitary approach and therefore does not make a distinction between “agent” and “intermediary”.

24. Furmston explained that in the English language the term “intermediary” was one of which “agent” was a sub-category. Intermediary included persons acting without the principal’s authority. In the light of the difficulty of finding clear definitions not only for the term “intermediary” but also “agent” he felt that paragraph 1 of Article 1 of the draft chapter was acceptable as it stated implicitly the meaning of “agency”.

25. Hartkamp argued that the difference between the European Principles and Bonell’s draft was merely one of drafting. The consequences in the European Principles and Bonell’s draft remained the same because in Bonell’s draft an agent not acting in the name of the principal would not be able to bind the third party and the principal, despite being called agent. Hartkamp rephrased the question to be decided by the Group as follows: “Should we call somebody acting on behalf of but not in the name of the principal an agent?” He wanted to know whether UNIDROIT had any policy considerations which would determine the answer to this question or whether it was open to the Group to reach a decision.

26. Kronke stated that UNIDROIT had no particular policy line the Group had to follow and that the Group could decide this issue on its merits. Bonell stressed that, in general, there had been an agreement at the first session to follow the Geneva Convention as a guideline.

27. El Kholy pointed out that it was a basic concept of “agency” that the agent had authority to bind the principal. The chapter should not apply to cases where there was no such authority. He also explained that the Egyptian Civil Code and a number of other Arab Codes made a helpful distinction between two forms of agency: one was where an agent acted in the name of the principal; another where the agent acted on behalf of, but not in the name of, the principal.

28. Farnsworth considered there to be a difference in substance between the European Principles, the Geneva Convention and Bonell’s draft. The Geneva Convention spoke of agency whenever one party was authorised to bind another. The European Principles, by contrast, also mentioned intermediaries who would bind the principal. He wondered whether, according to Bonell’s draft, an agent was the only person who could bind another person or whether there were agents as well as intermediaries and this chapter only applied to agents? He proposed the following wording: “This chapter governs the authority of one person, the agent, to bind another person, the principal, in relation to a contract with a third party.” Such a clause would be narrower than the one contained in the European Principles.

29. Bonell stated that he had not intended to deviate from the Geneva Convention in substance and expressed his appreciation for Farnsworth's suggested rewording of Article 1(1).

30. Hartkamp pointed out that the term 'bind' would be inconsistent with the approach taken in the Geneva Convention as such wording could be understood as including situations where the agent had no authority to bind. If, as Bonell suggested, the chapter followed the Geneva Convention the wording of the Convention should be used.

31. Farnsworth proposed the following wording: "This chapter governs the authority of one person, the agent, on behalf of another person, the principal, to conclude a contract with a third party."

32. Crépeau expressed his preference for the words "in relation to a contract with a third party" instead of "to conclude a contract with a third party" because the wording first mentioned would be broader and cover all aspects of a contract with a third party. The paragraph would then read as follows: "This chapter governs the authority of one person, the agent, to bind another person, the principal, in relation to a contract with a third party." This would also be more compatible with the second paragraph of Article 1. Date Bah agreed and suggested adding "subject to the provisions of this chapter" after the word "bind."

33. Finn warned that Farnsworth's definition of agency could encompass the English notion of trust. This should be clarified in a footnote. Hartkamp replied that paragraph 5 of Article 1 was intended to make it clear that the concept of a trust was excluded from the chapter.

34. Schlechtriem remarked that the word "bind" had a positive connotation. It did not include a negative meaning. However, agents would also be subject to negative acts such as receiving notices of non-conformity. It was important to cover this aspect of an agent's performance. The word "binding" was therefore misleading and paragraph 2 of Article 1 seemed important. He expressed the same concern in relation to the words "an act undertaken" in paragraph 2. Farnsworth commented that "bind" could also include negative action and he preferred the deletion of paragraph 2. He suggested a comment on the term "bind". Bonell confirmed that the word "binding" was used in a broad sense but that it may be preferable to clarify this in the Comments.

35. Di Majo wondered whether it was correct to speak of authority when the agent had no intention to bind the principal, but only himself. He proposed the word "undertaking" instead of "authority". Schiavoni made a procedural point. As the word "bind" recurred in the operative clauses of the chapter it would be easier to decide on a potential rewording at the end of the discussion of the whole chapter.

36. Hartkamp asked the Group whether it preferred the wording suggested by Farnsworth or that suggested by Crépeau. It was agreed that the wording proposed by Crépeau was preferable, subject to further refinement in the drafting.

*Article 1(2): "It governs not only the conclusion of such a contract by the agent but also any act undertaken by it for the purpose of concluding that contract or in relation to its performance."*

37. Bonell proposed the deletion of this paragraph as it seemed superfluous.

38. Schlechtriem suggested that there should either be a note in the comments explaining that "in relation to a contract" meant conclusion, performance and other related matters or this point could be expressed in Article 1(2). He preferred a note in the comments as he was in favour of a short black-letter text. Fontaine expressed the same point of view.

39. El Kholy spoke in favour of deleting paragraph 2. If the paragraph was kept then there was a need to define "act" so that act only included juridical, but not material acts. Lando was also in favour of deleting the paragraph, albeit for different reasons. He noted that paragraph 2 did not offer an exhaustive definition of an agent's scope of action and he preferred a more detailed description in the Comments instead.

40. As to the distinction between juridical and material acts, Crépeau stated that material and juridical acts of the agent ought to be included in this chapter. He suggested replacing the words "but also any act undertaken by it for the purpose of" in paragraph 2 with "any undertaking for the purpose of". Bonell argued that material acts should not be included. Di Majo and Komarov agreed. Finn asked for an explanation of the term "material act" and Farnsworth stressed that this term was not one familiar to lawyers in common law countries.

41. Crépeau explained that concluding a contract would amount to a juridical act. A physical act such as sending a fax, on the other hand, was a material act.

42. Furmston pointed out that the English reader would interpret "bind" in a narrower sense than suggested and that paragraph 2 should be kept in order to point to the wide interpretation of "bind". Finn added that a similar point could be made for readers from Australia and New Zealand. Farnsworth agreed. Jauffret-Spinosi pointed to the difficulty of translating the term "bind".

43. Farnsworth warned that the wording of paragraph 2 was so wide as to include cases where one party used another to discharge its duty towards a third party. Bonell disagreed: in his view, while the provision clearly covered the cases where a person was authorised to receive money or to pay money on behalf of somebody else, it did not



cover the case where a person was entrusted with the mere task of materially carrying out the payment (“*nuncius*”).

44. Furmston emphasised that the agent’s knowledge, i.e. mental state of mind, was another important element falling within the agent’s scope. Bonell found that paragraph 2 did not cover such a matter.

45. Schlechtriem proposed the formation of a drafting committee that would try to find adequate wording to explain the meaning of “to bind” in paragraph 1. He suggested including those actions of the agent which have a legal effect on the principal. Hartkamp and Bonell agreed and emphasised that it was precisely in such cases that the question of authority would arise.

46. Farnsworth supported Schlechtriem’s suggestion. It was agreed that a group consisting of Schlechtriem, Bonell, Farnsworth and Crépeau would be formed and that this group should work on a definite wording of paragraph 2.

*Article 1(3): “It is concerned only with the relations between the principal or the agent on the one hand, and the third party on the other.”*

47. Bonell explained that the provision was important as it clearly defined the scope of the chapter as dealing only with the external relationship between an agent/principal and a third party. This approach had also been adopted in the Geneva Convention and was in line with the fact that the Principles’s scope was contracts in general.

48. Crépeau expressed his concern about the word “only” since Articles 2, 7, 8, 9 and 10 would in fact include aspects of the internal relationship between agent and principal. He suggested replacing the word “only” by either “primarily” or “essentially”.

49. El Kholy suggested the deletion of paragraph 3 as the title of the chapter “Authority of Agents” would imply that the chapter covered only the external relationship. The title together with a comment would be sufficient. Fontaine and Farnsworth supported this view.

50. Finn commented that the reference to authority by no means led to the logical conclusion that only matters relating to the external relationship were covered in the chapter. There were many aspects of an agent’s authority which concerned the internal relationship between principal and agent. It was therefore necessary to include paragraph 3. The word “only” should, however, be deleted because it was misleading.

51. According to Uchida the basic idea was that the chapter was not concerned with the source of the agent’s authority and the paragraph should be reworded so as to reflect this idea. Komarov suggested that the paragraph should expressly state that the chapter

also dealt with the internal relationships between agent and principal, but this only in so far as they affected the external relationship.

52. An indicative vote showed that eight members of the Group were in favour of retaining the paragraph, while seven members voted for its deletion. It was decided to retain the paragraph subject to further refinement in drafting.

53. Hartkamp suggested that the word “only” be replaced or deleted. Bonell recalled that that word appeared in the Geneva Convention and that even those provisions dealing with the internal relationship between agent and principal did so only as concerns its impact on third parties. As to the suggested alternatives “essentially” or “primarily”, they were too unclear and might lead readers to expect that the chapter also covered the most fundamental aspects of the internal relationship between agent and principal.

54. While Lando and Di Majo supported Bonell’s view, Furmston insisted that the word “primarily” captured the meaning of what the chapter intended to convey better than the word “only”.

55. Schlechtriem suggested rewording the paragraph so that it would start with the following words: “It is concerned with the consequences of authority for the relations...”. Fontaine supported this suggestion. Kronke also expressed his preference for a solution along the lines of Schlechtriem’s proposal. Bonell objected that “consequences of authority” would imply that the establishment of the authority was outside the scope of the chapter which was contradicted for instance by Article 2.

56. Schlechtriem reworded his proposal to the following effect: “It is concerned only with the relations between the principal or the agent on the one hand and third party on the other created by authority or non-authority.” He suggested that these words be included in the Comments rather than in the black-letter rule.

57. Furmston pointed out that in its present form, paragraph 3 made an untrue statement. This view was also shared by Kronke. Crépeau illustrated this difficulty by referring to Article 10(1) which only dealt with the internal relationship. Bonell agreed but pointed out that it was precisely for this reason that he had proposed the deletion of Article 10(1).

58. Hartkamp suggested that, in the light of the discussion, a new vote should be taken about the deletion of the paragraph. By a vote of 13 to 3, it was decided to delete paragraph 3. Hartkamp expressed his hope that the Rapporteur would explain in the Comments what the chapter was intended to deal with.

*Article 1(4): “It applies irrespective of whether the agent acts in his own name or in that of the principal.”*

59. Bonell explained that the provision was literally taken from the Geneva Convention. He nevertheless recommended the deletion of the paragraph. He argued that the paragraph would be void of meaning for lawyers in common law countries and constitute an unnecessary provocation to lawyers in civil law countries. In substance, there would be little difference between retaining and deleting the paragraph.

60. El Kholy suggested that the words “whether the agent acts in its own name or in that of its principal” should be added to paragraph 1 and that paragraph 4 could be deleted. Paragraph 1 would then read as follows: “This chapter governs the authority of one person, the agent, to bind another person, the principal, in relation to a contract with a third party whether the agent acts in its own name or that of its principal.”

61. Date Bah spoke in favour of deleting the paragraph, but adding a provision to the Comments. Crépeau agreed. Di Majo was also in favour of deleting paragraph 4 because he thought it more appropriate for the operative provisions of the chapter to outline the different legal consequences that arise from the following two different situations: an agent acting in its name and an agent acting in the name of the principal.

62. Lando defended the approach taken in the European Principles, i.e. the differentiation between direct and indirect representation. In his view the latter would demand quite different treatment than the former. He proposed devoting a separate section of the chapter to this issue.

63. Furmston warned that common lawyers and civil lawyers would differ in their interpretation of Article 1 as a whole. If paragraph 4 helped to bridge the gap between these interpretations then it should be retained. Komarov thought that it would be helpful as well as pedagogical to civil lawyers to spell out the difference between the chapter and the traditional civil law approach. Fontaine supported this view and opted against the deletion of paragraph 4 so as to avoid confusion.

64. Furmston asked whether an agent who made it clear that it had acted as agent but did not disclose the name of the principal was covered by the scope of the chapter. If such a situation was within the scope of the chapter then a Comment to Article 1(4) should clarify this. Bonell confirmed that an agent who did not disclose the name of the principal was clearly within the scope of the chapter and he referred to Article 3 in this context.

65. Farnsworth and Fontaine supported El Kholy’s suggestion to add the words “whether the agent acts in its own name or in that of the principal” to paragraph 1 and delete paragraph 4.

66. Huang suggested that it should be made explicit that both direct and indirect agency were within the scope of the chapter. Bonell reminded the Group that this issue had been discussed for years in the preparation of the Geneva Convention. He stressed that he regarded the approach taken in the Geneva Convention, which did not make explicit reference to direct and indirect representation, as a step forward and urged the Group not to reverse this decision.

67. The Group decided to adopt El Kholy's proposal to add the second part of paragraph 4 to the first paragraph and to delete the fourth paragraph. Hartkamp stated that the first paragraph would read as follows: "This chapter governs the authority of a person, the agent, to bind another person, the principal, in relation to a contract with a third party, whether the agent acts in its own name or in that of the principal."

*Article 1(5): "It does not govern an agent's authority bestowed by law or the authority of an agent appointed by a public or judicial authority."*

68. Bonell explained that this paragraph was modelled on Articles 4 and 5 of the Geneva Convention. However, the Geneva Convention excludes from its scope contracts entered into by organs or officers of a company, partnership or association insofar as they did so on the basis of an authority conferred by law or by the constitutive documents of that entity (cf. Article 4(a)). The same approach has been adopted in the European Principles (cf. Article 3:101 para. 2 and Comment (c) stating that "the powers of representation which by statute are conferred on the directors of a company are not covered"). The wording chosen in his own draft, by contrast, did not exclude the possibility of applying the provisions contained in this chapter to the authority of an organ or officer of a company, partnership or association provided that these provisions do not conflict with the mandatory rules governing the organ's or officer's authority of the applicable domestic law. Illustrations 1 and 2 of Comment 4 ("Agents of companies") are intended to show the difference between the European Principles and the Geneva Convention, on the one hand, and his draft, on the other, in terms of practical results.

69. Kronke reminded the Group of the reasons for the approach taken by the Geneva Convention. There had been a desire to refrain from commenting on company law provisions as the first EC Directive was being prepared at that time. Kronke was not entirely sure why this approach had not been revised in the European Principles. Lando pointed out that the main concern during the preparation of the European Principles was not to interfere with the many national mandatory provisions.

70. Bonell emphasised that his approach in relation to officers of a company was intended to favour third parties. As shown in Illustration 2 of Comment 4 a third party unfamiliar with the mandatory provisions of another State would be free to rely on the provisions contained in the Principles as long as these provisions did not contravene the mandatory rules. In his example he had chosen section 35A of the English Companies

Act as an example of a mandatory rule prohibiting a company from limiting the powers of its officers in certain circumstances. A foreign third party unfamiliar with section 35A could alternatively invoke the provisions of the Principles to protect its interests. Such a possibility was excluded under the European Principles.

71. Schlechtriem said that he felt somewhat uneasy about the proposal to extend the scope of the chapter to cover officers of companies and similar actors. Such an extension would be welcome if the Group was drafting legislation. The Group, however, was drafting principles that the parties would be free to choose. He questioned whether the courts would apply the Principles if mandatory municipal rules were applicable at the same time. Bonell replied that the Principles would only apply if they were compatible with mandatory municipal rules, while in case of conflict obviously the mandatory rules would prevail. Bonell recalled that the new draft of the U.S. Restatement on Agency no longer ignored agency law in the field of company law.

72. Furmston agreed with Bonell's general proposal to extend the scope of the chapter to cover officers of companies and similar actors and he saw no reason for exempting company law from the scope of agency law. He did, however, disagree with the reasons that Bonell had given and explained his discontent with Illustration 2 of Comment 4. The example did not concern section 35A of the English Companies Act but rather related to the question of ostensible authority. In the example it is assumed that, if the Principles did not apply, the third party would have to rely on section 35A of the English Companies Act in order to prove the validity of a contract made by a 'president' who had exceeded his authority under the company's constitution. He pointed out that an English court would declare the contract valid if the 'president' had apparent authority and that section 35A, which was a mere application of the principle of ostensible authority, was in this example irrelevant. Incidentally he noted that English companies had no presidents but chief executive officers.

73. Bonell replied that section 35A was an implementation of a EC Directive and that section 35A was very different from the former English law on this subject. He was unclear as to why Furmston had raised the issue of apparent authority in the context of section 35A of the Companies Act. Furmston stressed that section 35A of the Companies Act was aimed at the doctrine of ultra vires and had little to do with agency law.

74. Finn explained that he also had some difficulties with Bonell's examples. The terminology posed problems because common law countries were unfamiliar with presidents in the context of companies. He asked what powers such a president had if he held himself out as having authority. The answer could not be found in section 35A of the Companies Act as this provision merely prohibited limitations on the power of a company's officer and did not convey any positive authority. Finn warned that in common law countries one may conclude that a president did not in fact have any legitimate power to enter into the contract. Illustration 1 of Comment 4 would in this

instance be faulty. He urged Bonell to offer better explanations in the Comments on how he had reached his conclusions in the Illustrations.

75. Lando stressed that the extension of the chapter in the way Bonell had proposed would only be useful if there were cases where municipal rules concluded that the company's officer had no authority to enter into a contract and the Principles came to the opposite conclusion. If, on the other hand, the Principles operated parallel to and came to the same conclusion as municipal rules then there was no point in having them. Bonell explained that the general idea of extending the scope of the Principles was to assist third parties who were not familiar with the municipal laws governing the contract.

76. Farnsworth urged Bonell to simplify the illustrations and transfer them to Ruritania so that references to specific national jurisdictions would be omitted. He also suggested replacing the word 'bestow' by 'confer' in paragraph 5.

77. Finn noted that in the Geneva Convention a distinction had been made between authority conferred by law and authority conferred by constitutive documents. The European Principles did not make such a distinction. He asked whether the distinction had meaning and noted that the distinction had not been made in the draft of the chapter. Bonell explained that in his opinion the words "constitutive documents" did not add anything to the text and that he had thus omitted them.

78. Kronke explained that the wording adopted in the Geneva Convention had been chosen to clarify that the provision was not intended to harmonise company law, family law (parents acting as agents of children) or procedural law. The draft chapter of the Principles would not interfere with any of these.

79. On this understanding the Group decided that the scope of the chapter should be extended to include contracts made by organs, officers or partners of a company, partnership or other entity. Paragraph 5 was adopted subject to further refinement in drafting. Hartkamp noted that the Illustrations would have to be revised.

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

80. Bonell remarked that Article 2 had been taken almost literally from the Geneva Convention.

81. Crépeau wondered to what extent the general provisions in the Principles applied to agency. He pointed specifically to Article 1.2 of the Principles stating that a

contract need not be concluded in or evidenced in writing and he wished to know whether this would also govern agency contracts. Would Chapter 5 of the Principles (on content) be relevant for the interpretation of paragraph 2 of Article 2 of the present draft on agency?

82. In reply Schlechtriem suggested the inclusion of a footnote to the effect that the granting of authority was a unilateral act and not a contract. Therefore, the general rules on contract would not apply.

83. Bonell emphasised the differences between common law and civil law on this issue. In common law countries agency was understood as being based on the underlying contract between principal and agent. In civil law countries the agent's authority was not necessarily linked to the underlying relationship between principal and agent. The same concept was adopted in the Geneva Convention.

84. With reference to Schlechtriem's remark that a granting of authority could be a unilateral act, Crépeau pointed out that the word "consensual" in Comment 3 of Article 1 was misleading. Bonell proposed replacing "consensual" by "voluntary", but Schlechtriem objected that there were cases where the principal was obliged to confer the authority. An example of this would be an authority granted pursuant to an employment contract. It was agreed that the terminology should be finalised by a drafting committee.

85. Farnsworth shared Crépeau's concern about the relationship between the provisions of this chapter and the general provisions of the Principles. He thought that for instance Article 1.5 of the Principles would qualify paragraph 2 of the present article. A Comment to that effect would be helpful.

86. Hartkamp suggested that the rules on agency were subject to the general rules of the Principles.

87. Bonell confirmed this view and explained that it was for this reason that he had not included Article 5 of the Geneva Convention. He nevertheless highlighted the potential difficulties of this approach. One may, for example, argue that paragraph 2 of the present article would be subject to the general principle of party autonomy as provided for in Article 1.5 of the Principles. However, the application of this principle to a trilateral relationship raised the question as to how an agreement between the agent and the principal to apply the Principles could be effective vis-à-vis a third party. Hartkamp suggested that the Geneva Convention had for this very reason stated in Article 5 that the principal and the third party would be able to derogate from the Convention.

88. Di Majo did not understand how implied authority could be inferred from express authority. He also pointed out that the distinguishing line between implied and

apparent authority was unclear. Bonell replied to Di Majo's first point by referring to Illustration 1. He agreed with Di Majo that the borderline between implied and apparent authority was in many cases difficult to draw, but there was nevertheless an important theoretical distinction between the two.

89. Schlechtriem asked whether the principal was able to grant authority to the third party and/or the agent. Moreover he suggested replacing the words "authority to perform all acts" in paragraph 2 by "authority to all undertakings necessary in the circumstances." Hartkamp suggested instead that a Comment stating that performance of an act would also include the receiving of a notice could be a solution. Schlechtriem agreed.

90. Schlechtriem also suggested providing for cases where the principal gives the express instruction to the agent not to conclude a contract. He noted that a mere reference to Article 1.5 of the Principles would not be sufficient in this respect. Article 1.5 referred to an agreement between parties and would therefore not cover cases where the principal, without even knowing the identity of the third party, restricted the agent's authority. Such a case could, however, be covered by adding the words "unless expressly restricted" to paragraph 2 of the present article.

91. Bonell stressed that a limitation of an agent's power by the principal would be a matter governing the internal relationship between principal and agent. A third party unaware of such a restriction and acting in good faith would not be affected by such a restriction. Where the principal informed the third party of such a restriction this problem would not arise.

92. Fontaine noted that the definition of authority covered also limits to that authority and thereby suggested that a specific provision allowing a principal to restrict the agent's authority was superfluous.

93. El Kholly remarked that two provisions in Articles 1 and 2 of the draft chapter would be contrary to legal concepts in the Arab world. First, in the Arab world a special power of Attorney was necessary for settlements. This would be in contrast with Illustration 1 of Comment 1 to Article 2 in which an implied authority was mentioned. Second, in the Arab world a notary was needed for conferring powers to the agent if the relationship between agent and principal had been established by a notary in the first place. This would be in direct conflict with the assumption of an implied authority. Bonell pointed to Article 1.4 of the Principles which established that mandatory rules of the municipal law would not be violated by the Principles.

94. The Group decided to adopt Article 2.

*Article 3: "Where an agent acts on behalf of a principal within the scope of his authority and the third party knew or ought to have known that the*



*agent was acting as an agent, the act of the agent shall directly bind the principal and the third party to each other unless it follows from the circumstances of the case [for example by a reference to a contract of commission] that the agent undertakes to bind itself only.”*

95. Bonell introduced Article 3 of the draft chapter and noted that there was a link between Articles 3 and 4, insofar as the latter, dealing with cases where an agent’s act did not directly bind the principal and the third party, constitutes an exception to Article 3 outlining cases where an agent’s act binds the principal and the third party.

96. Schlechtriem reminded the Group of the necessity to find an alternative to the word ‘bind’. Farnsworth supported this point.

97. Uchida remarked that an agent undertaking to bind itself only would by definition not act as an agent. The words “unless it follows ... itself only” could therefore be deleted. Bonell warned that in some legal systems such an agent would be considered an agent or at least an intermediary and that its actions would have some legal effects which justified the reference to such an actor in this Article.

98. Date Bah proposed to delete the square brackets in Article 3. He warned that in Ghana ‘commission’ referred to the mode of remuneration which meant something rather different from the use of the word “commission agent” envisaged in this chapter. Schlechtriem supported this point and wished to see a reference to commission agent in the Comments and an additional explanation focusing on the German concept of commission. The Group accepted Date Bah’s proposal.

99. El Kholy stressed that from an Arab perspective a third party’s knowledge of the identity of the principal was crucial. Mere knowledge that an agent acted as an agent would not be sufficient. He suggested that knowledge of the principal’s name should also in this chapter be a necessary requirement for binding the principal and the third party and he also suggested merging Articles 3 and 4. Bonell remarked that the identity of the principal would in most cases be revealed to the third party and referred to Comment 3 to Article 3. Hartkamp added that the third party could choose not to enter into the contract if he did not know, but wanted to know, the name of the principal. Likewise, the third party could choose to enter into a contract without knowing the name of the principal.

100. Furmston suggested that there were instances where the identity of the principal was not revealed for good reasons. One such situation was, at least in England, the treatment of brokers at the Stock Exchange who acted as principals. There could be other situations in which the third party had no interest in knowing the identity of the principal. Kronke emphasised that commodity sales were also traditionally performed in this manner and he stressed the importance of Article 3.

101. Kronke raised a procedural point by asking whether issues concerning the Comments to the chapter had to be discussed and voted upon in the large group. Hartkamp suggested that an initial informal approach should be taken and that any final decision about the content of the Comments was to be reached at the next session of the Group. The Group consented.

102. Crépeau highlighted a difference between the wording of Article 3 and that of the corresponding provision of the European Principles (Article 3.202) which expressly states that “the agent itself is not bound to the third party”. He suggested adding a similar statement also to Article 3. Fontaine agreed, all the more so since the words “that the agent undertakes to bind itself only” could be misunderstood and taken to mean that in any other case not only the principal but also the agent would be bound. The Group adopted Crépeau’s proposal.

103. Furmston proposed to split Article 3 into two paragraphs, the first of which setting out the normal case where the agent’s act binds the principal but not the agent, and the second setting out the case where an agent’s act would bind the agent but not the principal. The Group so decided.

104. Schlechtriem pointed to the overlap between Articles 3 and 4. Article 4(1) would be a repetition of Article 3 whereas Article 4(2) was not covered by any previous provision of the draft chapter. Bonell disagreed to the extent that Article 4(1)(a) was not a repetition of Article 3. Article 3 concerned cases of disclosed agency, while Article 4(1)(a) cases of undisclosed agency.

105. Komarov commented that the words “on behalf of the principal” would be redundant as an agent would by definition act on behalf of the principal. Instead, one should word the beginning of Article 3 as follows: “Where the agent acts within the scope of its authority ...”. Farnsworth agreed and reminded the Group that the words “on behalf of the principal” had also been deleted in Article 1. The Group decided to delete the wording “on behalf the of the principal” from Article 3 and to indicate in the Comments that this was merely a drafting point.

106. Finn noted that the formula “knew or ought to have known” would be distinctly problematic in common law countries. He did not wish to replace the formula but wanted to alert readers to the fact that the formula may have different meanings in different parts of the world.

107. Huang mentioned that in her experience of arbitration in China the agent’s act normally created a link between the agent and the third party so that a dispute would be resolved between them rather than between the principal and the third party. Bonell pointed to Article 4(1) so as to show that the draft chapter also envisaged that the agent and the third party could be bound, albeit in more exceptional cases.

*Article 4(1): “Where the agent acts on behalf of a principal within the scope of its authority, its acts shall bind only the agent and the third party if:*  
*(a) the third party neither knew nor ought to have known that the agent was acting as an agent, or*  
*(b) it follows from the circumstances of the case [for example by a reference to a contract of commission] that the agent undertakes to bind itself only.”*

108. Schlechtriem proposed amending paragraph 1 so that it would commence with the words: “If, under Article 3, no direct link is created between the principal and the third party the agent is bound itself.” Fontaine also favoured this wording for reasons of consistency. Article 4.1(b) dealt with the opposite case of Article 3 and should be worded as such. Hartkamp favoured the present text which, though heavier, indicated more clearly the cases in which the Article applied. He suggested retaining paragraph 1 subject to the deletion of the words “on behalf of the principal” and the words in square brackets. It was so decided.

*Article 4(2): “Nevertheless*  
*(a) where the agent [whether by reason of the third party’s failure of performance or for any other reason] fails to fulfil [or is not in a position to fulfil] its obligations to the principal, the principal may exercise against the third party the rights acquired on the principal’s behalf by the agent, subject to any defences which the third party may set up against the agent;*  
*(b) where the agent fails to fulfil [or is not in a position to fulfil] its obligations to the third party, the third party may exercise against the principal the rights which the third party has against the agent, subject to any defences which the agent may set up against the third party and which the principal may set up against the agent.”*

109. Kronke expressed his concern about the wording “knew or ought to have known”. He reminded the Group of Finn’s remark that the words “knew or ought to have known” would be interpreted differently in common law and civil law countries. This issue deserved thorough discussion as it was a fundamental point. Hartkamp explained that this issue touched upon the whole of the Principles and would therefore have to be discussed in the context of a general revision of the Principles.

110. Furmston asked whether paragraph 2 would apply to cases where two principals and two agents were involved. An agent selling on the Stock Exchange to another agent (the agent of the buyer) would be a typical example. Would, under this paragraph, the seller have an action against the agent of the buyer or against the buyer himself? Hartkamp replied that it seemed at first sight that the seller would have an action against the agent of the buyer, but not against the buyer himself.

111. Schlechtriem wanted further elaboration on the wording “the principal may exercise ... the rights acquired ... by the agent” which he considered unclear. Did it refer to an “*action oblique*” or to a legal assignment to the principal? Hartkamp replied that according to the Geneva Convention it was not a legal assignment although in some legal systems it may be construed as such. What was meant by the draft was the exercise of someone else’s right without dealing with the legal consequences which would be left to be decided by judges and arbitrators.

112. Lando thought it questionable that a minor non-performance should trigger a right of action under paragraph 2 and warned that such a solution would conflict with the principle of proportionality. Bonell explained that he did not think it wise to limit rights of action under paragraph 2 to cases of fundamental non-performance and insolvency. He mentioned that in practice a party would not choose to make a claim under paragraph 2 if there was only a minor non-performance. He was concerned that a reference to a fundamental breach would unduly complicate the procedure.

113. Hartkamp too favoured limiting the applicability of paragraph 2 to cases of fundamental non-performance (including insolvency). Di Majo agreed. Schlechtriem thought that “fundamental” as defined by the Principles would be too high a threshold for cases in which the principal had a legitimate reason to take a direct action against the third party. Lando reminded the Group that the European Principles did not provide a definition of “fundamental” but gave guidelines instead. The Group decided by a 10:5 majority to restrict the applicability of paragraph 2 to cases of fundamental non-performance.

114. Finn questioned why, in the opening phrase of paragraph 2, the wording of the Geneva Convention had been used rather than that of Article 7.3.3 of the Principles (“Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract”). The Group decided to extend the application of paragraph 2 to cases of anticipatory non-performance.

115. Grigera Naón pointed out that Article 4(2)(a) contained an anomaly which would make it difficult to decide on the issue that Lando had raised. The words in square brackets provided that the right of direct action under that paragraph would arise in the same way regardless of whether the default arose by reason of a third party’s non-performance or for any other reason. Grigera Naón suggested that a differentiation could be helpful. If the party’s default arose by reason of that party’s non-performance, an action under paragraph 2 should be possible even if the breach was just a minor one. If, by contrast, the party’s default arose for any other reason such as the agent’s default a different approach ought to be taken.

116. Grigera Naón also posed a question in relation to the defences a party may raise under Article 4(2). He imagined a situation where a contract of commission

existed, a breach occurred and the third party had not defaulted. He argued that the third party should be permitted to raise defences against the principal even if they were not those the third party could raise against the agent. Bonell and Hartkamp defended the approach taken in the draft by pointing out that there was no contractual relationship between the principal and the third party, and that the intention was not to put a third party against which the principal had taken a direct action in a better position than a third party against which the agent had taken an action.

117. Komarov wondered whether a direct action by the principal against the third party was also possible when the agent defaulted. Bonell replied that this would be the case if the words in square brackets (“whether by reason of the third party’s failure of performance or for any other reason”) were retained.

118. Hartkamp wondered whether the words in square brackets (“or is not in a position to fulfil”) should be deleted. Lando was in favour of deletion but wished to include an express reference to insolvency. It was decided to delete the words in square brackets.

119. The Group decided not to include a reference to insolvency in the black-letter text but to mention it in the Comments so as to make it clear that the fundamental non-performance referred to in paragraph 2 included insolvency.

120. Kronke noted that the Comments should include a definition of insolvency. Such a definition could be drafted with reference to the European Insolvency Convention, the Istanbul Convention or any other model.

*Article 4(3): “In the cases referred to in paragraph 2, the agent shall on demand communicate the name of the principal to the third party, or the name of the third party to the principal, as the case may be.”*

121. According to El Kholly this provision would create difficulties in the case of an obligation of confidentiality. Bonell noted that the Geneva Convention contained a provision on confidentiality (Article 13(6)).

122. Kronke thought the word “shall” ill chosen as the principal may for good reasons (such as confidentiality) choose not to comply with paragraph 3. Hartkamp replied that the principle of confidentiality would have to give way to paragraph 3. Kronke commented that this would be a policy decision which would have to be agreed.

123. Farnsworth recalled that in the United States the use of the word “must” or “shall” without providing for a sanction would be inappropriate. Bonell replied that the sanction would be damages. Hartkamp suggested that the question of a sanction would be a procedural one and thus lie outside the scope of the chapter. Finn agreed.

*Article 4(4): “The rights under paragraph 2 may be exercised only if notice of intention to exercise them is given to the agent and the third party or principal, as the case may be. As soon as the third party or principal has received such notice, it may no longer free itself from its obligations by dealing with the agent.”*

124. Finn wondered why the reference to giving notice within a reasonable time had been omitted while the Principles when dealing with notices elsewhere contained such a reference. The Article conferred exceptional rights on parties and this would justify the demand that the parties exercise them within a reasonable time. Bonell expressed sympathy with Finn’s proposal. Hartkamp clarified that the reasonable time period would start to run when the right under paragraph 2 arose. After being prompted by Schlechtriem he also clarified that the right would be lost if it had not been exercised within a reasonable time.

125. Lando commented that the reasonable time requirement should only be added if one wished to protect the party against whom a right under paragraph 2 would be exercised. He was unsure whether such a party deserved protection. According to Finn this was the case of a third party, who believed that it had contracted only with the agent, against whom the principal had brought an action pursuant to Article 4(2).

126. Notwithstanding the hesitations of Schlechtriem and Lando, the Group decided to add the requirement that the right under paragraph 2 could only be exercised within a reasonable time.

*Article 4(5): “The principal may not exercise against the third party the rights acquired on his behalf by the agent if it appears from the circumstances of the case that the third party, had he known the principal’s identity, would not have entered into the contract.”*

127. Bonell proposed the deletion of this paragraph as he felt it was too specific for an instrument such as the Principles. It was so decided.

*Article 5: “(1) Where an agent acts without authority or outside the scope of its authority, its acts do not bind the principal and the third party to each other.  
(2) Nevertheless, where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.”*

128. With respect to paragraph 2 Bonell pointed to a conceptual difference between the present draft (and the Geneva Convention) and the European Principles. The latter

(cf. Article 3.201(3)) considers apparent authority as one way in which authority can be granted with the consequence that the acts of an apparent agent bind not only the third party but also the principal. By contrast the present draft (and the Geneva Convention) considers apparent authority as a case of estoppel with the consequence that only the third party may invoke it.

129. According to El Kholy paragraph 2 was too restrictive as it would only allow apparent authority to be derived from the conduct of the principal and not cover an authority derived from other factors such as trade practices. Bonell thought that the latter case fell within implied authority which, at least in theory, is entirely different from apparent authority.

130. Furmston explained the concept of apparent authority in English law. Two cases could be distinguished. One was that of a principal holding out that the agent had authority. The other was that of an agent acting as if it had implied authority despite the fact that the principal had expressly denied such implied authority. In both cases the principal would be bound to the third party. Bonell thought that Furmston's second case would be decided differently on the Continent. Hartkamp pointed out that Furmston had referred to the appointment of a lawyer as agent and suggested that this amounted to conduct which could bind the principal. Even if the principal expressly told the lawyer not to contract with a third party and the third party was unaware of the prohibition, the lawyer would be bound.

131. Lando remarked that the debate showed how difficult it was to distinguish between apparent and implied authority. By ensuring that apparent and implied authority had the same legal consequences the European Principles had recognised this difficulty and had offered a formidable solution.

132. Schlechtriem thought that the distinction between implied and apparent authority in German law was helpful. In order for there to be implied authority the principal had to know that someone was acting without its express authority. Apparent authority would apply to a case where the principal negligently failed to know that someone was acting on its behalf.

133. Uchida mentioned that in Japanese law some positive conduct by the principal was required in order for apparent authority to be inferred. He therefore wanted to know whether the concept of conduct would also imply non-conduct. Bonell thought that conduct could also include an omission. Hartkamp added that it would depend on the circumstances of the case whether negative conduct was included and that it should be left to the judges and arbitrators in each case to decide this issue.

134. El Kholy thought that paragraph 2 would not necessarily deal with apparent authority but perhaps with implied authority instead. He based this argument on the assumption that an implied will was an existing will. Apparent authority could be based

on something other than an existing will. Conduct would constitute an existing will and thus likely be implied authority. Bonell emphasised that the language used in the draft chapter may help to see the distinction between implied and apparent authority more clearly. Implied authority as well as express authority were referred to as being granted. The word conduct was much wider and used to describe a form of behaviour on the part of the principal which gave the third party reason to believe that the agent had in fact authority.

135. Kronke remarked that a concept of conduct as including omission would perhaps be overly concise. He asked whether Bonell had refrained deliberately from distinguishing between the following two situations: firstly, where the principal knew that someone was dealing on his behalf; secondly, where the principal did not know that somebody was dealing on its behalf, but should have known.

136. Schlechtriem wondered whether the word 'conduct' also carried a negative meaning and thought it would be helpful to delete the word 'conduct' for the sake of clarity. He then asked whether the principal's conduct needed to be careless in order to create apparent authority and whether this was part of the interpretation of the words 'reasonably and in good faith'. In relation to Schlechtriem's first point Bonell explained that 'negative' conduct should be included but only in so far as the principal should have acted. Instead of deleting the word conduct altogether, the word 'ommission' could be added to the word conduct. In relation to Schlechtriem's second point Bonell replied that he thought it immaterial for the purpose of paragraph 2 whether the principal acted in good or bad faith.

137. Finn expressed his discomfort with the word 'conduct'. He stressed that the key issue was that of causation which carried a much broader meaning than the fairly restricted one of 'conduct'.

138. El Kholy suggested an alternative wording without the word 'conduct': "Nevertheless, where the principal or the circumstances causes a third party...". Di Majo supported El Kholy's suggestion and stressed that the reference to circumstances should be included in paragraph 2. Bonell replied that the principal should not be held responsible for external circumstances which causes the third party to believe that the agent had authority to act.

139. The Group rejected El Kholy's proposal and at the same time decided to delete the words "the conduct of".

140. Lando wondered why in case of apparent authority the principal is bound, but the third party is not. Why should it be that the third party could decide for or against the contract, whereas the principal was simply bound by the third party's decision in this respect? Farnsworth supported Lando's concern. He stated that in the United States apparent authority would not result in the third party having a choice as to the existence



of a contract and he would favour, also for the present draft, an approach similar to that of the European Principles.

141. Hartkamp pointed out that this theoretical distinction had little significance in practice as the number of cases where it would make a difference would be negligible. Bonell explained the connection between Articles 5 and 9 and stressed that a principal could, if there was apparent authority, ratify the contract within a reasonable period of time. The Group decided by a majority of 7:5 against Lando's proposal.

*Article 6(1): "An agent who acts without authority or outside the scope of its authority shall, failing ratification by the principal according to Article 9, be liable to pay the third party such compensation as will place the third party in the same position as it would have been in if the agent had acted with authority."*

142. El Kholy suggested the deletion of the Article because he regarded it as the mere application of general principles on liability. Schlechtriem replied that a provision on liability for damages would only be superfluous in relation to those legal systems which had provisions on extra-contractual liability.

143. Di Majo pointed out that in the current draft the liability of the agent was for expectation interest and should be for reliance interest. Bonell stressed that domestic legal systems were divided on this issue. He explained that the current draft was a compromise solution.

144. Furmston asked why the draft envisaged expectation interest. He did not recall a discussion on the recovery of damages in this context in English law. The simple rule was that an agent who reasonably believed to have authority was liable. He pointed out that the wording of the draft Article did not exclude such a situation. Farnsworth expressed his confusion on this point as he could not find a reference anywhere to the amount of damages in cases of warrant of authority.

145. Schlechtriem explained that in Germany the amount of damages in such a case would depend on whether the agent knew/should have known that it had no authority or whether it was unaware of the lack of authority. In the latter case damages would only amount to expenses whereas in the former they would amount to expectation interest. Lando commented that the position would be the same in Nordic law and Hartkamp pointed out that it was also the position in Dutch law. Kronke suggested that it might be a good idea to adopt this approach in the present draft.

146. Schlechtriem reminded the Group from civil law countries that under the 1930 Geneva Convention on Bills of Exchange an agent signing a bill of exchange without authority would always be liable for the full expectation loss. Bonell added that under the same Convention the agent would even become party to the negotiable instrument.

147. Finn made a reference to Article 2.15 of the Principles. He explained that a party breaking off negotiations in bad faith would only be liable for reliance loss. He thought that the rule that an agent acting in good faith could be held liable for damages reflecting expectation loss would contradict that provision. Komarov agreed.

148. Bonell thought that there were a number of instances where acting without authority was more reprehensible than breaking off negotiations and this would explain the difference in the amount of damages. In most cases the agent would know whether or not it had authority and would always have the opportunity of clarifying with the principal the extent of its authority. A third party had less control over the situation in this respect and therefore was more worthy of protection. Lando approved Bonell's approach in that the question was one of allocation of risk. He wondered however who should bear the risk in a situation where the agent contracted in the belief that it had authority to do so. According to Lando, agents were normally professionals and should therefore bear the risk. He suggested maintaining the present draft. Schlechtriem agreed.

149. Uchida supported the current draft as it was more compatible with Article 5 than any other proposal. In many cases a third party would be able to claim under the contract between the principal and itself. The third party choosing to claim under the direct contract (under Article 5) should be in the same position as the one choosing to claim damages against the agent (under Article 6). Uchida also explained that the main principle under Article 6 of awarding expectation loss was similar to Japanese law.

150. Di Majo thought that the current draft would favour the third party too much. Jauffret-Spinosi also thought that the draft would be quite harsh on the agent.

151. Furmston pointed out a technical problem. Article 6 did not necessarily envisage the existence of a contract between the principal and the third party. As there was no contract, the applicability of the Principles could be challenged and it seemed unclear on what grounds the third party could bring a claim against the agent. Bonell replied that the Principles were intended to apply even to cases where there was no contract with an express reference to the Principles and he suggested that the Group should take a less dogmatic approach on such issues.

152. Furmston thought that there was a strong argument for differentiating between the negligent and the innocent agent. He suggested that an innocent agent should only be liable for reliance loss.

153. Schlechtriem pointed out that it should be made clear either in the black letter rules or in the Comments that the agent would be regarded as bound by the contract that he had concluded without authority. The proposal was not carried.

154. Di Majo proposed a neutral wording so that no specific reference to either reliance or expectation loss would be made. Bonell explained that in chapter 3 of the Principles references to damages were qualified to refer explicitly to reliance interest. In the non-performance section of the Principles, by contrast, reference was made to expectation loss. There were thus two cases where damages were qualified and Bonell thought it unwise to detract from the approach taken in the Principles as a whole. The Group decided by a majority of 9:4 for limiting reliance loss irrespective of whether the agent acted in good or bad faith.

*Article 6(2): “The agent shall not be liable, however, if the third party knew or ought to have known that the agent had no authority or was acting outside the scope of its authority.”*

155. Hartkamp asked whether the second paragraph was needed and invited discussion. There were no interventions and the second paragraph was tacitly adopted as drafted.

*Article 7(1): “If a contract concluded by an agent involves the agent in a conflict of interests of which the third party knew or could not have been unaware, the principal may avoid the contract according to the provisions of Articles 3.12 and 3.14 to 3.16.”*

156. Bonell explained that, although he had not been requested to include such a provision in the draft (which therefore appeared in square brackets), nor did the Geneva Convention contain such a provision, he felt however that conflict of interests was too important a topic to be left out of the draft. The proposed provision was taken literally from the European Principles. He stressed that the reference to a presumption of a conflict of interests in paragraph 2 was not entirely clear to him as he did not know whether the presumption was rebuttable or not. He invited comments.

157. Furmston wanted to know whether avoidance of the contract would be the only remedy available to the principal as there might be cases where the principal may not want to avoid the contract but may want to claim some form of damages from the agent instead. Schlechtriem replied that the relationship between the principal and agent was subject to municipal law and not within the scope of the chapter. Furmston responded to this by arguing that the logical conclusion of Schlechtriem’s consideration would be to delete the Article. If the Article remained in the chapter an appropriate comment referring to municipal law should be made in the Comments.

158. Di Majo wanted to know why the Geneva Convention did not contain a similar provision. Maybe this was so because such a provision would deal with the relationship between principal and agent.

159. Farnsworth made a drafting suggestion. After the words “a conflict of interests” in the black letter text the words “with the principal” should be added so as to make it clear that the conflict existed between the principal and the agent.

160. The provision was adopted with this amendment.

*Article 7(2): “ There is presumed to be a conflict of interests where  
(a) the agent also acted as agent for the third party; or  
(b) the contract was with itself in its personal capacity.”*

161. Hartkamp stated that he had some difficulty with point (b) of paragraph 2. If an agent concluded a contract with itself then there would be a contract between the principal and the agent and no third party would be involved. In such a case the wording of paragraph 1 would not be appropriate.

162. Fontaine shared Bonell’s concern relating to the word “presumption”. He also expressed his discontent with the rule in paragraph 2(a) that a conflict of interests was presumed where the agent also acted as agent for the third party. Fontaine feared that this would apply to many cases and the rule as it stood would thus invite litigation. He therefore proposed the deletion of paragraph 2(a). Hartkamp added that the same issue created a problem in his country.

163. Bonell wondered whether it was not preferable to delete paragraph 2. The cases falling under paragraph 1 would in general include those mentioned in paragraph 2, but the presumption would be removed and decisions as to the existence of a conflict of interests would be made on a case to case basis. Paragraph 3 would then become the only exception to paragraph 1. Hartkamp pointed out that paragraph 1 could not cover the case referred to in paragraph 2(a) where the agent concluded a contract with itself because paragraph 1 contained a reference to a third party. A separate provision would be needed. Bonell replied that the reference to a third party should be interpreted in a wide sense so as to include cases of an agent contracting with itself.

164. Schlechtriem reminded the Group that in Article 1(1) of the draft chapter there was only a reference to a contract with a third party and no mention was made of the possibility of an agent contracting with himself. However, an appropriate change to the Comments could make it clear that Article 1(1) also covered such cases.

165. Lando commented that a deletion of paragraph 2 would put the burden of proof on the principal (the principal would have to prove that a conflict of interests existed). However, in a situation where the agent also acted for the third party it would seem justified that the agent would have to rebut the presumption of a conflict of interests.

166. Finn stated that he expected illustrations in the Comments if paragraph 2 were to be deleted. He noted that the most common examples of self-dealing would not relate to dealings in a personal capacity but rather with a related commercial entity. Finn was critical as to the word “personal” in paragraph 2(b).

167. Crépeau stressed that he would be inclined to adopt the second paragraph, but that the word “notably” should be added. There could be other instances where there was a presumption of a conflict of interests. The word “notably” would allow for such other instances and ensure that the paragraph appeared less rigid.

168. Hartkamp shared Fontaine’s concern and thought that the rule would be well situated in a consumer context, but not in the context of international commercial contracts. Players in this context would be wise enough to protect their own interests by ensuring that no conflict of interests existed. Hartkamp therefore opted for the deletion of paragraph 2.

169. Huang also expressed dissatisfaction with paragraph 2 as it created a presumption of a conflict of interests in cases which were normal and numerous in today’s commercial world where an agent often acted on behalf of both the principal and the third party.

170. El Kholy wished to see an additional paragraph obliging the agent to declare, before the conclusion of the contract, that a conflict of interests existed. The duty of honesty would demand such procedure. El Kholy also proposed to delete the word ‘presumed’ in the second paragraph as the cases referred to under subparagraphs (a) and (b) would clearly be cases of a conflict of interests. He then wanted to know whether the avoidance of a contract arising out of a conflict of interests presupposed that the conflict of interests had caused damage.

171. Bonell replied to El Kholy’s first point that the draft chapter would not deal with the internal relationship between agent and principal. Schiavoni wanted to know to whom the declaration would be directed. El Kholy replied that the declaration should be directed to the third party and to the principal. Lando pointed out that one could imply such a duty from paragraph 3(b) or from the duty of good faith and there was no need to spell it out. Date Bah commented that it would be somewhat unclear what the consequences of a failure to make a declaration would be. In relation to El Kholy’s third point Hartkamp and Furmston suggested that damage was not a necessary precondition for avoidance in the case of a conflict of interests.

172. The Group decided by a majority of 10:4 to delete paragraph 2.

*Article 7(3): “However, the principal may not avoid the contract*  
*(a) if it had consented to, or could not have been unaware of, the*  
*agent’s so acting; or*  
*(b) if the agent had disclosed the conflict of interest to it and it had not*  
*objected within a reasonable time.”*

173. Bonell thought that it may be sufficient to keep subparagraph (a) and to delete subparagraph (b). Schlechtriem expressed sympathy for keeping subparagraph (b) as it might be an inducement to the agent to disclose the conflict of interests, especially where the agent was unclear as to whether a conflict of interests existed.

174. Uchida wished to narrow down the scope of paragraph 3 by adding the words “if the authority of the agent is concerned only with the performance of a contract which was concluded validly.” Hartkamp suggested that the opening words of paragraph 1 (“if a contract concluded by an agent”) would already indicate that the conflict of interests only related to the conclusion of the contract and that this would make Uchida’s proposed wording superfluous. Bonell was uncertain as to this interpretation of paragraph 1 and thought it unnecessary to go into such great detail in relation to this issue. El Kholy stressed that the performance of a contract could include wide powers of discretion and the reference to performance would thus not necessarily have the desired effect of narrowing down the application of the paragraph.

175. El Kholy stressed that he wished to add a duty of disclosure by the agent. Date Bah repeated his earlier question what the consequences of non-disclosure would be. Schiavoni questioned the merits of inserting such a clause as the consequences of a conflict of interests would be that the contract could be rendered void by the principal in any case. El Kholy replied that the spirit of honesty and transparency would demand such disclosure. He responded to Date Bah’s question by proposing that the consequence of non-disclosure by the agent should result in the principal’s right to avoid the contract in all cases.

176. Bonell pointed to the Comment to paragraph 3 referring to the disclosure of a conflict of interests by the agent. This reference and an additional reference to municipal law which more often than not contained such a duty of disclosure should be sufficient to meet El Kholy’s primary concerns. Schiavoni added that paragraph 3 would confer sufficient protection upon the third party.

177. Finn added that the municipal system which he knew demanded not only disclosure of the fact that there was a conflict of interest, but also of the nature and the extent of the conflict. In paragraph 3, however, the disclosure of the mere fact that a conflict of interests existed was sufficient to constitute a valid disclosure. Bonell confirmed that this approach had been taken because a principal in a commercial context was capable of protecting his interests and making further inquiries if necessary.

Hartkamp suggested that the explanation given by Bonell should be added to the Comments.

178. Paragraph 3 was adopted as drafted.

*Article 8: “An agent has implied authority to appoint a subagent to carry out tasks which are not of a personal character and which it is not reasonable to expect the agent to carry out itself. The rules of this chapter apply to the subagency; acts of the subagent which are within its and the agent’s authority bind the principal and the third party directly to each other.”*

179. Bonell proposed to include a rule on subagency in the chapter and recalled that the provision had been taken from the European Principles.

180. Schlechtriem also wished to include an article dealing with subagency in the draft chapter. He queried whether the reference to “tasks which are not of a personal character” was necessary as tasks of a personal character seemed to lie outside the scope of international commercial contracts. Bonell replied that there were a number of commercial contracts where tasks of a personal character were performed.

181. Finn wondered what the words “which are not of a personal character” added to the words “which it is not reasonable to expect the agent to carry out itself”. Schlechtriem supported Finn’s suggestion. He noted that the phrase “which it is not reasonable to expect the agent to carry out itself” would be broad enough to cover tasks of a personal character. Komarov spoke in favour of deleting the words “not of a personal character.”

182. The Group decided to delete the words “which are not of a personal character and”.

183. El Kholy asked how many times there could be a subagency and whether it would be wise to put a limit to the number of possible subagencies.

184. Farnsworth noted that the word ‘bind’ should be replaced and that such a task should be left to Bonell.

185. Hartkamp pointed out that, according to the present text, a subagent disclosing its authority would bind the third party and the principal. He was unclear as to what would happen if the subagent failed to disclose its authority. Would Article 4 become relevant? Finn suggested that instead of inserting new words which were difficult to interpret it might be easier simply to state that the acts of the subagent had the same effect as if performed by the agent. This would also avoid the use of the word “bind.”

186. Farnsworth pointed out that the words “acts of the subagent which are within its and the agent’s authority bind the principal and the third party directly to each other” were superfluous.

187. Huang suggested that the simplest solution would be to define agency as including subagency. Bonell pointed out that subagency was the exception and not the rule and that he therefore favoured an article on subagency rather than a reference to subagency in a definition.

188. Hartkamp suggested that Finn’s formula (“the acts of the subagent had the same effect as if performed by the agent”) could be used instead of the second sentence of Article 8.

189. El Kholy made two proposals. In relation to the first sentence of Article 8 he wished to delete the words “the agent has implied authority to appoint” and to replace them with the words “the agent may appoint.” Schlechtriem disagreed with the first of El Kholy’s proposals. By referring to implied authority the Article would allow a principal to prohibit the use of a subagent by stating such a prohibition expressly. A change of the wording to “the agent may” would not provide for such an express prohibition which Schlechtriem regarded as a vital element of the power of the principal. Crépeau agreed with Schlechtriem’s reasoning. Lando, by contrast, thought that El Kholy’s first proposal was acceptable. The possibility of restricting the agent’s authority had already been considered in the Principles because the Principles were not of a mandatory character. Hartkamp commented that the parties’ freedom to exclude provisions of the Principles was still a matter of debate.

190. The Group decided not to change the present text.

191. El Kholy further suggested replacing the words “a subagent” with “subagents”. Furmston commented that in England there was a general rule in relation to documents that the singular included the plural and vice versa. He wondered whether there was an equivalent provision which could apply to the Principles.

192. Crépeau felt that for the sake of clarity it would be preferable to use the term ‘tasks’ not only in the first, but also in the second sentence or to use the word “act” also in the first paragraph. Furmston was attracted to “task” because it did not carry any conceptual baggage. Jauffret-Spinosi said that in France the word “task” did not have legal meaning. Farnsworth favoured the words “to perform acts” as the limits of the word “task” were difficult to establish.

193. It was decided to delete the words “to carry out tasks” and to replace them with the words “to perform acts”. Hartkamp added that this change would be subject to further refinement in drafting so that Schlechtriem’s concern relating to the extent of the



word “act” would be met. He then turned to the issue of the second sentence of Article 8.

194. Finn thought that it would be better retain a sentence which expressed clearly that the authority of the subagent had also to be within the agent’s authority and that it was impossible to enlarge an authority by delegation. Farnsworth commented that the first part of the second sentence was somewhat broader than the second part which was restricted to an authority to bind - a point that had been raised by Fontaine. He therefore suggested adopting the first part of the sentence instead of the second part. It was so decided.

195. El Kholy mentioned the important issue of the liability of the agent for acts of the subagent. Although it was outside the scope of the draft chapter it would be helpful to assure a principal that the agent would be liable for poor selection or supervision on the part of the agent. Kronke suggested putting a note in the Comments to the effect that this issue was dealt with by the applicable municipal law.

*Article 9(1): “An act by an agent who acts without authority or outside the scope of its authority may be ratified by the principal. On ratification, the act produces the same effects as if it had initially been carried out with authority.”*

196. Farnsworth commented that a reader might be somewhat struck by the reference to an agent without authority. A reference to a “purported agent” would be more appropriate for two reasons: firstly, it would be more consistent with the definition of agent, and secondly, there were some legal systems where it was only possible to ratify where the agent purported to have the necessary authority to act. Bonell thought that this point may also apply to Articles 5 and 6. Farnsworth replied that if the Group agreed that holding out by the agent was a necessary prerequisite of ratification then a note should be included in the Comments to that effect.

197. Finn proposed that the principal had only the power to ratify within a reasonable time after the conclusion of the contract. The reasonable time should run from the discovery of the lack of authority and such discovery could be made either by the principal or by the third party. Farnsworth agreed.

198. Schlechtriem noted that according to the proposal made by Finn and Farnsworth a contract would only be valid if it had been ratified by the principal within a reasonable time. In practice this would lead to a vast number of contracts being invalid because of the expiry of a time limit - a result which Schlechtriem did not welcome.

199. The Group decided to adopt paragraph 1 without any amendments.

*Article 9: “(2) Where, at the time of the agent’s act, the third party neither knew nor ought to have known of the lack of authority, the latter shall not be liable to the principal if at any time before ratification it gives notice of its refusal to become bound by a ratification. Where the principal ratifies but does not do so within a reasonable time, the third party may refuse to be bound by the ratification if it promptly notifies the principal.  
(3) Where, however, the third party knew or ought to have known of the lack of authority of the agent, the third party may not refuse to become bound by a ratification before the expiration of any time agreed for ratification or, failing agreement, such reasonable time as the third party may specify.”*

200. Bonell recalled that the provision had been taken from the Geneva Convention. He suggested that paragraphs 2 to 8 be deleted so that only the essence remained part of the black letter text.

201. Hartkamp pointed out that the European Principles contained two short provisions (cf. Article 3:207) which were the equivalent of the first paragraph of this draft Article. He suggested dealing with paragraphs 2 and 3 together and invited comments on whether the content of the paragraphs would be an issue for consideration in the chapter on agency.

202. Farnsworth thought that it would be useful to include these provisions and Hartkamp offered some alternative wordings along the following lines: “Ratification shall take no effect if the third party at any time before ratification gives notice of its refusal to become bound by the ratification unless the third party knew or ought to have known about the lack of authority of the agent.”

203. Schlechtriem wondered whether Hartkamp had given up the idea of a time limit for refusal. Hartkamp suggested that a second sentence could be added as follows: “The third party may specify a reasonable time for ratification.”

204. El Kholy did not see the justification for the rule. He wanted to know why the third party should be permitted to get out of the contract. Hartkamp replied that this was because the third party was in good faith. Bonell expressed sympathy for El Kholy’s concern: it was essential to distinguish between the question as to when the third party is entitled to pull out of the contract and whether the third party is entitled to set a time limit for ratification.

205. Di Majo suggested that the issue of ratification was an issue between the agent and the principal and not one for the third party to get involved. He therefore proposed the deletion of paragraphs two and three.

206. Uchida supported the retention of paragraphs two and three because the principal's freedom to choose for or against the contract could lead to speculations to the detriment of the third party unless the third party was protected by having the right to refuse to be bound by the contract.

207. Schlechtriem thought that it would be a good idea to set a time limit for ratification in the first paragraph so that the third party would not be 'in limbo' indefinitely. Bonell warned that paragraphs two and three would be an invitation to litigate. He agreed with Schlechtriem that setting a time limit for ratification would help to solve this problem. A time limit would make it clear to the principal that ratification could not be considered indefinitely and it would give the third party the opportunity to put an end to the period of uncertainty.

208. The Group decided by a majority of 7:5 not to include paragraphs 2 and 3 in the chapter on agency. Hartkamp suggested returning to the question of the time limit after the other paragraphs had been discussed and he invited comments on paragraph 4.

*Article 9(4): "The third party may refuse to accept a partial ratification."*

209. El Kholy was in favour of keeping paragraph 4 which permitted the third party to refuse to accept a partial ratification. He wanted to qualify the rule so that it would only give a third party that had acted in good faith the option of refusal. Farnsworth suggested that a note in the Comments should be added explaining that silence in the view of a partial ratification would amount to acceptance. Finn disagreed with Farnsworth and warned that silence could not be regarded as acceptance under Article 2.6 of the Principles.

210. Komarov spoke in favour of paragraph 4 because it provided protection for the third party. It would not be sufficient to mention the content of the rule in the Comments as the paragraph deviated from paragraph 1 and from the Principles in general.

211. Lando questioned the necessity of such a provision as a party could never be bound by half a contract. Furmston also questioned the rationale behind the rule. Once the rule was deleted the result in practice would not change. If the rule was, however, there to indicate that partial ratification would result in a binding contract then this would be quite a revolutionary rule that he did not welcome. Finn supported Furmston's argument. Schlechtriem agreed with Furmston that contracts should not be valid if there was only partial ratification. He nevertheless stated that there may be exceptional cases where this general rule could be broken, but it should be left to the parties to decide when such a case existed. He added that there would be no space for such a provision in the black letter rules.

212. The Group decided to delete paragraph 4. Bonell suggested mentioning in the Comments that partial ratification was not possible according to the Principles.

*Article 9(5): "Ratification shall take effect when notice of it reaches the third party or the ratification otherwise comes to its attention. Once effective, ratification may not be revoked."*

213. Farnsworth thought that the first sentence of paragraph 5 was unnecessary but stated that the second sentence might be useful. He could not exclude the possibility that in the United States it was possible to revoke ratification once it was effective and suggested to keep the second sentence so as to clarify that according to the Principles an effective ratification could not be revoked.

214. Finn agreed. However he expressed his concern about the fact that revocation had been raised as a possibility. This issue would seem incompatible with the second sentence of paragraph 1 where it was implied that ratification would create a contract. Discussing the possibility of a revocation of ratification would, in the light of paragraph 1, amount to discussing the unilateral revocation of a contract. This did not seem to be compatible with the Principles. Hartkamp explained that paragraph 1 would merely explain the effect of a ratification and that this effect could be reversed by making provision for revocation.

215. Furmston thought that in most legal systems a contract, once concluded, could hardly be rejected and that this principle was confirmed by the first paragraph. He suggested that the deletion of paragraph 5 would not alter this situation and that the second sentence of paragraph 5 would subsequently be otiose.

216. Bonell also thought that the second sentence of paragraph 5 would be superfluous. He was, however, concerned about Farnsworth's intervention. Bonell wished to know whether Farnsworth was in favour of permitting revocation or whether he was simply explaining the uncertainty to which a lack of an explicit rule stating that ratification once effective could not be revoked might cause to lawyers in the United States. Bonell thought that if the latter was the case, a note in the Comments would perhaps be sufficient to overcome the uncertainty. Farnsworth said that he would be happy with having an appropriate note added in the Comments.

217. Uchida pointed out that the rule stated in the first sentence of paragraph 5 that ratification would be effective when it comes to the attention of the third party could not already be inferred from other provisions of the Principles and was therefore necessary. Fontaine agreed and added that the first part of the first sentence would also be important. Rule 1(9) of the Principles would not be sufficient as it covered notices. He suggested adding a provision to paragraph 1 of Article 5 explaining when ratification was effective.

218. Schiavoni wondered whether Article 2.3(1) of the Principles, stating that an offer becomes effective when it reaches the offeree, might be of assistance. Bonell

thought that this was not the case as an offer by its nature consists of a statement and was therefore different from a ratification. He added that paragraph 8 of Article 9 expressly allowed ratification to be inferred from conduct.

219. Crépeau said that his understanding was that the issue of ratification was one between the principal and the agent. The statement in paragraph 1 that ratification meant that the act had the same effect as if it had initially been carried out with authority should be sufficient. Crépeau saw no need to include any provision for the giving of notices in this respect.

220. Finn also thought that ratification was a matter between principal and agent. He asked a point of clarification. Was it the case in other legal systems that before ratification had legal effect it was a matter between the principal and the third party? In the alternative, was it only a matter between the principal and the third party when there had been no ratification but there was conduct which amounted to an estoppel? Hartkamp explained that ratification by the principal could be directed either towards the agent or the third party. The crucial question would be whether ratification could only be effective if the third party knew of it.

221. Schlechtriem explained that the disagreement centered on whether the ratification should be addressed to the third party and how ratification should be achieved. The answer to these questions would depend on whether the third party had a way of clarifying the fate of the contract. Paragraph 2, which might have provided the third party with some certainty, had been deleted. He suggested a return to earlier proposals to insert a new paragraph 2 to the effect that the third party, once it learned of the lack of authority of the agent, would have the power to require the principal to make up its mind within a specified period of time. This would make paragraph 5 otiose.

222. Hartkamp suggested leaving it to the Comments to explain what ratification would be and how it would become effective and adopting Schlechtriem's proposal that the third party may specify a reasonable time within which the principal should ratify. Bonell was not opposed to the new paragraph 2 but he stressed that there may still be room for a rule specifying when ratification becomes effective because there would still be a small number of cases where this issue would not be settled by the new paragraph 2. Lando agreed and thought that it would be a good idea to add a rule stating when ratification was effective. He was of the opinion that ratification without the third party's knowledge should not be effective.

223. Schlechtriem thought that the reason for making ratification a matter primarily between the principal and the third party was that it was a parallel situation to that of the granting of authority which was also a matter primarily between the principal and the agent.

224. Hartkamp proposed the following wording for a new paragraph 2: “The third party may by notice to the principal specify a reasonable period of time for ratification. If the principal does not ratify within that period it can no longer do so.” Hartkamp noted that the Group was in favour of this proposal.

225. Hartkamp invited comments on whether paragraph 5 should be included at all. Schlechtriem thought it unnecessary to include such a paragraph. The German civil code contained a requirement that the third party be notified in relation to ratification. However, since this was not necessary according to a number of other legal systems, Schlechtriem thought it unnecessary to include such a provision. Di Majo agreed. Fontaine thought that the provision contained in paragraph 5 would still be useful but that he could also live with its deletion bearing in mind that the new paragraph 2 had been inserted.

226. Bonell recalled that a number of members including Uchida and Farnsworth had spoken in favour of keeping the paragraph. There was no disagreement as to the substance of the paragraph which would provide clarity. For these reasons it would seem a good idea to keep paragraph 5. Schlechtriem thought that there was an issue in substance. Retaining paragraph 5 would enable ratification to take place by notice to the third party. Deleting it would imply that ratification was a matter between the principal and the agent.

227. The Group decided by a majority of 9:5 to delete paragraph 5.

228. Bonell asked for suggestions concerning the Comments. Crépeau stated that the deletion of paragraph 5 would bring in the general rules, i.e. ratification would be considered a unilateral act and that the moment when it became effective would be a matter of proof. According to Farnsworth there was no need to resolve everything in the Comments as long as illustrations provided a guideline for dealing with the problem in a sensible manner.

229. Schlechtriem proposed to insert a note in the comments stating that ratification would be effected in the same way as the granting of authority was. Bonell thought it was important that the third party would be informed by the principal as to whether the principal had ratified the contract within the time limit that was specified by the third party. Hartkamp thought that it was self-evident that such information would be passed to the third party who had set the time limit in the first place.

*Article 9(6): “Ratification is effective notwithstanding that the act itself could not have been effectively carried out at the time of ratification.”*

230. El Kholly was in favour of deleting the paragraph as it lacked clarity and was unnecessary. Jauffret-Spinosi agreed. Huang preferred the more general approach taken in the European Principles and spoke in favour of deleting paragraphs 6 and 7.

231. Farnsworth was in favour of retaining paragraph 6. The second sentence of Article 9(1) would imply that ratification was retroactive and that ratification could not be effective had it not been possible to carry out the act at that time. This would be a different result from paragraph 6 and paragraph 6 was thus necessary. Farnsworth also suggested that paragraph 7 was included in paragraph 6. Bonell explained in relation to paragraphs 6 and 7 that the legal solutions were not always the same and that paragraph 7 had for this reason been included in the Geneva Convention.

232. Finn suggested that paragraph 6 dealt with an issue so specific that it would not be compatible with the general approach in the Principles of keeping the rules fairly general.

233. Crépeau drew the attention to Article 3.3 of the Principles which dealt with a similar situation. According to Article 3.3 the validity of a contract is not affected by the impossibility to perform an obligation or dispose of an asset to which the contract relates at the time of the conclusion of the contract.

234. Bonell was of the opinion that Article 3.3 of the Principles would obviate the need to include paragraph 6. Hartkamp added that paragraph 6 could raise uncertainties and referred to the example of a principal being insolvent. As a rule of law he would not be permitted to dispose of his goods. One may, however, come to a different conclusion by applying paragraph 6 and this would be a most problematic result.

235. Furmston expressed his preference for deleting paragraph 6. He noted that paragraph 6 would be the rule in English law but that it applied only to a small number of cases. He thought it incompatible with the more general approach taken in the Principles to deal with such a specific situation in this chapter.

236. The Group decided to delete paragraph 6.

*Article 9: “(7) Where the act has been carried out on behalf of a corporation or other legal person before its creation, ratification is effective only if allowed by the law of the State governing its creation.*

*(8) Ratification is subject to no requirement as to form. It may be express or may be inferred from the conduct of the principal.”*

237. Kronke asked whether the expression “by the law of the State” which was part of paragraph 7 was also used elsewhere in the Principles. If this was the case then it would be a good idea to deal with these provisions under a general heading.

238. Crépeau thought that instead of the present paragraph 7, the following rule should be adopted: when the act is being carried out on behalf of a corporation before its creation, ratification takes effect only when an actual authority has been created and it

has ratified the act. Issues about the laws of the states were issues of mandatory rules of the applicable law. Bonell replied that Crépeau's suggestion would carry the key message that companies should act through their authorised bodies. He thought that such a message was self-evident and that it was unnecessary to state this rule explicitly as part of Article 9.

239. Grigera Naón reminded the Group that its aim was to create a unified set of rules in relation to principles of contract law and not to create a unified set of rules in relation to conflict of laws. It would be more prudent to use the words "applicable national law" instead of "the law of the State governing its creation."

240. It was decided to delete paragraph 7.

241. With respect to paragraph 8 Farnsworth suggested that when the topic of 'no requirement as to form' was discussed in the general revision of the present edition of the Principles, there should be a reference that this would also apply in relation to ratification. It was so agreed and the deletion of paragraph 8 was decided.

*Article 10(1): "The authority of the agent is terminated:*

- (a) when this follows from any agreement between the principal and the agent;*
- (b) on completion of the transaction or transactions for which the authority was created;*
- (c) on revocation by the principal or renunciation by the agent; whether or not this is consistent with the terms of their agreement;*
- (d) when applicable law so provides."*

242. Bonell proposed the deletion of the paragraph. It was concerned with the internal relationship between principal and agent and the list mentioned therein was far from exhaustive. He recalled that the Geneva Convention contained additional articles referring to national law.

243. Schlechtriem thought that it was important to note that the principal had the power to revoke unilaterally the authority granted to the agent. He wondered whether this point was also clear to those who came from a legal system which regarded the agent's authority the result of a contractual, i.e. a consensual relationship between principal and agent.

244. Lando referred to Article 3:209 of the European Principles according to which the agent's authority continued until the third party knew or ought to have known of the termination of authority. Lando felt it necessary to have such a rule in the draft chapter and suggested deleting paragraph 1 and replacing it with such a rule.



245. Crépeau stated that, for the reasons Bonell had given in his introductory remarks, the paragraph should not be retained. Instead, a statement could be made to the effect that, where the applicable law has provided for a valid termination, that shall not affect the third party.

246. Schlechtriem spoke in favour of retaining a rule dealing with termination. He explained that the granting of authority to the agent had to some extent already been detached from the underlying internal relationship between principal and agent (Article 2) and was well within the scope of the chapter. A rule clarifying that a principal had the power to revoke the authority unilaterally should be included in the draft chapter. Also Di Majo was in favour of retaining paragraph 1 as it would provide clarity.

247. The Group decided by majority to delete paragraph 1 of Article 10.

*Article 10: “(2) The termination of the authority shall not affect the third party unless he knew or ought to have known of the termination or the facts which caused it.  
(3) Notwithstanding the termination of its authority, the agent remains authorised to perform on behalf of the principal or his successors the acts which are necessary to prevent damage to their interests.”*

248. Finn thought the words “or the facts which caused it” in paragraph 2 superfluous.

249. Uchida stated that he was in favour of retaining paragraph 2.

250. The Group decided to retain paragraph 2 of Article 10 subject to the deletion of the words “or the facts which caused it.”

251. El Kholy spoke in favour of retaining paragraph 3 but wished to add that the agent would in such a case not merely be authorised to act on behalf of the principal but also be obliged to act in the principal’s interests. Hartkamp noted that this would be a concern relating to the internal relationship between principal and agent and therefore be outside the scope of the draft chapter.

252. Farnsworth stated that it would be sufficient if paragraph 3 read as follows: “Notwithstanding the termination of its authority, the agent remains authorised to perform the acts which are necessary to perform their interests.” Bonell pointed out that Farnsworth’s proposal was problematic in that it would be unclear to what “their interests” related. Farnsworth agreed that a reference to the principal was necessary and that “their interests” could be substituted with “the interests of the principal”. Bonell summarised that “or his successors” should be deleted and that the reference to “their interests” should then be changed to “its interests”.

253. Crépeau suggested the deletion of paragraph 3 as it was concerned with the internal relationship between principal and agent. It would be sufficient to refer to the applicable law even if the results would be different for different applicable laws. Bonell replied that the rule would carry a wider meaning than Crépeau permitted. The rule also covered situations where termination took place, was effective and the agent was still obliged to mitigate damages if necessary. Di Majo was of the opinion that the paragraph should be kept.

254. The Group adopted paragraph 3 of Article 10 subject to the following amendments: firstly, the words “or his successors” were deleted, secondly, “their interests” was substituted with “its interests” and “damage” was replaced by “harm” (the latter proposal having been made by Bonell).

255. Furmston wondered whether it was implied in Article 10 that the contract between the principal and the third party had come into existence before the termination of the authority or whether it also applied to situations where no contract had been concluded. Hartkamp replied that the latter was the case and Furmston seemed comforted by this reply.

### III. DRAFT CHAPTER ON AUTHORITY OF AGENTS (SECOND READING)

256. Hartkamp invited Bonell to introduce the revised draft Chapter as prepared by the Drafting Committee.

*Article 1: “(1) This chapter governs the authority of a person, the agent, to affect the legal relations of another person, the principal, with respect to a contract with a third party, whether the agent acts in its own name or in that of the principal.*

*(2) It is concerned only with the relations between the principal or the agent on the one hand, and the third party on the other.*

*(3) It does not govern an agent’s authority conferred by law or the authority of an agent appointed by a public or judicial authority.”*

257. Bonell pointed out that the wording of this article had been substantially changed. Paragraphs 1, 2 and 4 of the original draft were redrafted and were merged into new paragraph 1.

258. With respect to paragraph 1 El Kholy suggested adding the words “or a unilateral undertaking” after “contract”. This would prevent the provision from applying to contracts only. Bonell replied that a reference to a unilateral undertaking would not be necessary in the black letter text as it would be mentioned in the Comments. Also, in the context of the revision of the present edition of the Principles, a general provision stating that all references in the Principles to contracts would include unilateral acts.

259. Fontaine disliked the wording “legal relations ... with respect to a contract”. He preferred “legal position or situation” instead. Farnsworth explained that the Drafting Committee had found it difficult to refer to the position or situation between two parties in other articles.

260. El Kholy expressed dissatisfaction with the wording “affect legal relations” in paragraph 1 and wished to replace it with “operate a change to.” “To affect legal relations” would not include the creation of legal relations. Hartkamp thought that it should be made clear in the Comments that “to affect legal relations” would include the creation of legal relations. Grigera Naón was also not in favour of the phrase “to affect legal relations” and suggested replacing it by “to create or modify legal relations or a certain act.” Bonell replied that a broad formula had been chosen so as to cover the situations referred to by Grigera Naón.

261. Finn pointed out that the words “to affect legal relations ... with respect to a contract” would presuppose the existence of a contract and thus be misleading. He thought that this could be remedied by adding the words “by or” before “with” so that paragraph 1 would read: “This chapter governs the authority of a person, the agent, to affect the legal relations of another person, the principal, by or with respect to a contract with a third party, whether the agent acts in its own name or in that of the principal.” It was so decided.

262. Crépeau pointed out that paragraph 1 was difficult to translate into French as there was no literal translation of “to affect legal relations”. The translation most accurately conveying the meaning would be “ce chapitre regit le pouvoir ... de produire des effets juridiques ...” Bonell replied that this seemed to be a concern of non-English speakers and that priority should be given to agreeing on an acceptable English version before giving thought to the translations. He suggested that non-literal translations should be acceptable as long as they did not change the meaning of the text. Crépeau agreed.

*Article 2: “(1) The principal’s grant of authority to an agent may be express or implied.*

*(2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted.”*

263. Bonell mentioned that there had been no amendments to Article 2.

*Article 3: “Subject to Article 4(1)(a), where an agent acts within the scope of its authority and the third party knew or ought to have known that the agent was acting as an agent, the act of the agent shall directly affect the legal relations between the principal and the third party and no legal relation is created between the agent and the third party.”*

264. Bonell indicated that the words contained in the original draft “the act of the agent shall directly bind the principal and the third party to each other” had been replaced by the words “the act of the agent shall directly affect the legal relations between the principal and the third party”. A second amendment was the addition of the words “and no legal relation is created between the agent and the third party.” A third amendment was the deletion of the final words “unless it follows from the circumstances of the case ...” which were replaced by the opening phrase “subject to Article 4(1)(a)”.

265. Grigera Naón noted that the problem that had occurred in Article 1(1), namely that the reference to “affecting legal relations” did not include cases of the creation of a contract, also occurred in Article 3. Bonell disagreed and explained that the problems with the expression in Article 1(1) had resulted from the words “legal relations in relation to a contract”. There was no such reference to a contract in Article 3 and therefore no such restriction.

*Article 4: “(1) Where the agent acts within the scope of its authority, its acts shall affect only the relations between the agent and the third party if:*  
*(a) it follows from the circumstances of the case that the agent intended to do so, or*  
*(b) the third party neither knew nor ought to have known that the agent was acting as an agent.*  
*(2) Nevertheless*  
*(a) where the agent commits a fundamental non-performance or it is clear that there will be a fundamental non-performance of its obligations towards the principal, the principal may exercise against the third party the rights acquired on the principal’s behalf by the agent, subject to any defences which the third party has against the agent;*  
*(b) where the agent commits a fundamental non-performance or it is clear that there will be a fundamental non-performance of its obligations towards the third party, the third party may exercise against the principal the rights which the third party has against the agent, subject to any defences which the agent has against the third party and which the principal has against the agent.*  
*(3) In the cases referred to in paragraph 2, the agent shall on demand communicate the name of the principal to the third party, or the name of the third party to the principal, as the case may be.*  
*(4) The rights under paragraph 2 may be exercised only if within reasonable time notice of intention to exercise them is given to the agent and the third party or the principal, as the case may be. As soon as the third party or principal has received such notice, it may no longer free itself from its obligations by dealing with the agent.”*

266. Bonell indicated the major changes to Article 4. One was that paragraphs 1 (a) and (b) had exchanged positions so as to read more elegantly in conjunction with the new wording in paragraph 1 replacing the references to the word “bind”.

267. Grigera Naón expressed his concerns regarding paragraphs 1 and 2 of Article 4 from a practitioner’s point of view. Paragraph 1 would apply to situations where the third party negotiated a deal with somebody without knowing or being in a position to know that the latter was not contracting on its own behalf. Alternatively, the third party may have knowledge of the fact that the person was not contracting on its own behalf but the agent was intending to bind itself only. Grigera Naón found it difficult to reconcile this rule with the general principle of the freedom of contract.

268. Grigera Naón’s main concern was, however, directed against paragraph 2(b) stating that an agent’s fundamental non-performance would enable the third party to make a claim against the principal. He thought it important to clarify in the Comments that the third party still had the option to make a claim against the agent and was not limited to claiming against the principal.

269. Kronke too expressed some concern about the potential assault by the principal on the third party. Paragraph 2(a) provided that an agent’s non-performance could trigger the principal’s right to make a claim against the third party. The third party had chosen the agent as the contractual partner and had the opportunity to examine the agent and formulate the content of the contract accordingly. Had it known about the principal it might have made a number of different decisions in relation to the contract. Subsequently, it seemed harsh that the principal could take an action directly against the third party.

270. Bonell recalled that the rule was not a new one. The rule reflected a compromise solution reached in Geneva and Bonell explained that a number of civil law systems knew various exceptions to the privity of contract. Grigera Naón thought that such a comparative law analysis was of limited assistance to the current project of formulating rules governing international contracts. He stressed that a contracting party would not wish a third party to appear unexpectedly and to make a claim against it. To a certain extent paragraph 2 provided for an assignment of a contract without making this explicit.

271. Hartkamp thought that the protection of the third party could be granted by enabling the parties to add to a non-assignment clause that the principal’s rights under Article 4(2) could not be exercised.

272. Finn expressed sympathy for Grigera Naón’s concerns. He stated that his proposals to restrict the applicability of Article 4(2) to cases of fundamental non-performance and to add a time limit to the exercise of the rights under paragraph 2 were intended to protect the third party. Nevertheless, Article 4(1) still conferred an

advantage on the principal at the cost of the third party's rights. While one may argue that reasons of harmony suggested adopting a rule compatible with those in the Geneva Convention and the European Principles, it should at least be acknowledged that the solution conferred an advantage on the principal.

273. In the light of the concern expressed in particular by Grigera Naón and Finn, Farnsworth asked the Rapporteur to prepare an alternative draft in which the undisclosed principal would be omitted and hoped that the Group could decide on this issue once such a draft existed. He announced that he would consult with other experts in his country on this issue.

274. Bonell agreed and, in view of the fact that members from common law countries were prepared to give up the undisclosed principal rule, wondered whether members of civil law countries might in turn agree to omit references to commission agents. This would lead to the deletion of Article 4 and the deletion of the cross-reference to Article 4(1)(a) in Article 3. Wording expressly stating that the direct effect would occur unless the agent intended to 'bind' itself only should be added to Article 3. Lando supported Bonell's proposal and stated that he had never liked the idea of including the commission agent and undisclosed principal in the chapter. Hartkamp concluded that Bonell should provide the Group with two drafts - one excluding a reference to an undisclosed principal and the other including such reference.

*Article 5: "(1) Where an agent acts without authority or outside the scope of its authority, its acts do not affect the legal relations between the principal and the third party.*

*(2) Nevertheless, where the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent."*

275. Bonell explained that the only change was that "to bind" had been replaced by "affect the legal relations". Farnsworth pointed out that this was one of the provisions where a reference to "legal position or situation" would have been inappropriate.

*Article 6: "(1) An agent that acts without authority or outside the scope of its authority shall, failing ratification by the principal according to Article 9, be liable for damages so as to put the third party in the same position as it would have been if the agent had not so acted.*

*(2) The agent shall not be liable, however, if the third party knew or ought to have known that the agent had no authority or was acting outside the scope of its authority."*

276. Bonell drew attention to the change in substance in paragraph 1. While in the original draft damages had been based on expectation loss, in the new draft they were based on reliance loss.

277. Hartkamp wondered whether the new wording actually conveyed the meaning it was intended to convey. The wording “had not so acted” could mean “if the agent had not acted at all” (the intended meaning), but it could also mean “if the agent had not acted without authority” (i.e. it had acted with authority) which would clearly lead to the opposite result. Farnsworth invited Bonell to look to the formulation which had been adopted in one of the Restatements for guidance in finding the appropriate wording.

*Article 7: “(1) If a contract concluded by an agent involves the agent in a conflict of interests with the principal of which the third party knew or could not have been unaware, the principal may avoid the contract according to the provisions of Articles 3.12 and 3.14 to 3.16.  
(2) However, the principal may not avoid the contract  
(a) if it had consented to, or knew or could not have been unaware of, the agent’s so acting; or  
(b) if the agent had disclosed the conflict of interest(s) to it and it had not objected within a reasonable time.”*

278. Bonell explained that the reference to a conflict of interests in the first draft had been refined by adding the words “with the principal” (conflict of interests with the principal). Paragraph 2 had been deleted. Paragraph 3 had not been changed.

279. Finn wondered whether paragraph 1 of Article 7 would also attract Article 3.18 of the Principles. He added that the common law rule was that a party was entitled to damages irrespective of whether the contract was avoided or not. The reasoning for this common law rule was that it was in many instances impossible to avoid the contract, for example where property had been sold off. Hartkamp replied that he did not think that Article 3.18 was attracted because Article 7 was only concerned with the fact that a party may avoid the contract. Bonell added to this that the consequences of avoidance would be left to the applicable law as this was a matter which would relate to the internal relationship between agent and principal.

280. Schlechtriem suggested that the cross-references to Articles 3.12, 3.14 and 3.16 could be made in a more general way by referring to the “appropriate provisions of chapter 3” or the “provisions of chapter 3 respectively”. Bonell warned that it would not be clear to the readers which articles of chapter 3 of the Principles applied and that they may well think of the wrong articles.

281. Crépeau noted that Article 3.12 of the Principles dealt with situations when it was not possible to avoid a contract. Article 7, however, referred to Article 3.12 as one of the means by which avoidance could take place.

282. Furmston proposed the deletion of the words "... the principal may avoid the contract according to the provisions of Articles ..." and replace them by "... the principal may avoid the contract. The right to avoid is subject to Articles ..." It was so decided.

*Article 8: "An agent has implied authority to appoint a subagent to perform acts which it is not reasonable to expect the agent to perform itself. The rules of this chapter apply to the subagency."*

283. Bonell noted that the reference to "task" had been replaced by "acts". The words "not of a personal character" had been deleted and the second part of the second sentence ("acts of the subagent which are within its and the agent's authority bind the principal and the third party directly to each other") had been deleted.

284. Finn suggested that if the Group wished to exclude the possibility of subagents of subagents then a note in the Comments should make it clear that a subagent should not be allowed to appoint another subagent. It could be implied from the second sentence of Article 8 that the Principles considered further subagencies. Schlechtriem did not understand why this limitation should be made. He pointed out that Article 8 spoke of the implied authority of an agent to appoint a subagent in certain circumstances. Such an implied authority could be curtailed if the principal expressly limited the scope of the agent's authority. Fontaine also thought that there was no reason to prohibit a subagency of a subagency. Lando, by contrast, thought it dangerous to provide for situations where subagents appointed subagents. This could have a snowball effect which was difficult if not impossible to control. The Group decided by a majority of 8:4 that the subagent should, under certain circumstances, have the implied authority to appoint another subagent. Hartkamp concluded that a note in the Comments should make this position clear.

*Article 9: "(1) An act by an agent that acts without authority or outside the scope of its authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority.  
(2) The third party may by notice to the principal specify a reasonable period of time for ratification. If the principal does not ratify within that period it can no longer do so."*

285. Bonell explained that paragraph 1 was unchanged. All other paragraphs had been deleted and a new paragraph added so as to ensure that the third party could specify a time period for ratification by the principal.

*Article 10: "(1) Termination of authority shall not be effective in relation to the third party unless it knew or ought to have known of the termination."*



*(2) Notwithstanding the termination of its authority, an agent remains authorised to perform on behalf of the principal the acts which are necessary to prevent harm to its interests.”*

286. Bonell pointed out that paragraph 1 had been deleted as well as the last words of paragraph 2 (“or the facts which caused it”). The words “or his successors” (the principal’s successors) had been deleted from paragraph 3 and the word “damage to their interests” had been replaced with “harm to its interests”.

287. Crépeau thought that the wording “an agent remains authorised” to perform acts necessary to prevent harm to the principal’s interests would not be sufficiently strong as the agent should be under a duty to perform such necessary acts. Bonell replied that this concern was one relating to the internal relationship between principal and agent.

288. El Kholly proposed that in Article 10(2) the words “on behalf of the principal” should be deleted and that “its interests” should be replaced by “the principal’s interests” so that the relevant provision would read as follows: “... an agent remains authorised to perform the acts which are necessary to prevent harm to its interests.” Huang supported this proposal which was then adopted by the Group.

#### IV. LIMITATION OF ACTIONS BY PRESCRIPTION

289. Schlechtriem introduced the position paper he had prepared on this subject (UNIDROIT 1999 Study L – Doc. 58).

290. First of all Schlechtriem invited comments on whether the draft chapter should be based on the United Nations Limitation Convention. He himself favoured such an approach for a number of reasons. The U.N. Limitation Convention was well drafted and the four year period of limitation seemed to be a good compromise between conflicting interests. Since the draft chapter was concerned with limitation rules for international contracts it seemed sensible not to deviate too far from this existing uniform law text. Another reason against deviating too far from the U.N. Limitation Convention would be that parties from States parties to the U.N. Limitation Convention would have to derogate from that Convention if they adopted the Principles.

291. Bonell reminded the Group that this issue had already been discussed last year and that the outcome had been to take the U.N. Limitation Convention as the precedent for the draft chapter on limitation. He was reluctant to reopen this debate. Bonell also thought that the title had been agreed last year and should read: Limitation of Actions. He asked the Group whether it would be necessary to refer to prescription.

292. Fontaine thought that “limitation” should be used in English and the word “prescription” in those other languages where it was appropriate to do so.

293. El Kholy explained that the concept of limitation was entirely different in Islamic law. Under Islamic law, there would be no such concept that rights could be lost by the mere passage of time. In some Arab countries there was a limitation of actions but this was merely a rule of good administration. For the purposes of the Principles it would therefore be more appropriate to refer to “limitation” only and not to “limitation of actions.” Bonell thought that this point should be considered when the remarks under point 6 of the position paper would be discussed.

294. Lando recalled that a draft which had been inspired by the U.N. Limitation Convention had been discussed by the Commission on European Contract Law at its last session in Edinburgh and that there had been some argument against it. Another draft which provided for a three year limitation period had been presented by R. Zimmermann. Zimmermann’s main argument against the U.N. Limitation Convention was that no member State of the European Union had ratified the Convention. Lando mentioned that the Convention had been ratified by Norway and by the United States and that it would be unclear what the outcome of the debate would be. Bonell stressed the desirability of the coordination of the efforts of the Commission and of the Group.

295. El Kholy pointed towards the difference between the U.N. Limitation Convention and the Principles. The Convention would be binding on Contracting States whereas the Principles would not be binding. A conflict between the Convention and domestic law would not create a problem whereas a conflict between the Principles and domestic law would be problematic. The Group should be aware of such potential problems. Bonell added that this would be a convincing reason for drafting the chapter along the lines of the U.N. Limitation Convention.

296. Grigera Naón stated that there could be situations in which it was clear that no national laws would apply. He stressed the need for the Principles to apply outside the scope of the Convention.

297. Addressing the basic points of his paper, Schlechtriem pointed out that by taking the U.N. Limitation Convention as the model, the general period of limitation would be four years. He wondered whether the draft should deal with all claims arising out of a contract or, following the example of the U.N. Limitation Convention, should exclude cases of personal injury and damage to property. In his view at least claims arising out of personal injury cases should be excluded so as to avoid an overlap with the law of torts.

298. El Kholy pointed out how difficult it was to distinguish between contractual and non-contractual claims. The misuse of a contractual right could fall within the ambit of non-contractual liability under Egyptian and French law.

299. Lando explained that the European Principles followed a different route. The Commission on European Contract Law intended to prepare general rules on prescription and had discussed even family torts. An exclusion of personal injury claims would not be in the interest of the Commission but Lando acknowledged that the UNIDROIT Principles covered a geographically wider scope than the European Principles and that this might well lead to a different conclusion. He nevertheless emphasised how difficult it was to draw a clear line between tort and contract.

300. Kronke commented that it would be a possibility to look at the problem from a different angle. One could provide for personal injury actions, set limitation periods, define jurisdictions etc. and then determine that other contractual and non-contractual claims would be dealt with on similar terms. Schlechtriem replied that the Principles dealt with commercial contracts between businessmen. In those circumstances it would be most unusual to have a personal injury claim and it would be sufficient to leave it to the applicable law of torts to deal with such situations.

301. Crépeau noted that the scope of the Principles would go beyond the scope of commercial contracts. Contracts of services would also be included and those could well be non-commercial. He therefore suggested that prescription for all kinds of damages resulting from a breach of a duty be dealt with. Schlechtriem warned that the Group was not in the position of a domestic legislative body with the power to set limitation periods for tort claims. Bonell agreed with Crépeau in that the Principles would not only cover commercial contracts but indeed all non-consumer transactions. However, setting a limitation period for both contractual and tort claims would go beyond the scope of the Principles.

302. Lando was attracted by Crépeau's comment. He stated that there were a number of 'delocalised' contracts where claims for personal injury would play an important role. He mentioned contracts relating to the oil industry as an example and stressed that a reference to private international law was in this respect unsatisfactory. Grigera Naón thought that it might be helpful to distinguish between tort law in general and an action for personal injury in the context of a labour contract on the other hand. In relation to the latter Grigera Naón mentioned a case of a worker injured on an oil rig. The legal solution was not to apply the rules of the territorial waters where the oil rig was based but the laws of the country from which the injured party came. Grigera Naón thought it too ambitious to try to find a unified system of law applicable to such cases. Bonell concluded that there was sufficient support for Schlechtriem to limit the scope of the chapter as proposed.

303. Schlechtriem asked the Group whether or not consumer transactions should be included in the chapter. He warned that there were a number of mandatory domestic rules in relation to consumer transactions and favoured consumer transactions to be excluded. Bonell confirmed that consumer transactions had already been excluded.

304. Furmston thought that the object of the exercise was to provide a set of rules for contracts governed by the Principles and was therefore astonished to come across the issue to provide rules on limitation for contracts clearly outside the scope of the Principles.

305. Schlechtriem wanted to know whether there should only be one limitation period or whether there should be exceptions allowing for a longer period in certain circumstances. One possibility would be to allow a limitation period of e.g. eight years for latent defects. Construction contracts and contracts in relation to real estate would be prone to problems some eight or nine years after the conclusion of the contract. Another option would be to permit the courts to deviate from the prescribed limitation period in certain circumstances. A third option, which was favoured by Zimmermann, was to have two periods of limitation. One period would be a relatively short one commencing on the day when the claimant knew or ought to have known of the facts giving rise to the claim. The second, longer period, would be a cut-off period and start to run at the time when the action arose regardless of whether the claimant knew or ought to have known about it.

306. Fontaine stated that he was attracted to the concept of having two limitation periods and that it was a concept that found growing support. Hartkamp also thought that the two-tier system would be preferable to the other solutions and added that it had been adopted in the new Dutch Civil Code. Lando was also in favour of the two-tier system. Komarov thought that the two-tier system would be more flexible than other systems and would be an adequate response to the different problems arising in the context of limitation periods. Furmston explained that English law had known limitation periods which started from the time when the action arose for hundreds of years and that this was now considered inappropriate. Bonell concluded that the majority of the Group seemed to favour the two-tier system.

307. Schlechtriem asked for more guidance on the specific length of the two limitation periods. He wanted to know whether the short period should be the four year limitation period adopted in the U.N. Limitation Convention. Date Bah thought a four year period appropriate for the short limitation period and a 10-12 year period for the long one. Both periods should not be cumulative but concurrent.

308. Finn thought that a period shorter than four years would be preferable for the short limitation period. Once having discovered their claim one could expect businessmen and women to act swiftly. Lando thought that a three year period could be sufficient for the short limitation period.

309. El Kholy explained that under Egyptian law there would be a senior liability of a contractor with a ten year guarantee. There would also be a limitation of three years from the discovery of the defect.

310. Farnsworth warned that the short limitation period should not be cut too short. He reminded the Group that the period could start to run from the time when the claimant ought to have known about the facts giving rise to the claim and that the types of transactions covered by the Principles were primarily complicated ones involving e.g. technical and legal experts. Uchida also thought that a short period of four years would be appropriate and sought some clarification as to when the period of limitation was interrupted, suspended or when it ceased. He explained that in his legal system the declaration to claim damages would lead to the cessation of the limitation period.

311. Schiavoni saw an acute problem with a limitation period of four years with regard to international construction contracts. He pointed out that it would for most main contractors be impossible to rely on national limitation periods as they were far too long. Usually no guarantee could be offered for a period that exceeded one or two years. Schiavoni suggested that a provision should be inserted enabling the parties to decide the length of the limitation period themselves. He made this point in order to provide for the possibility of parties' agreeing on a shorter period of time. Schlechtriem said in relation to the parties' free choice on the length of the limitation period that he had initially only considered a four year limitation period because he thought that the parties were free to agree on a longer limitation period. Date Bah raised some policy concerns about this and warned that parties should not be allowed to extend the limitation period *ad infinitum* as this would contradict the main aim of setting a limitation period in the first place. Hartkamp added that it was for this reason that in the Netherlands parties were only allowed to shorten the period of limitation and were prohibited from lengthening it. Too short a period could, however, be regarded unfair. Schlechtriem noted that such a problem should be considered under the Unfair Contract Terms Act.

312. Bonell spoke in favour of considering a four year limitation period with the possibility of the court extending that period. Finn mentioned that the Australian courts had this power and that this had proven problematic in practice.

313. Schlechtriem emphasised that the two-tier system would depart from the approach taken in the U.N. Limitation Convention in two respects: firstly, there would be a different time of commencement of the limitation period and secondly, there would be a longer period. Huang spoke in favour of the two tier system but wished to have a note in the Comments explaining that these limitation periods would only apply where the parties chose their contract to be governed by the Principles.

314. El Kholy mentioned that in Egyptian law the two periods of limitation could run cumulative. If, for example, a party discovered a latent defect on the last day of the longer period, the shorter one would start to run and the party could start an action until the short period had expired. Fontaine commented that he understood the two-tier system to consist of two periods running concurrently. If a defect was discovered on the last day of the longer period, no claim could be made after that period had expired.

315. Crépeau suggested that the length of the limitation period should be made dependent on the type of the claim. One could set a limitation period for claims relating to the validity of the contract and a different limitation period for claims relating to the performance of the contract. Bonell stated that the Principles already provided time limits for specific remedies such as avoidance of a contract or specific performance. He suggested that these provisions were still applicable and not governed by the chapter on limitation of actions. Schlechtriem agreed in principle.

316. Bonell concluded that the Group had decided to adopt the two-tier system and had thereby tacitly overruled the basic decision to take the U.N. Limitation Convention as a model.

317. Schlechtriem proposed that no further provisions for escape clauses and clauses covering cases of fraud would be needed as the 10 year period would cover them. Kronke returned to the issue of construction contracts and wished to have some research data on this issue. He also referred to issues of technology (e.g. computer software) and invited the Group to share their experience and expertise on these issues. Schlechtriem referred to research carried out by the University of Aachen on construction contracts which suggested that the majority of the defects occurred some five to eight years after the contract was concluded.

318. Schlechtriem suggested that the limitation periods should apply to all kinds of remedies in the widest sense. Actions for specific performance, claims for damages, rights of avoidance and termination should all be included. Bonell expressed his surprise about this proposal and illustrated his concerns by giving an example. The right to terminate a contract was covered by Articles 7.3.1 *et seq.* of the Principles. Accordingly, a right to terminate could be exercised by giving notice to the other party within a reasonable time. Bonell wondered what would become of this provision should the chapter on limitation of actions apply to the termination of a contract as well. He thought that these kinds of rights which were capable of being exercised without court involvement were outside the scope of the chapter and that this issue had been decided last year. Schlechtriem replied that the application of the chapter on limitation of actions would in such cases be obsolete and of mere theoretical importance.

319. El Kholy noted that the exchange of opinions between Bonell and Schlechtriem pointed towards the difficult problem of distinguishing between limitation and prescription on the one hand and the forfeiture of rights on the other hand. Hartkamp offered an explanation by stating that a right to be exercised juridically would be a right to which limitation/prescription applied whereas a right to be exercised within a reasonable time would create a *déchéance* (forfeiture of rights). However, if an action were to be brought before a court in relation to a right to be exercised within a reasonable time, this action would be subject to the limitation of action.

320. Schlechtriem returned to the issue of party autonomy. He had assumed that the parties could derogate from the provisions on limitation of actions contained in the Principles, for instance with respect to warranty periods. He proposed following the U.N. Limitation Convention in this respect which provided that the limitation period commences when the buyer notifies the seller of the facts on which its claim is based provided that this falls within the warranty period. Without notice, the limitation period should commence at the end of the warranty period.

321. Schlechtriem then raised the question of the recommencement and cessation of the limitation period. He saw a problem with stipulating specific provisions on recommencement and cessation in relation to adjudicated claims as many different domestic legal provisions existed in this respect. He suggested leaving it to the domestic law to determine how long a limitation period for adjudicated claims would be. Farnsworth agreed.

322. El Kholly felt strongly that in the case of fraud the period of limitation should be extended as combat of fraud was a most important issue. He also mentioned a basic distinction in French law between prescription based on the presumption of payment and prescription based on other factors. In relation to the latter point Hartkamp explained that the distinction would not be an easy one to make and that not many countries had incorporated it into their laws. He therefore proposed not to adopt it in the Principles. Schlechtriem agreed. In relation to El Kholly's comment on fraud cases Schlechtriem commented that there was always the possibility to sue in tort and that this made a special provision for fraud cases superfluous. He also pointed out that if combating fraud constituted an essential element in domestic legal systems rules governing fraud cases would be mandatory domestic ones and would override the Principles in any case.

323. Schlechtriem turned to the question of interruption by acknowledgment. He noted that this concept is inherent in most legal systems. However there are considerable differences as to what would constitute an acknowledgment. Crépeau thought that what constituted an acknowledgment could be implied from conduct. Schlechtriem, by contrast, mentioned the unsatisfactory attempts of the German courts to interpret the conduct of the parties in this respect. Uchida stated that acknowledgment would be an application of the concept of estoppel, so that deciding what constitutes an acknowledgement would be a matter of proof rather than of form. Hartkamp supported Crépeau's remarks and expressed his reluctance to give up the general rule in the Principles that a manifestation of intention may also be by other means than by writing. Date Bah agreed and emphasised that it was important to be consistent with the other provisions in the Principles.

324. Schlechtriem wanted to know whether the chapter should include a 'safety provision' similar to Article 19 of the U.N. Limitation Convention. This article provides that any act performed by the creditor in the State in which the debtor has its place of

business, which under the law of that State has the effect of recommencing a limitation period, should have the same effect, i.e. a new limitation period of four years shall commence on the date prescribed by that law. Hartkamp thought that such a provision was important in a Convention which overruled mandatory domestic rules, but not in the Principles which had no effect on mandatory domestic rules.

325. Fontaine asked for some clarification of terminology. An interruption would lead to the limitation period starting all over again and the causes of interruption in French and Belgian law were acknowledgment and commencement of judicial proceedings. However, in the paper the acknowledgment would be treated as a cause of suspension - i.e. the running of time was estopped. Schlechtriem agreed and suggested that at page 9 point 2 the the words 'cessation' and 'interruption' be replaced by 'suspension' in the paper.

326. Furmston explained that in the English legal system the writ had to be issued within the limitation period. However, the limitation period would not stop so that a second cause of action could not be added once the limitation period had expired. By contrast, in the paper it is suggested that additional actions could be brought at such time. Finn also wondered what would happen in relation to the limitation period if one action was brought and another still to be brought. Schlechtriem replied that this would be a procedural point to be determined by domestic procedural laws.

327. Bonell asked the Group whether the start of legal proceedings should lead to interruption or suspension. Hartkamp said he would favour interruption and emphasised again the need to include a formal notice by the creditor to the debtor demanding performance as a ground for interruption. He believed this to be the position in most civil law countries. Bonell replied that it was not part of Italian law and not part of the U.N. Limitation Convention either. Fontaine added that in Belgium interruption was only caused by the formal commencement of judicial proceedings and added that he was in favour of interruption and not suspension. The Group supported the concept that commencement of judicial proceedings triggered the interruption of the limitation period.

328. Furmston commented on the terminology chosen. In his view the distinction was not carried adequately by the words 'interruption' and 'suspension'. Kronke agreed and added that 'interruption' was likewise not the adequate word in a number of civil law countries, for example Germany, for what it was meant to convey. He suggested that new terminology be found. Bonell stressed that at this stage the Group should decide on the substantive issue and that questions of terminology would be discussed at a later stage.

329. Komarov explained that in the Russian legal system an interruption (i.e. the limitation period starts to run all over again) was caused by a court decision on the



merits of the case. If, however, a decision was made only on procedural points, only a suspension of the limitation period was effected.

330. Schlechtriem noted that interruption could lead to a period of limitation of up to 20 years given that the longest period was 10 years. Finn wanted to hear a substantive argument in favour of interruption. An argument against it would be that interruption opened the gates for a perpetual limitation period if a party chose to continue proceedings and to discontinue them on a regular basis. Crépeau mentioned that in the new Civil Code of Quebec there was no interruption if a case was discontinued or dismissed. Kronke stated that this rule was also part of the German Civil Code and stressed that the concept of interruption required an elaborate set of provisions dealing, for example, with the question of which actions or events would not trigger interruption.

331. Hartkamp thought that the best solution would be for Schlechtriem to present a new paper to the Group at its next session. Schlechtriem replied that this would be based on the U.N. Limitation Convention in this respect and he would thus take the approach that the limitation period would be suspended and not interrupted with the commencement of judicial proceedings.

332. Schlechtriem suggested that the suspension of the limitation period should also be triggered in the case of arbitration. It was so agreed.

333. The next issue mentioned by Schlechtriem was whether events causing a defendant (e.g. a debtor) to be unable to maintain its defence (for reasons such as incapacity, death, company dissolution) should also trigger suspension. He was in favour of such an approach as was Komarov who thought that force majeure should be regarded as such an event. Fontaine thought it a good idea to link the concept of force majeure to that described elsewhere in the Principles. Schlechtriem said that he had already done so.

334. Farnsworth spoke against the proposal made by Uchida earlier that negotiations should also trigger suspension. It would be too vague a concept and unnecessary given that the proposed limitation periods were fairly long. It was so agreed.

335. Schlechtriem stated that the time for the commencement of the limitation period would be where the action accrued, was discovered or was capable of being discovered. The alternative would be to calculate it from the end of the calendar year in which this took place (this would make it easier for the party concerned not to miss the end of the limitation period). Schlechtriem favoured the former approach and thought that the latter was unnecessary as the limitation periods were quite long. The Group agreed. Schlechtriem warned that there should be a provision ensuring that when the date of expiry of a limitation period falls on a Sunday or on any other non-working day then the following working day would be the relevant date. Farnsworth suggested that

the Principles should contain a general provision to that effect and that this should be discussed in the context of a general revision of the present edition of the Principles.

336. El Kholy criticised that the words “accrual of right” would not constitute a precise legal expression and they should be replaced with something like “the moment the right becomes due.”

337. Schlechtriem said that another issue was the influence of the running of the limitation period on securities and collaterals. He proposed leaving this issue to municipal law. It was so agreed. Another problem Schlechtriem mentioned was whether the Principles applied to sureties. If they did then this would pose the question whether the chapter on limitation of actions should apply to sureties as well. Hartkamp thought that this was included.

338. Schlechtriem then turned to the question of the consequence of the running out of the period of limitation. Would claims be fully extinguished or would the defendant merely have a right to raise the expiry of the limitation period as a defence? Under the EC Products Liability Directive the expiry of the long limitation period operates as extinguishing claims. He suggested following this proposal which would also mean that the expiry of the shorter period would not extinguish the claim. Hartkamp proposed to have a unified concept for both periods of prescription and preferred that the defendant should raise the defence of the expiry of the limitation period. Fontaine supported this view. El Kholy agreed and stated that any other solution would not be looked upon favourably by Arab countries. The Group expressed its agreement.

339. Crépeau recalled that a number of provisions in the Principles demanded action within a reasonable period of time and asked whether it was justifiable that the lapse of time would amount to a *déchéance* in these cases (extinguishment of right after a reasonable time has elapsed and no action been taken). He thought that this seemed harsh and proposed that the references to periods of reasonable time in the Principles operate as limitation periods instead. This should be discussed in the context of a general revision of the present edition of the Principles. Hartkamp mentioned that the concept of reasonable time periods was much more flexible than that of limitation periods and that it was thus less harsh than it appeared at first sight. Fontaine supported this view. Also, according to Finn, Crépeau’s proposal would create far too many issues where it was difficult to reach a majority decision in a satisfactory manner. Jauffret-Spinosi agreed and mentioned that in France this issue had been discussed for a long time and that still no conclusion had been reached. Komarov spoke in favour of this.

340. Schlechtriem suggested that the question of the relationship between limitation of actions and set-off should be postponed until the chapter on set-off in general was more precisely defined. He then moved to ancillary claims such as claims for interest and proposed that the same prescription period should apply to those as applied to the main claim.

341. With respect to the issue of party autonomy Schlechtriem wondered whether the parties should be granted the liberty to lengthen or shorten the limitation period. He was aware that the stronger party could abuse its position but thought that any such abuse was caught by domestic municipal laws. Date Bah thought that this position would invite the application of domestic laws. Crépeau thought that such a position would be an invitation to litigation. Certainty should be the primary policy consideration in this respect. Bonell supported this view. Schlechtriem thought that, considering that a two-tier system had been adopted, the need for party autonomy was somewhat less pressing than it would be in a system where only one limitation period of four years existed.

342. Farnsworth felt that there were different possible solutions to the issue of party autonomy. One could, for example, allow limited party autonomy by prescribing a minimum limitation period of four years. He pointed out that the possibility of shortening the period would arise once the contract was made, whereas the possibility of lengthening the limitation period would arise more often when the defect had occurred and the parties knew that there was a dispute. The possibility of abuse was much less present where the parties knew that there was a dispute. One could thus provide for a possibility of lengthening the period after the claim had arisen. Huang thought it might be a good idea to include a shorter period of limitation for warranty actions. Lando agreed with Farnsworth's proposal to grant parties the freedom to lengthen the limitation period once the dispute has arisen. Permitting the parties to shorten that period without limit would, by contrast, be much more problematic.

343. Komarov wished to know whether it was necessary to state explicitly that an assignment would not operate to exclude the provisions on limitation of actions which otherwise governed a contract. Schlechtriem thought that it was not necessary to do so in the specific provisions on limitation of actions, but he was in favour of having a more general provision to that effect in the context of the chapter on assignment. Fontaine agreed.

#### V. THIRD PARTY RIGHTS UNDER CONTRACT

344. Furmston introduced the position paper he had prepared on this subject (UNIDROIT 1999 Study L – Doc. 59).

345. As a preliminary statement Furmston drew attention to the conceptual problems connected with the topic of third party rights under contract, in view of the fact that it was a difficult endeavour to draw the border line between contract and tort. He mentioned the case of *White v Jones* where the House of Lords held that a solicitor was liable in tort to those who would have benefited under the will had the solicitor not been negligent. Many civil law systems would tend to hold solicitors liable

in contract for similar claims and deal with the matter within the ambit of third party rights under contract.

346. Furmston then explained that he had written his paper assuming that third parties should be permitted to claim under a contract in many, but not all situations where they wished to do so. He proposed that an explicit reference in a contract permitting a third party to benefit from the contract should be effective. Any explicit reference to the opposite should also be effective so that parties could expressly provide that a third party may not benefit from the contract. Schlechtriem agreed to both proposals but mentioned that the terms had to be subject to domestic law on unfair contract terms.

347. Fontaine supported the view that an express mentioning in the contract of a third party that may benefit from it would be valid. On the contrary a stipulation in a contract expressly providing that a third party may not benefit from the contract is rare. Bonell supported this view. He repeated Schlechtriem's concern that express exclusions could be challenged under the domestic law on unfair contract terms.

348. Furmston asked the Group whether a general rule should be adopted that third parties can enforce the contract where the parties intended them to do so. He explained that most legal systems had such a provision. Should such a general rule be adopted the question would arise as to how the benefit test could be applied in practice. He recalled that on this point the courts seemed unable to establish final guidelines.

349. Farnsworth noted that also in the United States it was controversial what the basic criteria to be followed were. One could ask whether the parties had intended to confer such a benefit on a third party. Alternatively one could ask whether one party intended to confer the benefit. According to Farnsworth such limitation to one party's intention might be helpful. In this connection however the question may arise as to whether the party conferring the benefit on the third party had received any payment for it from the latter.

350. Crépeau thought that this problem was essentially one relating to the content of the contract. This issue was dealt with in Chapter 5 of the Principles which stated that contractual obligations could be implied. Article 5.2 of the Principles established that implied obligations would stem from various different sources and Crépeau suggested that the Principles went beyond the concept of the intention of the parties when determining the content of the contract.

351. Fontaine pointed out that the issue whether third party rights could be derived from the intention of the parties or from the nature of the contract itself was a sensitive one. He explained the difficulties by referring to life insurance contracts. In the absence of a specific stipulation in the contract for the benefit of a third party, such a benefit may be implied. However, as the money would pass through the estate first, creditors would

have a preferential right. By contrast, if there was an express stipulation in favour of a third party, that party would have a direct, immediate claim to the benefit of the contract.

352. Lando referred to Article 6:1.10 of the European Principles and explained that according to this provision, a third party may require the performance of a contractual obligation in any of the following cases: firstly, when its right to do so has been expressly agreed between the promisor and the promisee and secondly, when such agreement is to be inferred from the purpose of the contract or the circumstances of the case. He stated that the issue had been carefully considered before the final text had been drafted and that it had proven impossible to lay down more specific rules. He warned that by admitting third party rights only if they could be inferred from the intention of the parties, there would be many cases where third party rights could not be enforced under the Principles but could very well be enforced under domestic laws. After all it was often easier to determine the purpose of the contract and the circumstances of the case than the intention of the parties. Finn supported Lando's arguments.

353. Finn wanted to know whether Furmston, when referring to the intention-to-benefit test, had equated the intention to enforce a contract (i.e. that a third party could enforce it) with the intention to benefit a third party. He thought that these were two very different concepts that should not be confused. He concluded against using the intention-to-benefit test. Farnsworth agreed. Furmston's paper did not make a distinction between intention to benefit and intention to confer a right on a third party. The Group should decide whether it preferred the intention-to-benefit test or the intention-to-confer- a-right-to-enforce contractual obligations test. He favoured the latter test as the intention-to-benefit test would be far too wide.

354. Kronke informed the Group of the latest developments in German law with respect to the liability of accountants sued by a company's creditors after a 'wrong' evaluation of the company's accounts for misrepresentation. Whereas in the past the courts had made the potential liability of accountants dependent on the question whether the third party was sufficiently close to the promisee (objective test), they now make it dependent on the question whether the accountant should have known that the third party was close to the promisee and was able to evaluate its risk of liability to the third party. Kronke welcomed this change in the approach taken by the courts in view of the fact that it is very difficult to determine whether the third party is, objectively speaking, sufficiently close to the promisee. Schleichtrien thought that the issues of third party protection and damages which Kronke had raised should be postponed as Furmston had dealt with these issues at a later point in his paper.

355. Date-Bah stated that in Kenya an Act was passed in 1960 according to which a third party was able to enforce a contractual obligation if the contracting parties had intended to benefit that party.

356. Schlechtriem asked Furmston whether he had considered the possibility that the parties to the contract may wish to change their mind with respect to the rights conferred upon a third party during the life of a contract.

357. Furmston noted that 'intention' was treated as a subjective concept in many legal systems while in England it would be thought of as an objective one. He acknowledged that more careful drafting was needed in this respect and stated that he had enough guidance from the discussion to be able to do so. He thought it necessary to make explicit reference to the purpose of the contract and the surrounding circumstances of the case. In relation to Kronke's argument he explained that English courts were extremely reluctant to hold accountants liable in the case that Kronke had mentioned. The main reasons for this were not so much conceptual ones, but policy reasons. In relation to the issues raised about the intention-to-benefit test Furmston suggested using a number of examples to illustrate the point.

358. Finn referred to Question 3 ("Should a general rule be adopted that third parties can enforce the contract where the parties intended them to do so?") and Question 4 ("If intention-to-benefit is the test, can we formulate any guides which will help the decision maker to reach clear and predictable results?") of Furmston's paper. He stressed that the two questions referred to two different tests, and that the first was in his opinion preferable. Furmston agreed .

359. With respect to Question 5 ("Should we go beyond the test of benefit and, if so, in what circumstances?"), Hartkamp mentioned that in some legal systems the relevant test would be whether the third party had claimed performance under the contract. The reference to the benefit test would perhaps not be correct. Schlechtriem thought that those legal systems which were unable to protect third parties sufficiently under tort (in cases where both tort and contract could be applied) tended to expand the third party's ability to claim under contract. Such a tendency could be observed in German law. Schlechtriem suggested postponing the issue of claims for damages by third parties.

360. With respect to Question 6 ("Do we need to make an express provision as to the effectiveness of exemption or limitation clauses?"), Furmston spoke in favour of inserting such a clause which was to clarify that not only the contracting parties but also a third party (most commonly a contracting party's servant or agent) could rely on clauses in the contract exempting or limiting liability. Hartkamp was also in favour of inserting such a clause. He mentioned that such a clause had been incorporated into the new Dutch Civil Code and that it had been drafted in a very broad way: a third party would have a right to claim performance of the contract or could rely on the contract in any other way (i.e. also on exemption clauses). Schlechtriem mentioned that the new German transport law contained similar provisions. Despite these provisions in

municipal law express provisions in the Principles should be adopted to make the position clear. Kronke added that international conventions contained similar rules.

361. With respect to Question 7 (“Do we need to say anything about the impact of the contract on the tort position of both parties?”), Furmston explained that courts had in some cases used contracts between two parties to define the duty of care (i.e. part of a tort action) which one party of the contract owed to a third party. He asked the Group whether this issue should fall within the scope of the chapter. Schlechtriem thought that the influence of contracts on tort duties was outside the scope of the chapter as he could neither define the limits nor the extent of such an impact. It was so agreed.

362. Furmston then referred to some legal issues on the borderline of contract and property law. It was a well established principle in English property law that clauses such as the restraint of user clause in contracts for the sale of land were binding on successors in title. It was less clear whether such a rule could also be applied to non-land transactions involving chattels (he gave the example of the lease of movable goods).

363. Kronke thought that the subject was worthy of reconsideration when the question of assignments was discussed. One could argue that this was a special case of an assignment of contracts. Fontaine agreed to this.

364. Fontaine made a comment relating to benefits and burdens of a contract. He suggested that an express stipulation in a contract conferring a burden on a third party was not possible. However, stipulations for the benefit of third parties often contained duties. One example was motor insurance. In Belgium, the owner of a car could extend its insurance so as to cover all persons driving the car (i.e. third parties, as they would not have to be parties to the actual contract). The insurance attached certain duties on the drivers. In this context it had been held that certain rights conferred on third parties were accompanied by duties.

365. Crépeau thought that this concept would be that of the obligations (warranties) running with the goods. Furmston pointed out that the question he had posed was whether the concept that burdens could run with the land, i.e. whether a limited property interest would exist, could be extended to such cases as the lease of chattels. This was distinct from the issue that Crépeau had raised, namely that of obligations being attached to goods.

366. Schlechtriem thought that including the questions discussed would mean that the Group would stray too far away from stipulations in a contract in favour of third parties.

367. Hartkamp raised the question whether there was the need to include a provision dealing with the issue of burdens being accompanied by rights. Schlechtriem

thought that this problem could be dealt with in the Comments as it was a problem relating to the definition of 'right'. Furmston agreed that this specific problem should be addressed. The Group agreed that the general issues relating to the borderline between contract and property law were outside the scope of the chapter but that the Comments should address the issue that rights conferred on third parties could be accompanied by duties.

368. Furmston wondered whether the question of damages suffered by third parties ought to be addressed and, if so, what solution should be offered. He explained that the problem arose in cases where the action for damages to which a third party could be entitled was brought by a contracting party. This posed the question whether the damages claimed by a Plaintiff who was a contracting party should also take into account the loss suffered by a third party.

369. Schlechtriem thought that this problem was one of damages and should not be dealt with in this context. The Group agreed.

370. With respect to the question whether the defences available against the contracting party would also be available against the third party (Question 10 in Furmston's paper), Date Bah stated that he favoured a derivative nature of third party rights. This would mean that the rule proposed by Furmston would be adopted as a general rule. Lando suggested that this rule would follow from general principles and it may be sufficient to deal with this issue in the Comments.

371. Schlechtriem noted that the issue might be more complicated than it appeared at first sight as the defences of the promisor might arise later. The Group agreed to deal with the question under consideration.

372. With respect to Question 11 ("When do the contracting parties lose their right to change their minds and divest the rights of the third party?"), Hartkamp wondered whether it also included the issue of the contracting parties being able to revoke the right conferred on the third party. Furmston confirmed that this was the case.

373. Schlechtriem divided the question into two parts. The first was whether and, if so, to what extent the contracting party could change the right conferred on the third party. Schlechtriem suggested that the answer depended on the contract between promisor and promisee. The second question was whether there should be exceptional circumstances in which the third party relying on the right should be protected. This would be an issue concerning the relationship between the promisee and the third party. Schlechtriem's own opinion on the question posed by Furmston was that the contracting parties should as a general rule have the power to revoke the rights conferred on the third party at any time (even after the third party has accepted the right).



374. Lando explained that according to the European Principles a promisee may by notice to the promisor deprive the third party of the right to perform unless (a) the third party has received notice from the promisee that the right has been made irrevocable or (b) the promisor or the promisee has received notice from the third party that the third party accepts the right.

375. Farnsworth summarised the position in the United States. The basic idea was that it would be unfair to deprive the third party of the right conferred under the contract once it had relied on it. He pointed out that this would leave a certain amount of uncertainty which could be avoided by giving the third party the chance to accept the rights. The rule in the United States was thus that the contracting parties were prevented from revoking the rights granted to the third party if there has either been reliance on that right by the third party or the third party has accepted the right.

376. Fontaine was in favour of the solution adopted in the European Principles. He pointed out that according to the European Principles the promisee could unilaterally declare that the right of the third party should be revoked. He preferred this approach to one where both contracting parties had to revoke the right conferred upon the third party.

377. Crépeau argued that the parties should be free to revoke the right conferred upon a third party at any time before the third party has accepted that right. He thought that the third party should also be free to reject the right. Jauffret-Spinozi agreed with Crépeau and specified that the revocation should be a unilateral act.

378. Schlechtriem thought that the parties should be permitted to specify in the contract how and by whom revocation should be changed or modified. Hartkamp replied that the rule sought was one which applied when the parties had not provided differently in their contract.

379. Furmston stated that this was a very difficult issue which could be more easily decided once he had prepared a draft.

380. Fontaine proposed that the chapter include a rule on identification. Such a rule might for example provide that the identity of the third party would have to be ascertained not at the time of the conclusion of the contract, but at the time of performance of the contract.

## VI. ASSIGNMENT OF CONTRACTUAL RIGHTS AND DUTIES

381. Fontaine introduced the position paper he had prepared on this subject (UNIDROIT 1999 Study L – Doc. 61).

382. He explained that there were many references to the discussion on this topic last year. It had transpired that the subject was a very difficult one and that the civil law approach differed from the common law one. Some of the potential misunderstandings would be related to the fact that civil law systems used the notions of rights and duties (*créance*, debt) in the context of assignment, which were not familiar to common law systems. Similarly, it had transpired that the concepts of creditors and debtors were different in civil and common law jurisdictions. Fontaine mentioned that he had, in his paper, drawn inspiration in particular from the UNIDROIT Convention on International Factoring and also from the UNCITRAL Draft Convention on Assignment in Receivables Financing.

383. The first question to be decided was whether the chapter on assignment should be divided into three sections: one on assignment of rights, a second on assignment of duties and a third on assignment of contracts. One might argue that the first two sections covered the third, although according to Fontaine this was not the case. The Group agreed on Fontaine's suggestion to divide the topic into three separate chapters.

384. Lando informed the Group of the preliminary draft on assignment of rights prepared within the Commission on European Contract Law and offered to provide the Group with copies of it. Lando explained that the draft envisaged three chapters on this topic, one dealing with the assignment of claims, one with the assumption of debt and one with the assignment of contract. Moreover, although a final decision had not yet been taken, it was assumed that property issues, assignment by way of factoring and future receivables will also be covered. It had also been agreed that assignment need not comply with any formal requirements.

385. Grigera Naón wanted to know whether the issue of using assignment as a securitisation device was excluded from the scope of the chapter. If it was included this might lead to the need to touch upon foreclosure and fiduciary duties of assignees. Hartkamp noted that this issue had been included by the European Commission in its draft.

386. Farnsworth made a number of remarks concerning the law on assignment of rights in the United States. In reply to Fontaine's observation that there were no general concepts similar to the ones used in the civil law countries, he stated that such concepts did exist in the United States and that they were quite refined. The concepts of rights, duties, obligors were used in the United States while the terms 'claims', debtors', 'creditors' which were also used by the European Commission would narrow the issue too much. He then pointed out that the meaning of assignment was different in different legal systems. In the United States, for example, the terms 'assignment of rights' and 'delegation of duties' would be used. He suggested that Fontaine use a more neutral word such as 'transfer' instead of 'assignment'. He reminded the Group that a similar approach had been taken in the Vienna Sales Convention where the section on defects with respect to goods avoided all national terminology.

387. Schlechtriem asked Farnsworth whether the term ‘transfer of rights’ implied that legal assignments were included and pointed out that this would fall outside the scope of the chapter. Farnsworth replied that a definition could take care of this point. Bonell thought that the term ‘voluntary transfer’ might be helpful. Lando said that the UNIDROIT Factoring Convention used the term assignment. Farnsworth replied that the UNIDROIT Convention was of limited scope and dealt only with the assignment of receivables and not assignment or delegation of duties. Finn thought that the word transfer might itself be misleading. He noted that ‘voluntary transfer’ would in his country imply that the transfer was not for value. The Group was undecided on this issue.

388. Kronke stated that the use of the word transfer would bring the topic close to property rights. Bonell, referring to the UNCITRAL draft, pointed out that the term ‘assignment of rights’ was an internationally accepted term. Farnsworth clarified that he had no problem with the term ‘assignment of rights’ as long as the term ‘assignment of duty’ was not used. The term ‘transfer of duties’ was acceptable to him. It was decided to use the term ‘assignment of rights’ but that an alternative terminology had to be found in respect of duty.

389. Kronke and Fontaine spoke in favour of using the term ‘assumption of debt.’ Finn remarked that this term would be fairly meaningless in a common law world. He preferred the term ‘transfer of debt’. Schlechtriem agreed. El Kholy suggested using the term ‘transfer of obligations’. Hartkamp thought that this was not a good idea as it implied a positive meaning. Ultimately the Group agreed on the term ‘transfer of duties’.

390. In relation to the title of the third section of the chapter, the Group agreed on the term ‘assignment of contracts’.

391. The Group then discussed the scope of the envisaged rules on assignment. With respect to the question whether they should be limited to assignment of contractual rights only, Fontaine stated that he preferred not to adopt such a limit. Furmston explained that it was unclear in which circumstances English courts would permit the assignment of a tort claim but he was not opposed in principle to taking a broad approach. He thought that the issue of including tort claims was somewhat academic as not many transactions governed by the Principles would give rise to a claim in tort. Farnsworth stated that in the United States some States had mandatory rules prohibiting assignment of tort claims. As mandatory rules prevailed over the Principles there would not be a problem of taking a broad approach as long as the Group was aware that this scope might in practice be limited under domestic laws. It was decided not to limit the scope of the chapters to contractual rights only.

392. The Group further agreed on the exclusion of transfer of rights through negotiable instruments and that the uniform rules should not interfere with the specific rules that exist in many systems concerning the legal transfer of some rights under certain circumstances

393. As to the possible exclusion of all property aspects, Fontaine explained that assignments of property rights would most often occur in the context of third party issues. Property rights and assignments also raised the issue of several assignments. He noted that at the last meeting there had been a tendency to exclude property aspects but he thought it preferable to attempt to include such aspects at least in the preliminary draft. Hartkamp thought that a sensible way of approaching the topic would be to deal first with the issue of several assignments and then with the priority position among the assignees.

394. Schlechtriem thought that two important questions were at stake. One was the question at what moment the assignment would become effective (also against third parties). The other one which was outside the scope of the chapter would be whether an attachment was capable of reaching the assigned receivers regardless of the perfection of the assignment. This question would touch upon insolvency law.

395. Bonell stressed that the Group could not interfere with insolvency law. He was also concerned about touching upon the position of the third party. He mentioned that dealing with a trilateral relationship in the context of agency had already constituted a daring task given that the main provisions of the Principles were only concerned with the parties of a particular transaction which was subject to the Principles. Third party issues in the context of assignments would widen the scope of the Principles considerably because the number of parties involved was potentially numerous. Bonell also warned that the requirements for an assignment to be effective vis-à-vis third parties could under the relevant applicable law differ from UNIDROIT rules. In such a conflict there would be little chance of the Principles prevailing. Bonell was of the opinion that dealing with third party rights in the context of assignments would be overly ambitious.

396. Schlechtriem thought that the question of an assignment being effective against third parties would be at the heart of the issue of assignment. He also mentioned that if Fontaine intended to deal with the issue of successive assignments, issues concerning creditors should not be excluded because the creditor might be an assignee. Only the issue of the enforcement of the security in insolvency situations should be excluded.

397. Kronke suggested that Fontaine should be asked to provide two different drafts on this issue.

398. With respect to the question of possible limits to the assignability of rights, Finn wondered whether it was assumed that the contract from which the assigned right arises was subject to the Principles. If so, what would happen if the third party was opposed to the Principles? According to Fontaine the assignment had to be subject to the Principles but that there was no need for the contract from which the assigned right arose to be governed by the Principles before the assignment took place. Hartkamp agreed.

399. Lando explained that the Commission on European Contract Law had decided to include future rights in its draft. Hartkamp proposed not to exclude future rights at this stage and to discuss it further once the draft had been prepared. Grigera Naón spoke in favour of including future and eventual rights. Schlechtriem thought that conditional rights should also be included.

400. In relation to disputed rights (rights subject to a dispute), Fontaine explained that some civil codes contained special provisions on this subject. El Kholly suggested that the only difference between disputed and undisputed rights was that in some jurisdictions a party could take the right back for the price paid by the purchaser. He suggested that no special treatment should be given to disputed rights. The Group agreed.

401. Fontaine mentioned that the issue of bulk assignments had caused special problems. It should perhaps be the object of a special provision. The Group agreed.

402. Fontaine was of the opinion that it was not necessary to mention legal limits such as salaries and rights against the State. Hartkamp mentioned that the Commission on European Contract Law had decided to include them. Schlechtriem thought that in this context the question of mandatory rules dealing with part-assignments were important. Furmston explained that some of these provisions were issues of public policy.

403. Kronke mentioned the UNIDROIT Factoring Convention and various new laws which were a consequence of it and suggested that this might be of guidance on this issue. Hartkamp supported this and suggested that legal restrictions should be referred to in the chapters.

404. As to the question whether there should be formal requirements between assignor and assignee Fontaine suggested that probably there should not, and that assignment should merely be consensual. A slightly different procedure could be contemplated in relation to assignments of property rights.

405. Uchida mentioned that bulk assignments were used for the purpose of asset-backed securities. These were usually connected with special regulations as to the form of assignment and the identity of the assignee.

406. Hartkamp suggested dealing with the legal effects of assignments against third parties and not making a dogmatic distinction between contractual and property aspects. The legal effects against third parties should not be made dependent on formal requirements.

407. Farnsworth pointed out that there was an important distinction between a commitment to assign in the future and a present assignment. If Hartkamp's proposition not to demand formal requirements was made so as blur this distinction then this would be most problematic.

408. Furmston explained that the English Court of Appeal had decided that a transaction where the assignor had purported to assign rights which were non-assignable created a trust over those rights.

409. Turning to the question whether the assignor owes any warranty to the assignee, Schlechtriem stated that it would be important to distinguish between the assignment and the underlying contract. The warranty of the assignor would be a question of the underlying contract. Once this separation was made it transpired that it was not necessary to deal with this issue in the chapter on assignment. He thought it would be a step backwards to merge the underlying contract with the performance of assignment.

410. Lando pointed out that the European Principles included a rule on warranties dealing with warranties related to the assignment itself.

411. Turning to the question as to whether a right can be assigned without participation of the assignee, Fontaine explained that this question had been raised last year and for this reason he had included it in his paper. Finn explained that at common law a right could voluntarily be assigned by way of gift. This might not be relevant in relation to the contractual assignment of rights where the participation of the assignee was necessary. However, it would be important to determine whether specific rights had to be assigned under contract or whether they could be given away voluntarily. Hartkamp replied that he understood the assignment to take place under a contract and for value and suggested that the question under consideration be answered in the negative.

412. With respect to the question whether the debtor's agreement should be a condition of validity of the assignment, Hartkamp felt that in principle the reply should be negative. Bonell asked for some clarification of the term 'validity'. Hartkamp pointed out that validity could be construed as validity between the assignor and assignee or as the legal effect as against the debtor. In the latter case a mechanism such as a notice seemed to be needed. One could also imagine a system whereby notice was a requirement for the validity of the contract between assignor and assignee. Hartkamp

explained that in most legal systems the matter of validity would concern the relationship between assignor and assignee and the effectiveness of the assignment against the debtor would depend on additional conditions.

413. Schlechtriem stated that he wished assignment to be possible without the consent of the debtor and the Group so agreed. Uchida explained that in many commercial transactions in Japan the assignor would not want the debtor to know about the assignment. New laws had been introduced to enable assignments to take place without the debtor's knowledge. Schlechtriem stated that the German Civil Code provided for the possibility of silent assignment. Finn added that this was also provided for in common law countries.

414. Fontaine concluded that issues such as silent assignments were special cases which may demand special rules. The general rule should protect the debtor. This could either be done by having a notice requirement or by formulating a rule which ought to take into account whether the debtor was aware of the assignment. Bonell emphasised that it would be a crucial question who had the duty to give notice. This question could prove difficult in cases of bulk assignments.

415. Date Bah pointed out that even in a commercial setting it may be convenient for a business unit to confer a benefit on its subsidiary by a unilateral act and that it should be a valid assignment even without the express participation or acceptance of the assignee in such cases. Hartkamp replied that one would expect the assignee to agree to the assignment and that silence could be interpreted as a form of acceptance. Fontaine suggested that this discussion should be continued once he had drafted a set of rules.

416. With respect to the question as to whether assignment can modify the debtor's legal situation, Hartkamp pointed out that the debtor should retain its defences against the assignee. Set-off would be a special problem and Fontaine noted that this question could not be covered before the rules on set-off in general had been drafted. Fontaine mentioned that withholding performance was a difficult issue under Belgian law which emphasised the complexity of the problem. The general principle was that a defence could be set-up against the assignee prior to notification. He wondered whether there were special defences demanding special treatment. Hartkamp explained that in the Commission on European Contract Law there had been long discussions on the special treatment of claims and counterclaims arising from the same contract. He thought that this question could not be decided instantly and that it would be preferable to discuss it once a draft had been prepared.

417. Schlechtriem supported the idea that underlying securities should be transferred to the assignee. However, the means of doing so (automatic transfer or not) might differ according to the types of security and the jurisdiction.

418. Finally Fontaine addressed the question as to under what conditions third parties other than the debtor must bear, or may invoke, the consequences of the assignment to a new obligator. He said that this question would be relevant if the chapter would deal also with creditors' issues. Yet the question was also relevant in so far as successive assignments raised the issue of priorities.

419. Schlechtriem stated that if the assigned rights were burdened with a lien or mortgage this would affect a third party and this problem should be addressed. This also had an effect on priorities as it depended on the time the lien had been created what its legal consequence was.

420. Grigera Naón pointed out that the UNIDROIT Principles applied as a result of the parties' choice. A third party had no such choice and he found it difficult to justify that the Principles could affect third parties' position. Hartkamp mentioned that this issue had been discussed in general before the drafts had been prepared. Bonell acknowledged that the effect of an assignment *inter partes* would already constitute a deviation from the general approach taken in the Principles (i.e. it applied to a transaction where the parties had chosen the Principles). Whereas this deviation seemed acceptable, like Grigera Naón he doubted whether it was wise to apply the Principles with respect to the effect of an assignment vis-à-vis a potentially large number of third parties.

421. Grigera Naón stated that in a number of legal systems the effect of an assignment vis-à-vis third parties depended on whether notice had been given to the debtors. In addition, different formalities were required in different legal systems.

## VII. AGENDA OF THE NEXT MEETING AND OTHER BUSINESS

422. Lando proposed that the second reading of the chapter on agency be done in conjunction with the second reading of other draft chapters. Bonell replied that he would not wish second readings to take place too long after the first reading as such a long gap would invite continuous changes.

423. Schlechtriem wondered whether it would be possible to have a copy of the latest draft on limitation of actions prepared by the Commission on European Contract Law in order to adapt the terminology as far as possible. Lando agreed and emphasised that the exchange of drafts between the Commission and the Group should be a reciprocal process.

424. Fontaine asked whether he should prepare a draft on assignment of rights and not on the two other subjects (transfer of duties and assignment of contracts) which had not been discussed yet. He could, alternatively, prepare a draft on all these issues but felt that he had very little guidance. Kronke thought that such guidance could be given by electronic communication and pointed out that the drafting committee on the Security



Interests and Mobile Equipment Convention used this procedure. Bonell however pointed out that the drafting committee to which Kronke had referred had resorted to these means only in the very late stage of its deliberations, i.e. after years of preparatory work being carried out at meetings in person. Kronke acknowledged that electronic communications were no substitute for the Group's annual meetings and pointed out that his proposal only referred to initial replies which Fontaine had called for.

425. Finn mentioned that in relation to the specific topic of assignment last year's discussion in particular had shown that the scope for misunderstanding between different legal systems was so great that without preliminary discussions Fontaine's time might be wasted if electronic communication was meant to substitute group meetings. Fontaine thought that it would nevertheless help if those members of the Group who wished to do so would send preliminary remarks to him.

426. Bonell proposed the following agenda for next year's meeting: 1. Draft Chapter on Limitation of Actions; 2. Draft Chapter on Third Party Rights under Contract; 3. Discussion of the position papers on transfer of duties and assignment of contracts and on set-off; 4. Second reading of the Draft Chapter on Authority of Agents. It was so agreed.

427. Grigera Naón, on behalf of the ICC International Court of Arbitration and in his personal capacity, expressed his gratitude to Bonell, Kronke and the distinguished group of colleagues for their invitation to participate actively in the discussions. He stressed that everything aimed at unifying international trade law had an impact on commercial arbitration. He thought that this kind of cooperation and exchange between the ICC International Court of Arbitration and UNIDROIT should continue in the future.

**WORKING GROUP FOR THE PREPARATION OF  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS**

Second session

Bolzano/Bozen, 22-26 February 1999

LIST OF PARTICIPANTS

- |                         |  |
|-------------------------|--|
| Mr M. Joachim BONELL    | Professor of Law<br>University of Rome I “La Sapienza”<br>Legal Consultant<br>Unidroit, Via Panisperna 28<br>00184 Rome (Italy)                                  |
| Mr Paul-André CRÉPEAU   | Professor of Law (retired)<br>Quebec Research Centre for Private and<br>Comparative Law<br>McGill University<br>3647 Peel St.<br>Montreal, P.Q. (Canada H3A 1X1) |
| Mr Samuel Kofi DATE BAH | Special Adviser<br>Economic and Legal Advisory Service<br>Division, Commonwealth Secretariat<br>Marlborough House<br>Pall Mall<br>London SW1 Y 5HX (England)     |
| Mr Adolfo DI MAJO       | Professor of Law<br>University of Rome I “La Sapienza”<br>Via Giuseppe Avezzana 22<br>00195 Rome (Italy)   |

Mr Aktham EL KHOLY	Attorney at Law (Supreme Court) Former Professor of Law 5, Musadk Str. Dokki, Giza Cairo (Egypt)
Mr E. Allan FARNSWORTH	McCormack Professor of Law School of Law Columbia University in the City of New York 435 West 116th Street New York, N.Y. 10027 (U.S.A.)
Mr Paul FINN	Judge of the Federal Court c/o Judge's Chambers Federal Court Childers St., Canberra A.C.T. 2601 (Australia)
Mr Marcel FONTAINE	Professor of Law University of Louvain Centre de droit des obligations Place Montesquieu 2 1348 Louvain-la-Neuve (Belgium)
Mr Michael P. FURMSTON	Professor of Law Faculty of Law University of Bristol Wills Memorial Building Queens Road Bristol BS8 1RJ (England)
Mr Arthur HARTKAMP	Advocate-General at the Supreme Court of the Netherlands Professor of Private Law Utrecht University Postbus 20303 2500 EH 's-Gravenhage (The Netherlands)

Ms Danhan HUANG

Lawyer & Professor of Law  
Sinobridge Law Firm  
Room 528  
SINOCHEM Tower  
Fuxingmenwai Dajie, A2  
Beijing 100045 (China)

Ms Camille JAUFFRET-SPINOSI

Professor of Law  
University of Paris II  
31 Avenue Georges Mandel  
75116 Paris (France)

Mr Alexander KOMAROV

Professor of Law  
Russian Academy of Foreign Trade  
Pudovkin Street, 4A  
Moscow 119285 (Russian Federation)

Mr Ole LANDO

Professor of Law  
Skovlodden 26  
2840 Holte (Denmark)

Mr Peter SCHLECHTRIEM

Professor of Law  
University of Freiburg  
Platz der Alten Synagoge 1  
79085 Freiburg (Germany)

Mr Takashi UCHIDA

Professor of Law  
The University of Tokyo  
Faculty of Law  
Hongo 7-3-1, Bunkyo-ku  
Tokyo 113 0033 (Japan)

#### OBSERVERS

Mr Horacio GRIGERA NAÓN

Secretary General  
ICC International Court of Arbitration  
38, Cours Albert 1er  
75008 Paris (France)

Mr Giorgio SCHIAVONI

Vice President  
Milan National and International Arbitration  
Chamber  
Palazzo Mezzanotte  
Piazza degli Affari, 6  
Milano (Italy)

UNIDROIT SECRETARIAT

Mr Herbert KRONKE  
Ms Paula HOWARTH  
Ms Yvonne PODBIELSKI

Secretary-General, Unidroit  
Translator/Drafter, Unidroit  
Secretary to the Working Group

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