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UNIDROIT

International Institute for the Unification of Private Law

WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

SUMMARY RECORDS

of

THE MEETING HELD IN ROME

FROM 3 TO 7 JUNE 2002

(Prepared by the Secretariat of UNIDROIT)

Rome, September 2002

1. The Working Group for the preparation of Part II of the UNIDROIT Principles held its fifth session in Rome (Italy) from 3 to 7 June 2002. The session was attended by M.J. Bonell (UNIDROIT, Chairman), P.-A. Crépeau (Canada), S.K. Date Bah (Ghana), A. El Kohly (Egypt), E.A. Farnsworth (U.S.A.), P. Finn (Australia), M. Fontaine (Belgium), M. Furmston (United Kingdom), A. Hartkamp (The Netherlands), Huang Danhan (China), C. Jauffret-Spinozi (France), A. Komarov (Russian Federation), O. Lando (Denmark), P. Schlechtriem (Germany) and T. Uchida (Japan). J. Carlevaris and A.M. Whitesell (ICC International Court of Arbitration) and G. Schiavoni (Milan Italian and International Chamber of Arbitration) attended as observers. The session was also attended by H. Kronke (Secretary-General of UNIDROIT). The list of participants is attached as APPENDIX I.

2. A. Di Majo (Italy) and F. Dessemontet (Swiss Association of Arbitration) were excused; L. O. Baptista (Brazil) was replaced by A. Garro (Argentina).

3. The session was mainly devoted to the examination of the revised draft Chapter on Limitation Periods prepared by P. Schlechtriem (UNIDROIT 2002 Study L - Doc. 73), the revised draft Chapter on Assignment of Rights, Transfer of Obligations and Assignment of Contracts prepared by M. Fontaine (UNIDROIT 2002 Study L - Doc. 74), the revised draft Chapter on Set-off prepared by C. Jauffret-Spinozi (UNIDROIT 2002 Study L - Doc. 75) and the revised draft Chapter on Third Party Rights prepared by M. Furmston (UNIDROIT 2002 Study L - Doc. 76). The Group was also seized of a document containing a questionnaire and replies thereto on “UNIDROIT Principles and Electronic Commerce” prepared by M.J. Bonell and E. A. Farnsworth (UNIDROIT 2002 Study L – Doc. 77) and a position paper on “Waiver and Related Issues” prepared by P. Finn (UNIDROIT 2002 Study L – Doc. 78).

I. THIRD PARTY RIGHTS

4. In the absence of Schlechtriem the Group decided to examine first the draft Chapter on Third Party Rights.

5. Before opening the discussion Bonell recalled that the black letter rules of this draft chapter as well as those of the other draft chapters on the agenda had already been extensively discussed and in substance approved by the Group, while the Comments were new and therefore should be the focus of the discussion.

Article 1 (Contracts in favour of third parties)

(1) Parties (the “promisor” and the “promisee”) may confer by express or implied agreement a right on a third party (the “beneficiary”).

(2) The existence and content of the beneficiary’s right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement.

6. In introducing this article Furmston first of all drew attention to the title which was new as were those of the other articles of the chapter. With respect to para.1, the words between brackets had been added. Para. 2 was new and had been added so as to make it clear that both the existence and the content of the beneficiary's right are determined by the agreement of the parties and are subject to any conditions or other limitations under that agreement.

7. Farnsworth suggested making Illustrations 6, 7, 8 and 9 self-contained by adding wording such as (for Illustration 6): "A's wife has no rights as a beneficiary absent circumstances indicating the contrary." Furmston agreed.

8. Finn noted that a number of illustrations referred to non-commercial situations and wondered whether an attempt should be made to give only illustrations relating to commercial cases.

9. Furmston explained that his illustrations were taken from actual case law. In practice there were hardly any commercial transactions in which the parties have not expressly provided for or excluded any right of a third party arising from their contract. He promised however to give further thought to the illustrations with a view to eliminating all non-commercial situations.

Article 2 (Third Party Identifiable)

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

10. This article was approved without changes and the Rapporteur was asked to consider to what extent the illustrations could be taken from a commercial setting.

Article 3 (Exclusion and Limitation Clauses)

For the purposes of this chapter, the conferment of rights in the beneficiary includes the right to rely on a clause in the contract which excludes or limits the liability of the beneficiary.

11. Lando wondered whether the situation addressed in the last paragraph of the Comment actually fell within the scope of the provision or whether it was covered by Art. 1.

12. Furmston acknowledged that there might be some overlapping between the two provisions but felt that an express statement such as the one contained in the last paragraph was helpful.

13. Hartkamp agreed with Furmston but suggested beginning the Comment with a sentence such as "Conferment of rights according to Art. 1 is to be understood in a broad sense, i.e. as meaning not only conferring on the third party a right but also excluding or limiting its liability or releasing it from an obligation".

14. Uchida questioned the exact meaning of the words “to rely on” in the black letter rule which in this context seemed to have a different meaning from that e.g. in Art. 5.

15. Hartkamp was also in favour of replacing the words “to rely on” in this article by “to invoke”.

16. It was so decided.

Article 4 (Defences)

The promisor may assert against the beneficiary all defences which the promisor could assert if the claim was made by the promisee.

17. In introducing this article Furmston recalled that there were no changes of substance.

18. Crépeau suggested replacing the words “if the claim was made by the promisee” by “against the promisee”.

19. Fontaine recalled that in Art. 2:8 of the chapter on Assignment the same formula has been used while in Art. 1:13(1) the wording was still the same as that of the present article. He suggested to align the language in these articles along the lines suggested by Crépeau.

20. It was so agreed.

21. Hartkamp suggested that what was presently stated in small print at the end of the Illustration should be stated in large print and in general terms in the Comment itself, i.e. that the beneficiary’s rights may be shaped in a way that is entirely independent of the other rights. Furmston agreed.

22. Farnsworth raised again the question of the non-commercial nature of the case referred to in the Illustration. He wondered whether in some cases mere cosmetic changes such as using “truck” instead of “car”, “partner” or “employee” instead of “wife” or “child” would suffice. He also felt that the Illustration was too complicated and suggested that it be simplified and with no implied reference to the insurance practice in a particular country. Furmston agreed.

Article 5 (Revocation)

The contracting parties may modify or revoke the rights conferred by the contract on the beneficiary until the beneficiary has accepted them or relied on them.

23. Uchida had difficulties with the words “or relied on them” which after all proved to be almost impossible to translate into Japanese. He wondered whether simple

reliance was sufficient or whether detrimental reliance was necessary (as he personally thought was the case). He proposed the deletion of the words.

24. Jauffret-Spinosi also found it difficult to find a suitable corresponding term in French. Crépeau and Fontaine drew her attention to Art. 2.4(2)(b) of the present edition of the Principles where a perfectly acceptable French term had been found.

25. Like Jauffret-Spinosi however Fontaine too wondered whether in the context of Art. 5 there was a difference between reliance and tacit acceptance or whether the former was already covered by the latter.

26. Lando drew attention to Art. 6:110 (3) PECL (“(3) The promisee may by notice to the promisor deprive the third party of the right to performance 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 latter accepts the right”) which clearly took a different approach in this respect. He personally was not sure which of the two approaches was preferable.

27. Furmston insisted that there was a difference between “accepted them” and “relied on them”: acceptance involved the beneficiary telling the parties that it had accepted them whereas reliance did not but involved some conduct on the part of the beneficiary which showed that it was doing or not doing something because of the promise but without telling the parties. He wanted to retain both notions. He accepted however the proposal to replace the words “relied on them” by “acted in reliance on them”.

28. Crépeau referred to Art. 2.6 and wondered whether in the present context it would be sufficient in the Comment to refer to Art. 2.6(1) as the general rule indicating that acceptance can be met in a number of ways, either expressly or impliedly, and state that one of the ways was to rely on conduct.

29. Bonell voiced some doubt. Art. 2.6(1) had been taken literally from the Vienna Sales Convention and was not intended to include any conduct even if not made known to the offeror. Only exceptionally under the conditions set out in Art. 2.6(3) was mere conduct considered equivalent to acceptance even in the absence of a notice to the offeror. This was exactly Furmston’s point, i.e. if one deletes from the present article the last words, there was the possibility for the third party beneficiary to accept impliedly but its rights could still be revoked by the parties if it simply “acted in reliance” on them without informing the parties. Farnsworth agreed.

30. Furmston, in support of the broader formula used in Art. 5, gave the following illustration: let us suppose that there is a major contract to rebuild the World Trade Center in New York involving contractors from all over the world. The lead contractor enters into an insurance contract with an insurance company which is to cover the work done by all of the sub-contractors and suppliers. This become generally known and as a result of it one of the sub-contractors does not itself take out insurance. That would amount to reliance on the insurance coverage provided by the lead contractor so that the latter and the insurance company could no longer change their arrangement in favour of

the sub-contractor. Art. 5, which is a default rule for the parties' changing their minds, says that the parties cannot change their minds either once the third party has accepted, i.e. that it has told them that it has accepted, or that it has relied on it. And if it has relied on it, it does not need to tell them so in order to stop them from being able to revoke. If it is not clear, it ought to be said in the Comment.

31. Lando felt there were two situations to be distinguished when talking about reliance. One is that it is reasonable for the parties to expect the beneficiary to rely on the contract concluded to its benefit and it has done so. The insurance example given by Furmston illustrates it. Another is that the beneficiary gives notice to the parties that it has relied on it, even where it was not reasonable for the parties to expect the beneficiary to rely on it. Should the parties then be bound?

32. Bonell drew attention to Art. 2.4(2)(b) where it is expressly required that "... it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer".

33. Finn suggested that at least in the Comments when reference is made to reliance it should be made clear that the reliance should be reasonable in the circumstances. He thought that also in the context of Art. 5 there should be some limitation imposed on the third party beneficiary, either in the article itself or at least in the Comments to indicate that the third party beneficiary must act reasonably.

34. Uchida stressed that simple reliance by the third party should not restrict the freedom of the parties to modify or revoke the contract.

35. Furmston recalled that the Comments expressly say that the parties can have whatever regime they like. So if the parties wanted to make a contract in which they gave or purported to confer rights on a third party, but to provide that these rights were revocable at any moment without notice, that would be permissible under the existing text. One could deal with what he would regard as relatively unusual cases of unreasonable reliance by including the word "reasonable".

36. Crépeau pointed out that this was not the first time where the Principles refer to reliance yet not always was "reasonableness" added in relation to reliance. He wondered whether Art. 5 was a special case of "reasonable" reliance or whether "reasonable" should be included in all cases of reliance.

37. Finn agreed that this was a serious question.

38. Bonell recalled that indeed for instance in Art. 3.10 there is no mention of reasonableness which was at most hinted at in the Comments. He asked the Group to express its views on the issue.

39. According to Furmston it was premature to take a definite view on whether to have throughout the Principles additional language to the effect that the reliance must be reasonable under the circumstances. He proposed coming back to the issue once the new enlarged edition of the Principles was ready.

40. Komarov felt that the longer the matter was discussed the more qualifications that might come up. He suggested keeping the rule flexible and to mention all possible qualifications in the Comments. In modern Russian law rules on reliance were not developed and it would be difficult for him to explain the rule. One should try to explain the approach in the Comments and give illustrations.

41. For Huang it made no difference whether “reasonable” was included in the black letter rule or in the Comments.

42. Lando warned that not everybody interested in the Principles necessarily read the Comments. Therefore he thought it a good idea to put “reasonableness” in the black letter rule.

43. Date Bah objected that an indication of preference on this issue was not yet possible. If a black letter rule on reliance of a more general character was introduced, this might well influence the decision on how to draft the specific applications of that rule.

44. In summing up Bonell concluded that there seemed to be substantial support in favour of having a reference to the reliance doctrine in the context of Art. 5. It had been agreed to change the present wording to “acting in reliance on them”. The Group also had requested the Rapporteur to be as explicit and elaborate as possible on this point in the Comments, hopefully with illustrations. As to the further qualification of reasonableness, he suggested postponing a decision until a later stage when a provision of a more general character might be adopted. It was so agreed.

45. Bonell then turned to another issue raised by Crépeau, i.e. whether it was self-understood that under the Principles the conferment had an immediate effect so that as soon as the parties (promisor and promisee) agree, the third party may accept or act in reliance on it, or whether one might think of a different solution similar to the one adopted by PECL, i.e. that the conferment becomes effective only upon notice by the parties to the beneficiary.

46. Fontaine pointed out that his understanding was in the first sense which was also the approach taken by Belgian law.

47. Bonell observed that also the heading of Article 5 made it very clear that acceptance or acting in reliance on the conferment had only to do with the right to revoke or modify the conferment, not with the very effectiveness of the conferment.

Article 6 (Renunciation)

The beneficiary may renounce a right conferred on it.

48. Huang found the Comment to be too short. She also missed illustrations.

49. Furmston promised to elaborate further the text.

50. Finn recalled that in other situations where a party is given an option to do something, the Principles specify that the option must be exercised either within a fixed period of time or within a reasonable time. He wondered whether the same approach should be adopted also with respect to the present article.

51. Schiavoni wondered whether the possibility of renouncing the right after acceptance of the conferment was envisaged, and after hearing the Rapporteur's answer that it was not, he found it difficult to conceive of a right to renounce something before having accepted it.

52. Bonell recalled that under the Principles the right is conferred by the mere agreement between the parties with no need for the beneficiary to accept it so that it was quite logical that Art. 6 provided the possibility for the beneficiary to renounce the right conferred upon it.

53. Date Bah thought that renunciation may well take place also after acceptance because nobody can be forced to enjoy something he/she does not want to enjoy and was against the imposition of any time limit.

54. Finn found both propositions difficult to accept. If there was acceptance, the general principle according to which contract rights can only be modified with the agreement of all parties concerned.

55. Fontaine objected that in this context acceptance did not have the same meaning as the acceptance of an offer. As an illustration he suggested the case of a general contractor willing to take out an insurance policy not only for itself but also for its sub-contractors: one of the sub-contractors might say right from the start that it did not need that insurance because it already had its own, while another sub-contractor might even after acceptance have good reason to be insured by another insurance company and therefore renounce the right after acceptance.

56. Hartkamp felt that after acceptance the position of the third party should be exactly the same as in all other cases where it has acquired a right by its own will. Consequently the possibility for the beneficiary to renounce the right should be admitted only before acceptance.

57. Farnsworth agreed and proposed the addition of the following language to the present text: "After acceptance or reliance the right to renounce is the same as in the case of anyone else who has a contractual right under these Principles".

58. Uchida was not sure whether mere reliance should suffice to exclude the possibility of renunciation.

59. Jauffret-Spinosi felt that when the beneficiary accepts, the contract is perfect and all terms agreed between the promisor and promisee are binding on the beneficiary who at this point may no longer unilaterally renounce.

60. Crépeau agreed.

61. Bonell noted that a number of members of the Group had expressed their preference for an express exclusion of the beneficiary's right to renounce after acceptance. If this was to become the majority view, he wondered however whether this should be expressly stated in the black letter rule or mentioned in the Comments. The latter solution would seem to be preferable in view of the fact that in practice there might well be cases where there will be no acceptance at all by the beneficiary. The Comments could refer to the general principle of the prohibition of *venire contra factum proprium*.

62. In an indicative vote a substantial majority was in favour of excluding the possibility of renunciation after acceptance, leaving it to the Rapporteur to decide whether this should be expressed in the black letter rule or in the Comments.

II. LIMITATION PERIODS

Article 1 (Scope of the chapter)

(1) *Rights governed by these Principles cannot be exercised after expiration of a period of time, referred to as "limitation period".*

(2) *This chapter does not govern the time within which one party is required under these Principles, as a condition for the acquisition or exercise of its right, to give notice to the other party or perform any act other than the institution of legal proceedings.*

63. Lando recalled that PECL used the term "prescription" and wondered whether the Principles could use it as well so as to avoid any misunderstanding by users of the two instruments. After all the Rapporteur himself, in the Comments, mentioned that the French language version would use the term *prescription*.

64. Bonell pointed out that the issue had been extensively discussed at previous sessions and there were two important reasons for having chosen the term "limitation periods": first the precedent of the 1974 U.N. Convention on the Limitation Period in the International Sale of Goods; second, and even more important, the difficulty Islamic legal systems have in accepting the very notion of limitation of actions or prescription and El Kohly's insistence on the necessity to make it very clear that the expiry of a period of time does not extinguish the right but only operates as a defence to the enforcement of an action in court. With respect to the last two sentences of the first paragraph in Comment 1 he suggested their deletion since the Comments should not address questions of translation into other languages.

65. Fontaine agreed and it was so decided.

66. Finn asked the meaning of the second paragraph of Comment 1.

67. Schlechtriem explained that he intended to refer to remedies contractually agreed by the parties or provided by the otherwise applicable domestic law.

68. Finn had difficulties in understanding the need to refer to remedies under domestic law, all the more so as they might well be subject to their own rules on limitation periods.

69. It was decided to delete such reference in the Comments.

70. Finn wondered whether Comment 2 was at all necessary given the self-explanatory nature of paragraph 2 of the black letter rule.

71. Recalling the lengthy discussion on Art. 1, paragraph 2 Bonell felt that Comment 2 was therefore very useful. The references to individual articles should however be reviewed since, for instance, Art. 3.15 relates to avoidance of the contract for all defects of intent and not only for mistake, a reference to Art. 7.2.2, *lit.* (e) was missing, etc.

72. It was so agreed.

73. In the context of the discussion on Art. 9, the Group decided a new wording of paragraph 1 of the present article (see *infra*. paragraph 130).

“The exercise of rights governed by these Principles is barred by expiration of a period of time, referred to as “limitation period”, according to the rules of this chapter.”

Article 2 (Limitation periods)

(1) The general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee’s right [could have been exercised or the obligor’s performance could have been required], can be exercised or the obligor’s performance can be required.

(2) In any event, the maximum limitation period is ten years beginning on the day after the day the right [could have been exercised or the obligor’s performance could have been required], can be exercised or the obligor’s performance can be required.

74. With respect to the black letter rule, the Group was not in favour of the alternative wording in square brackets and decided to keep the text as it stood.

75. Hartkamp wondered whether mere constructive knowledge should suffice to cause the general limitation period to begin running. This may well result in a too harsh rule on the obligee. In his country actual knowledge by the obligee was required, and he felt that this should also be the approach taken by the Principles, all the more so since the limitation period was even shorter (three years as opposed to the five years provided for in the Dutch Civil Code).

76. Schlechtriem replied that the matter had been extensively discussed and the Group had ultimately decided in favour of the present text also in view of the extreme difficulty to prove actual knowledge. On the other hand “ought to know” meant not only that one had to know that one has a claim, but also who the obligor is. Moreover it should be borne in mind that the present chapter applied only to rights arising out of contracts while Hartkamp’s concern related to tort claims.

77. The Group confirmed its previous decision.

78. Turning to the Comments, it was suggested that in Comment I.1 the words “or prescription” be deleted, that instead of “all legal systems” one should speak of “most legal systems”, that in the last line the word “some” be deleted and that in Comment I.3 in the last line the words “a two-periods system” be replaced by “a two-tier system”. The Rapporteur agreed.

79. With respect to Comment II.1 it was suggested that the first part of the opening sentence be replaced by “the basic policy that an obligee should not only be barred from enforcing the right before it could be exercised ...”, the last three words of the last line be deleted, that in Comment II.2 the word “debtor” be replaced by “obligor”, that either Illustration 1 or 2 be replaced by an illustration referring to a case where there is a time-bar, that Comment II.5 be redrafted so as to read “the obligee is barred from exercising its right ... This maximum period of ten years ... and to prevent speculative litigation ...”. The Rapporteur agreed.

80. Furmston had difficulties in understanding Illustration 6. Since A is the creditor and its claim is being barred, it was hard to see the relevance of the death of B’s accountant to A’s claim. Schlechtriem replied that this was so because B’s accountant was the only reliable source to know whether A had been paid or not. Furmston suggested that, as he had never met a creditor who did not know whether he has been paid or not, the illustration should mention that A did not keep books nor knew whether or not he had been paid. Schlechtriem agreed.

81. With respect to Comment II.6 Bonell wondered whether it was not a bit too elaborate and difficult to understand by an outsider in view of the fact that the Principles did not provide any special regime for ancillary claims.

82. Hartkamp agreed and found there was ambiguity in the second sentence stating that “ancillary claims” are governed by the general rules of Art. 2”. He suggested abbreviating the whole passage to read “ancillary claims are subject to the same rules” which means they have their own separate limitation periods.

83. Schlechtriem said that he would add at the end of sentence 2 “i.e.” and then repeat, with regard to ancillary, what is stated in Art. 2.

84. Bonell felt that the illustrations were very helpful, but could perhaps be built into the text so as to make it clear that it is reference is being made mainly to interest and penalty clauses.

Article 3 (Modification of Periods of Limitations by the Parties)

The parties may modify the limitation periods. However they may not

(a) shorten the general limitation period to less than one year and

(b) the maximum limitation period to less than 4 years;

(c) extend the maximum limitation period to more than 15 years.

85. Furmston proposed to replace in the title the words “Periods of Limitation” with “Limitation Periods”. Farnsworth proposed to split the provision into two separate paragraphs. It was so agreed.

86. With respect to Comment 2 Finn suggested replacing the second part of the first sentence with the words “take advantage by either shortening or lengthening the period”. The Rapporteur, who agreed, was asked to provide illustrations.

87. Bonell wondered whether the statement in the last paragraph of Comment 2 was sufficient. He recalled that when announcing to the Governing Council of UNIDROIT the Group’s decision to include a chapter on limitation periods the question was raised how this could be done in a non-binding instrument such as the Principles given the mandatory nature of the rules on limitation periods in most domestic legal systems. Admittedly, there was already Art. 1.4 of the Principles stating in general terms that nothing in the Principles should prevent the application of otherwise applicable mandatory rules of domestic law. However, he wondered whether, with respect to the rules on limitation periods, there should be a special statement indicating that these rules may or may not apply as a whole on account of the existence of domestic mandatory rules.

88. Schlechtriem, while agreeing in substance, thought that such a statement would only awake sleeping dogs. After all if it was included in the Comments of this chapter why not do the same in other chapters, e.g. the ones on set-off or on authority of agents where the problems were rather similar.

89. Farnsworth thought that the question addressed in Comment 2 was a different one from that raised by Bonell. He thought that the general question of the legitimacy of drafting rules on limitation periods in the Principles should be dealt with either in the context of Art. 1.4 or of the Preamble.

90. Furmston and Komarov shared Bonell’s concern. While Komarov confirmed that he too had repeatedly been asked by lawyers in his country how the Principles could deal with limitation periods which in Russia are subject to mandatory rules, Furmston felt it necessary not only to remind users of the Principles of the existence of mandatory rules in this field but also positively to indicate those cases where on the contrary the provisions of the Principles on limitation periods apply to the exclusion of any domestic law. In this respect he gave the example of an international contract containing a reference to the Principles and an arbitration agreement.

91. In summing up the discussion Bonell suggested that the Rapporteur add a third Comment to Art. 1 with language along the lines indicated by Furmston including an illustration relating to a case where the provisions of the Principles on limitation periods are applicable to the exclusion of the corresponding mandatory rules of – say – Ruritania.

92. Schlechtriem agreed.

Article 4 (New Limitation Period by Acknowledgement)

Where the obligor, before the expiration of the limitation period, acknowledges the right of the obligee, a new general limitation period begins on the day after the day of the acknowledgement. The maximum limitation period does not begin to run again, but may be exceeded by the beginning of a new general limitation period under Art. 2 (1).

93. Crépeau suggested splitting Art. 4 into two paragraphs. It was so agreed.

94. Finn wondered whether the words “before the expiration of the limitation period” should be deleted. He noted that this was the solution adopted in Art. 14:401 PECL which consequently also implicitly covered the case of renouncing a limitation period after it has expired.

95. Schlechtriem pointed out that there was a basic difference between renewal by acknowledgement while the period of limitation was still running or acknowledgement after the right has been barred because the period has run out. He recalled that the issue had been discussed at length and it had been decided that renewal by acknowledgement could take place only until expiry of the limitation period. After expiry it was a different matter. There could be a novation of the barred obligation by a new contract or by waiver or estoppel.

96. Asked by Finn why PECL adopts a different approach, Lando confessed that he was not so sure that Art. 14:401 was really meant to go as far as Finn suggested.

97. Schlechtriem agreed with Lando and quoted the comparative law references in the comments to PECL which all refer to provisions dealing with the so-called interruption of the prescription. Yet you can interrupt prescription only as long as it is still running.

98. Crépeau preferred however to delete the words “before the expiration of the limitation period”.

99. Fontaine on the contrary was in favour of keeping them. Like Schlechtriem he saw a clear difference between acknowledgement during the period of limitation and renunciation of the right to revoke limitation after its expiry. Arts. 4, 5, 6, 7 and 8 dealt with all sorts of events that occur during the period of limitation and 4 was one of those events. It would be strange to have here a provision that would also cover events that occur after the end of the limitation period

100. Hartkamp agreed.

101. Farnsworth too found that Art. 4 should be limited to acknowledgements before the expiry of the limitation period. The Comments could mention the possibility of an acknowledgement afterwards which takes the form of a promise and which, according to the Principles, would not require consideration.

102. Date Bah agreed.

103. Schlechtriem announced that he would provide two illustrations where two legal technical instruments were used to undo the effects of limitation by a later acknowledgement. One would be a waiver: the debtor waives his right to rely on the period of limitation that has expired. The other would be an acknowledgement as a new promise. There was an important technical difference between the two: if I renew the old obligation, accessory rights are revived too, so I can go after e.g. a guarantor. If I create a new obligation by a unilateral promise accepted by the other party, there would be no accessory securities for the new obligation.

104. Hartkamp proposed to insert in paragraph 1 of the black letter rule the word “general” before “limitation period” so as to make it clear that the reference was not to the maximum limitation period. For the same reason he suggested to add to Illustration 3 in the last line “paragraph 1” after “Art. 2” and to specify in Illustration 2 that there was not even mere constructive knowledge on the side of B because otherwise the general limitation period would have run.

105. Farnsworth hoped that it would be possible to redraft much of Comment 2 as he confessed that he had had to read the first sentence many times before understanding it. Moreover in Illustration 1 an answer was missing. He wondered whether there should be a last sentence saying $X = 2000$. He was not sure why “X” was used, but “X” must be 2000 if the limitation period begins to run in 2002, because “X” plus 2 has to equal 2002.

106. Huang had difficulties with the use of the term “notified” in Illustration 1 in Comment 2. Schlechtriem agreed to replace it by the word “told”.

Article 5 (Suspension by Judicial Proceedings)

(1) The running of the limitation period shall be suspended

(a) when the obligee performs any act, by commencing judicial proceedings or in judicial proceedings already instituted, that is recognised by the law of the court as asserting the obligee’s right against the obligor;

(b) in the case of the obligor’s insolvency when the obligee has asserted its rights in the insolvency proceedings; or

(c) in the case of proceedings for dissolution of the entity which is the obligor when the obligee has asserted its rights in the dissolution proceedings.

(2) Suspension lasts until a final decision has been issued or until the case has been otherwise disposed of.

107. Hartkamp, given the fact that the general limitation period is very brief – only three years – and given the fact that it may run even before the obligee knows of the debt because it starts to run from the moment the obligee ought to know – and it may well be that only after two years or so it really knows that the limitation period is running, felt it was rather harsh to require that the obligee institute judicial proceedings within three years, even where negotiations are under way, in order to suspend the limitation period. He proposed adding another ground for suspension: a letter in which the obligee clearly and unequivocally expresses its intention to retain its rights.

108. Lando recalled that PECL, in accordance with a trend apparent in a number of legal systems, provides for the postponement of expiration in case of negotiations. Article 14:304 reads: “If the parties negotiate about the claim, or about circumstances from which a claim might arise, the period of prescription does not expire before one year has passed since the last communication made in the negotiations.” He felt that such a rule was preferable to the one proposed by Hartkamp because to require a formal letter presupposes that the obligee knows the rules, whereas to enter into negotiations needs no knowledge of the rules.

109. Schlechtriem recalled that in a previous version of his draft there had been a provision of this kind but that the Group had then rejected it in view of the difficulty of defining when negotiations begin and when they end.

110. Komarov was very much in favour of introducing a rule of the kind mentioned by Lando.

111. Fontaine too expressed support for such an approach. He recalled that in Belgium a solution along the lines suggested by Hartkamp had been adopted in the insurance sector only where prescription was interrupted by the mere request to be indemnified. As a general rule the one adopted by PECL seemed preferable: the difficulty of defining negotiations is partly solved by the fact that it says that prescription starts again not before one year after the last communication.

112. Garro expressed his preference for the rule suggested by Hartkamp.

113. According to Schlechtriem the difference between Hartkamp’s proposal and the negotiation scheme was not too great. He recalled the German caselaw under the old civil code which had a provision on negotiations: the solution then adopted with respect to the question as to when negotiations begin, was that whenever a party requests and the other party does not definitely deny, negotiations are regarded as going on. He too felt that negotiations should be deemed to begin whenever one of the parties requests negotiations and the other party does not definitely say no. The suspension should end whenever one of the parties definitely refuses to go on with negotiations. He preferred such a rule to the one adopted in PECL because the notion of “last communication” was rather vague. He also doubted whether a period of grace of one year was too long.

114. Uchida was in favour of Hartkamp's proposal because in his view the very notion of negotiation was too ambiguous.

115. Furmston pointed out that parties who are subject to the Principles are normally assisted by lawyers whose job it is to make sure that the proceedings are started in good time. As to the suggested rule on suspension by a unilateral communication, he thought it was rather odd that simply because one side has written to the other saying "we think we have a claim against you for \$100,000" and the other side does not bother to reply, there would be an extension. As to the idea of a suspension due to commencement of negotiations, he did not like it either. In virtually all cases there were negotiations before the proceeding starts. Actually in his country it was professionally improper to start proceedings without first writing to the other side and giving it an opportunity to settle. If this was the case he did not think it was a good idea that the mere starting of negotiations always extended the limitation period. Otherwise, instead of having a 3 year period one would have a 4 or 5 year period because negotiations would hardly ever start on the day that the dispute arose. Yet if the proposal was that where parties start negotiations and behave in a business-like way and end the negotiations having discovered that they cannot resolve the matter by negotiation that there will be no extension and that there will be an extension only where the negotiations are in some sense left in limbo and one of the parties is behaving badly by taking advantage of that, he found it extremely difficult to draw a clear line between the one case and the other. In his view it followed already from the general rules on good faith that a party is disabled from relying on the limitation defence if it had acted in bad faith.

116. El Kohly thought of another possible solution, i.e. to give the parties two or three months during which the limitation would not start to run.

117. Finn shared Furmston's doubts. After all, the Principles are intended to be used by sufficiently sophisticated business people who always know that if they want to do so, they are able to agree on an extension of the limitation period. He felt that if parties were going to undertake negotiations in a time frame which might run up against the possible expiry of the limitation period, they should address the matter themselves as part of their negotiations and either agree to enlarge the limitation period or else if one party will not so agree, expose themselves to a possible bad faith claim.

118. Bonell asked the Group to express its preference for one or the other approach, i.e. to have a provision stating that a unilateral communication by one of the parties or negotiations may suspend the limitation period, or to leave the entire matter to party autonomy and the general principle of good faith. The majority of the Group chose the latter approach.

Article 6 (Suspension by Arbitral Proceedings)

(1) The running of the limitation period shall be suspended when the obligee performs any act, by commencing arbitral proceedings or in arbitral proceedings already instituted, that is recognised by the law of the arbitral tribunal as asserting the obligee's right against the obligor.

In the absence of regulations for an arbitral proceeding or provisions determining the exact date of the commencement of an arbitral proceeding, proceeding shall be deemed to commence on the date on which a request that the right in dispute should be adjudicated reaches the obligor.

(2) Suspension lasts until a binding decision has been issued or until the case has been otherwise disposed of.

119. Lando questioned the exact meaning of the expression “recognised by the law of the arbitral tribunal”. Was it the law of the seat of arbitration or was it the law of the arbitral proceedings?

120. El Kohly too expressed doubts and pointed out that the issues at stake might in some cases be governed by the applicable procedural law and in some other cases by the applicable substantive law.

121. After a lengthy discussion where several alternative formulations were proposed, but none of which met sufficient approval, the Group decided to retain the present text.

Article 7 (Alternative Dispute Resolution)

The provisions of Arts. 5 and 6 apply with appropriate modifications to other proceedings whereby parties request a third person to assist them in their attempt to reach an amicable settlement of their dispute.

122. Schlechtriem recalled that the wording of the provision had been changed so as to conform it to the latest version of Art. 2 of the UNCITRAL draft Model Legislative Provisions on International Commercial Conciliation. The word “proceedings” and the reference to the intervention of a third party were intended to make it clear that mere negotiations between the parties were not sufficient.

123. Bonell wondered whether the Illustration in the Comment could be slightly changed so as to refer to a situation more common in international commercial practice. Schlechtriem agreed.

Article 8 (Suspension in case of force majeure, death or incapacity)

(1) Where the obligee has been prevented by an impediment that is beyond its control and that it could neither avoid nor overcome, from causing a limitation period to cease to run under the preceding articles, the limitation period is suspended so as not to expire before one year after the relevant impediment has ceased to exist.

(2) Where the impediment consists of the incapacity or death of the obligee or obligor, suspension ceases when a representative for the incapacitated or deceased party or its estate has been appointed or a successor inherited the respective party’s position; the additional one-year period under para. 1 applies respectively.

124. El Kohly questioned the one year period of grace.

125. Schlechtriem explained that the provision had been taken from the U.N. Limitation Convention

Article 9 (Effect of Expiration of a Limitation Period)

Expiration of the limitation period entitles the obligor to invoke this expiration in any judicial, arbitral or administrative proceeding as a defence.

126. Farnsworth and Hartkamp expressed some doubts as to the appropriateness of the wording. While it was important to state that the expiration of the limitation period has to be raised as a defence by the obligor, it was equally important to make it clear that such a defence may also be raised outside a court. They proposed a new text reading as follows:

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

(2) The obligor may do so in any judicial, arbitral or administrative proceeding.”

127. The Group adopted this new text.

128. El Kohly asked the Rapporteur to mention in the Comments that the expiration of the limitation periods may not only be invoked as a defence but may also be the subject of a declaratory judgment.

129. It was so agreed.

130. Farnsworth pointed out that in the light of the new wording of Art. 9, Art. 1 (1) would have to be amended. Indeed in its present wording Art. 1 (1) seemed to suggest that after the expiration of the period of time the right could in no case be exercised while it was now clear that a right can be exercised even after the expiration of the limitation period if the obligor does not raise it as a defence. He suggested the following new text of Art. 1 (1):

“The exercise of rights governed by these Principles is barred by expiration of a period of time, referred to as “limitation period”, according to the rules of this chapter.”

131. The Group adopted this new text.

132. Referring to the Comment Hartkamp suggested first of all replacing the words “extinctive prescription” by “extinction of the right” and to replace in line 8 “obligee” by “obligor”. With respect to the Illustration, he suggested changing it to the effect that A does appear in court, but fails to raise the defence.

133. Schlechtriem agreed.

Article 10 (Set Off After Expiration of the Limitation Period)

[Notwithstanding the expiration of the limitation period for a right, a party may rely on this right as a defence or for the purpose of set off against a claim asserted by the other party.]

134. Schlechtriem explained that the reason for the square brackets was that one had to wait for the Group's decision on set-off in general.

135. It was agreed to replace the words "a party" by "the obligee" and "the other party" by "the obligor".

Article 11 (Restitution)

Where there was performance in order to discharge an obligation, there is no right to restitution merely because the period of limitation had expired.

136. With respect to the Comment, it was decided to delete the words "or claim" in line 2 and to replace "cause" by "obligation".

III. ASSIGNMENT OF RIGHTS, TRANSFER OF OBLIGATIONS AND ASSIGNMENT OF CONTRACTS

SECTION 1: ASSIGNMENT OF RIGHTS

Article 1:1 (Definitions)

In these Principles, « assignment of a right » means the transfer by agreement from one person (the "assignor") to another person (the "assignee"), including transfer by way of security, of the assignor's right to payment of a monetary sum or other performance from a third person ("the obligor").

137. Fontaine recalled that this definition had already been agreed upon at the Group's last session in Rome, including the words "including transfer by way of security". However this wording posed a problem. Both the United Nations Convention on the Assignment of Receivables in International Trade (2001) and the draft chapter on Assignment of PECL used a broader formula intended to include also the granting of rights by way of security (cf. Art. 2 (a) of the U.N. Convention: "The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer"; Art. 11:101 (4) and (5) PECL: "In this Chapter 'assignment' includes an assignment by way of security"; "This Chapter also applies, with appropriate adaptations, to the granting by agreement of a right in security over a claim otherwise

than by assignment”). Within the Commission on European Contract Law the view was expressed that, given the differences in substance between a transfer of a right by way of security and the granting of a right in a claim by way of security, it was impossible to deal with the two cases in one and the same context without at least indicating which of the general provisions on assignment of rights would apply only to an “assignment” or “transfer” grant of a security interest and not to a “non-assignment” or “non-transfer” grant of a security interest. The majority of the Group, including the Rapporteur, however favoured the broader scope of the chapter on account of the unity of function of the two ways of granting a security. The same approach has been taken by the U.N. Convention, which however has prompted the UNCITRAL Secretariat to explain in the Comments that “Both outright transfers, including those made for security purposes and assignments by way of security are covered. In order to avoid any ambiguity as to that matter, Art. 2 (a) covers it explicitly and creates the legal fiction that for the purposes of the draft Convention the creation of security rights in receivables is deemed to be a transfer. However the draft Convention does not define outright assignments and assignments by way of security in view of the wide divergencies existing among legal systems as to the classification of assignments, this matter is left to other law applicable outside the draft Convention. In fact, an assignment by way of security could possess attributes of an outright transfer while an outright transfer might be used as a security device.”

138. El Kohly wondered whether there would be any harm in deleting “including transfer by way of security”. In his view it would not change anything because a transfer of right is a transfer of right, whatever the motive would be.

139. Finn and Furmston, on the contrary, expressed their strong support for the inclusion of the wording in question, recalling that the possibility of assigning a right by way of security was a possibility which was not recognised in all legal systems, including the common law systems.

140. Lando expressed some doubts as to the suggested broadening of the scope of the chapter since the non-transfer grant of security was in most countries subject to special rules.

141. Furmston too was not convinced of the necessity of following the example of PECL. PECL was intended to operate in the context of a finite number of legal systems addressing the issue, some of which permit granting by agreement of a right in security otherwise than by way of transfer and some of which do not. The Principles operate in the context of an almost limitless number of systems, the details of which we do not know. If nothing is said on this issue in the Principles it will be governed by some other system of law and rightly so since the Principles do not attempt to alter them, nor could they.

142. Bonell felt that also as far as the UNCITRAL Convention was concerned, things were different. First, it was a legislative instrument; secondly, significantly enough it is not stated therein that for those cases the rules will apply with appropriate modifications. There it is stated – and a legislator may do so – that the creation of rights

in receivables as security is deemed to be a transfer. Thirdly, the subject matter of the Convention was only receivables and not rights in general.

143. Fontaine confirmed that similar arguments have been put forward also within the Commission on European Contract Law by those against the broad definition of the scope of the chapter on assignment. Moreover, the European Bank for Reconstruction and Development, in its comments on Article 2 of the draft UNCITRAL Convention, expressed similar concerns.

144. Asked by Bonell whether in his view the text of Art. 1 as it stood would be understood so as to include or exclude the non-assignment or non-transfer grant of a security interest, Fontaine answered that in his view it was difficult to give a definite answer either in one or the other sense given the considerable differences existing on this point among jurisdictions.

145. With respect to Comment 2 Crépeau suggested replacing the words “tort law” by “tort or non-contractual claims” since the concept of tort law was not universally known.

146. Both Furmston and Farnsworth had difficulty with the suggested language: if the term “tort law” had to be replaced it should be replaced by “delictual claims”.

Article 1:2 (Exclusions)

This Section does not apply to transfers :

(a) of instruments, or

(b) of rights in the course of transferring a business, made under the special rules governing such transfers.

147. Lando and El Kohly expressed doubts about the use of the term “instruments” which, with no further qualification, could hardly be understood by future users of the Principles.

148. Fontaine recalled that originally the term “negotiable instrument” had been used but that the Group at its previous session had decided to delete “negotiable” in view of the fact that in English law most of the bills of lading were not negotiable.

149. Date Bah, Furmston and Farnsworth suggested re-formulating the provision so as to meet Lando’s and El Kohly’s concern.

150. The Group finally agreed on the following wording:

“This section does not apply to transfers made under the special rules governing the transfer: (a) of instruments, or (b) of rights in the course of transferring a business.”

Article 1:3 (Assignability of non-monetary rights)

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

151. In introducing this new provision Fontaine recalled that in the previous draft the provision on partial assignment contained a paragraph stating that the assignor had to compensate the obligor for any increase in the expenses incidental to performing in several parts. When discussing this provision two ideas had emerged: first, that in cases of assignment of non-monetary rights assignment could sometimes not simply involve an increase in costs for the obligor but could make the obligor's situation substantially more burdensome so that the remedy should not be to compensate the additional cost but to prevent assignment altogether. Secondly, as far as additional costs were concerned, the question was not limited to partial assignment but could arise in all cases of assignment. As a result of the discussion a new Art. 1:3 was drafted dealing with the first issue and a new Art. 1:8 was drafted concerning additional costs caused by assignment in general.

152. El Kohly wondered whether in cases where an assignment rendered an obligation more burdensome it was not up to the debtor to insist on a clause forbidding the assignment.

153. Fontaine drew attention to the fact that the draft contained a special provision on non-assignment clauses but that according to that provision non-assignment clauses do not always prevent the assignment.

154. Garro wondered whether also in cases of assignment of monetary rights the obligation could become more burdensome to the point that it would be unfair to require the obligor to accept such assignment. He drew attention to Art. 15 of the UNICTRAL Convention on Assignment of Receivables in International Trade stating that the debtor/obligor is not bound by the burden of having to pay in a different currency or having to pay in a different place.

155. Fontaine admitted that the draft followed a slightly different approach insofar as according to Art. 1:8 in such cases the obligor would be compensated for additional costs.

Article 1:4 (Partial assignment)

(1) A right to payment of a monetary sum may be assigned partially.

(2) A right to other performance may be assigned partially only if:

- it is divisible, and

- it does not render the obligation significantly more burdensome.

156. Bonell noted that bulleting had never been used in the Principles and suggested the deletion of the bullets.

157. Garro suggested replacing in paragraph 2 the second "it" with "the assignment".

Article 1:5 (Future rights)

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

158. Hartkamp suggested adding the words “As between the assignor and the assignee” at the beginning of the provision. Garro supported this suggestion.

159. Fontaine had no objection but in view of the fact that if this language were to be added to the present article it may well have to be added also in other provisions he would give further thought to the issue and decide accordingly.

160. Huang wondered whether the article mixed up two different aspects, i.e. that also future rights may be assigned and the time at which such assignment becomes effective. She suggested either splitting the provision into two separate paragraphs or expanding the Comments to this effect.

161. This second proposal was backed by Schlechtriem and Date Bah who suggested mentioning the possibility of assigning future rights already in the Comments to Art. 1:1.

Article 1:6 (Rights assigned without individual specification)

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

162. Uchida noted that the word “obligee” in the third line of the Illustration should be replaced by “obligor”.

Article 1:7 (Agreement between assignor and assignee sufficient)

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

163. Crépeau questioned the appropriateness of the words “right ... of an essentially personal character”. He preferred the wording used in a similar context in Art. 7.2.2 (“... exclusively personal character”).

164. Lando drew attention to the admittedly more cumbersome language used in Art. 11:302 PECL (“An assignment to which the debtor has not consented is ineffective against the debtor so far as it relates to a performance which the debtor, by reason of the

nature of the performance or the relationship of the debtor and the assignor, could not reasonably be required to render to anyone except the assignor”).

165. Schlechtriem was not in favour of such cumbersome language. He suggested keeping the word “essentially” and to explain in the Comments the meaning of “essential” in this context. He gave the following practical example: Pavarotti has made a contract with a concert agent to sing in concerts organised by this agent. And now this agent sells his claims against Pavarotti to another concert agency. That is not an exclusively personal nature, but essentially it is because Pavarotti probably was willing to sing only for this agent.

166. Bonell noted that the Comments already rightly put emphasis on the fact that “right of an essentially personal character” should be understood as a right which has been granted by the obligor in favour of a specific person.

167. According to Schlechtriem there were two situations where this provision applied. There are obligations of an essentially personal character per se and obligations which are of an essentially personal character on account of the relation between assignor and obligor. An example of the first case would be – admittedly not very frequent in international commerce – one in which a surgeon makes a contract to treat a patient. It is of course non-assignable because the special illness of the patient requires this to be a personal service to that person. An example of the second case would be that of a contract between writer and publisher: the publisher’s right may well be assigned to another publisher unless the parties in their contract make it clear by circumstantial evidence that the writer will not write for another publisher.

168. Finn suggested changing the wording of the second part of paragraph 2: as follows “unless the right in the circumstances is essentially personal in character” and to elaborate in the Comments the circumstances in which the right would be of an essentially personal character.

169. Schiavoni insisted that “essentially personal character” meant that the identity of the obligee/assignor was of essence to the obligor.

170. Fontaine, also in view of this latter remark, suggested replacing “right” by “obligation”. It was so agreed.

Article 1:8 (Obligor’s additional costs)

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

171. Asked by El Kohly about the relationship between this article and Art. 1:3, Fontaine explained that the present article was applicable whenever the assignment did not make the obligation significantly more burdensome but only implied additional costs.

172. El Kohly also wanted to know whether the obligor had a right to choose the person who will have to pay. Fontaine stated that obviously the obligor could request compensation from either the assignor or the assignee.

Article 1:9 (Non-assignment clauses)

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

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

173. Lando recalled that the Art. 11:301 PECL had adopted a similar rule with the important qualification however that the ineffectiveness of the non-assignment clause is limited to cases where “the assignment is made under a contract for the assignment of future rights to payment of money”.

174. El Kohly questioned the value of a rule stating the effectiveness of assignment even if the assignee knew that the possibility of assignment was contractually excluded between the assignor and the obligor.

175. Fontaine pointed out that the article aimed at creating a balance between different interests. The rule in paragraph 1, which by the way makes no distinction between present and future rights, was in the interest of credit in general since it encouraged financing methods, while the opposite rule in paragraph 2 was justified because there the interest of credit in general was involved to a lesser extent.

176. Bonell recalled that PECL was intended to cover also consumer transactions while the solution adopted in this article corresponded to what had been provided in both the 1988 Convention on International Factoring (Art. 6) and the UNCITRAL Convention on Assignment of Receivables in International Trade (Art. 9). The latter however expressly excluded from this provision assignment of receivables arising from financial services, construction contracts and contracts for the sale or lease of real property.

177. Schlechtriem also supported the present provision in view of the fact that the Principles were restricted to commercial transactions. He recalled the adoption of the same rule in the German Commercial Code.

178. Finn urged the redrafting of Comment 2 to Art. 1:7 so as to make it clear that what is presently stated there does not apply to rights to payment of monetary sums.

179. Uchida wondered whether the last sentence in both paragraphs was necessary. Fontaine admitted that even without them the result would be the same since Chapter 7 on non-performance would in any case apply and grant the obligor in case of actual losses suffered the remedy of damages against the assignor. For pedagogical reasons it might however be preferable to state this expressly.

180. Furmston expressed sympathy for El Kohly's doubts as to the appropriateness of the article. If, as pointed out by those in favour of it, its justification lay in the interest of the factoring industry, he wondered whether the UNIDROIT Principles would ever apply to a factoring contract which is regularly governed by the very detailed standard terms of the individual financial institutes. In other words the admittedly unorthodox rule of the present article would apply in practice in all cases except in those for which it was intended to apply.

181. Bonell asked whether there was further support for El Kohly's position. Since this was not the case it was agreed that the article would stand as submitted.

Article 1:10 (Notice to the obligor)

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

(2) After receiving such a notice, the obligor is discharged only by paying the assignee.

182. El Kohly wondered whether, notwithstanding the rule set out in paragraph 1, an obligor, by paying the assignor, would be discharged even when acting in bad faith e.g. because it had learned of the assignment from other sources.

183. Fontaine thought that this could be taken care of by reference to the general principle of good faith.

184. Finn thought that both the assignor and the assignee may have good reasons to have the obligor pay the assignor and therefore agree not to give notice of the assignment to the obligor. In such cases there is nothing wrong with the obligor's paying the assignor even if it has been informed adventitiously of the assignment by a third party.

185. Hartkamp too felt that the rule as set out in paragraph 1 was justified in the context of international commercial contracts. Perhaps El Kohly's concerns could be met by an express statement in the Comments that there might be border line cases where the obligor acting in bad faith would not be discharged or at least would become liable for damages towards the assignee.

Article 1:11 (Successive assignments)

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

186. No observations having been made, the Group approved the article.

Article 1:12 (Adequate proof of assignment)

(1) If notice of the assignment is given by the assignee, the obligor may request the assignee to provide within a reasonable time adequate proof that the assignment has been made.

(2) Until adequate proof is provided, the obligor may withhold payment.

(3) Unless adequate proof is provided, notice is not effective.

(4) Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

187. Fontaine drew attention to paragraph 2 which had been included following the discussions at the previous session.

188. No observations having been made, the Group approved the article.

Article 1:13 (Defences)

(1) The obligor may assert against the assignee all defences which the obligor could assert if the claim was made by the assignor.

(2) The obligor may assert against the assignee any right of set-off already exercised by notice between obligor and assignor at the time notice of assignment was received.

189. Crépeau suggested rewording paragraph 1 so as to read as follows: “The obligor may assert against the assignee all defences which the obligor could assert against the assignor.”

190. With respect to paragraph 2 Finn wondered why a distinction has been drawn between set-off before notice of assignment and (attempted) set-off after such notice.

191. Fontaine said that the reason was that both set-off and assignment with respect to the obligor become effective when notice is given. If there are reciprocal claims between the assignor and the obligor and if no notice of set-off is given, it would still be possible to assign the claim, and if notice of set-off is given after the notice of assignment, that notice of set-off is no longer effective. But if notice of set-off is given first, then it is the notice of assignment that is no longer effective because the claim no longer belongs to the assignor, and the obligor may object that the obligation has already been extinguished by set-off before the assignment.

192. Hartkamp asked what had induced the Group to depart from the well-known principle in the civil law systems and perhaps also in common law systems, that on account of assignment the legal position of the third party/obligor should not be made worse than it was before. If the obligor has a right of set-off and has not exercised it,

why should it lose such right after assignment? He thought that the obligor would always retain its right to set off its claim against a claim by the assignor.

193. Fontaine admitted that such an approach was just as possible but only in legal systems where set-off operates automatically, while as was the case under the Principles set-off depends on notice, the other solution seemed more logical.

194. According to Schlechtriem the rule set out in paragraph 2 made sense where the obligor acquires a right of set-off after notice of assignment, while he agreed with Hartkamp with respect to cases where the obligor could already have set off before assignment. He wondered whether the two situations should be distinguished and regulated differently, i.e. to allow set-off at any time even after notice of assignment if the right of set-off pre-existed assignment, and to restrict the present rule to cases where the obligor acquires a right of set-off only later.

195. Bonell drew attention to Art. 11:307(2) PECL stating “The debtor may also assert against the assignee all rights of set-off which would have been available against the assignor under Chapter 13 in respect of any claim against the assignor: (a) existing at the time when a notice of assignment, whether or not conforming to Article 11:303(1), reaches the debtor; or (b) closely connected with the assigned claim.”

196. Hartkamp recalled that in the Lando Commission there had been a lengthy discussion on two topics, i.e. whether the debtor retains its right to set off even after assignment, and whether the debtor retains this right only with respect to debts due or also to debts not yet due. In his recollection the Commission opted for the first alternative.

197. Fontaine suggested that he, together with Jauffret-Spinosi and Schlechtriem, prepare a new draft. The proposed new draft Art. 1:13 read as follows: “(1) The obligor may assert against the assignee all defences which the obligor could assert against the assignor. (2) The obligor may assert against the assignee any right of set-off already existing at the time of the assignment. (3) The obligor may exercise set-off by notice to the assignor with an obligation acquired against the assignor, after assignment, until it has received notice of such assignment.”

198. Finn suggested that paragraph 3 be reworded as follows: “The obligor may set off by notice to the assignor an obligation acquired against the assignor after assignment, until it has received notice of such assignment”.

199. Farnsworth suggesting replacing the word “it” in the last part of paragraph (3) by “the obligor” and to redraft paragraph (2) so as to read: “The obligor may set off against the assignee any obligation already existing at the time of the assignment”.

200. Schlechtriem, apologising for not having raised the point when the new proposal was drafted, thought that paragraph (2) should read as follows: “The obligor may set off by notice to the assignor any obligation already existing at the time of assignment”.

201. Hartkamp felt that the idea behind the rules laid down in paragraphs (2) and (3) could be expressed in a single sentence stating “The obligor may set off by notice to the assignor any obligation already existing at the time of notice of assignment”.

202. Schlechtriem and Fontaine expressed their preference for two separate paragraphs.

203. Finn felt that in paragraph 2 the reference to notice was superfluous and suggested the following wording: “The obligor may set off against the assignee any obligation already existing at the time of assignment”.

204. Fontaine on the contrary thought that the language was appropriate since the right of set-off was one thing and set-off as a defence was another. While the obligor can set off only against the assignor, the obligor may raise the existence of such a right as a defence against the assignee.

205. Furmston pointed out that looking at Art. 1:13 (1) and (2) and Art. 11:307 PECL a distinction is made between defences and set-offs. All defences which could be raised against the assignor can be raised against the assignee irrespective of matters of time. On the contrary not all set-offs that could have been raised against the assignor can be raised against the assignee but there is a cut off point at which new set-offs which could still arise as between the obligor and the assignor can no longer be raised against the assignee.

206. Farnsworth, while agreeing that this was the purpose of Art. 11:307 PECL and that this made sense to him, felt that the suggested paragraphs (2) and (3) of Art. 1:13 did not express the same idea in a sufficiently clear way.

207. Fontaine did not see any difference in substance between the two texts and recalled that in his original redraft of paragraph 2 he too had used the language “the obligor may assert against the assignee any right of set-off ...”.

208. Garro drew attention to Art. 18 (2) of the UNCITRAL Convention on Assignment of Receivables in International Trade which read as follows: “The debtor may raise against the assignee any other right of set-off, provided that it was available to the debtor at the time notification of the assignment was received by the debtor”. He thought this language could provide a useful basis for the redraft.

209. The Group asked Fontaine, Jauffret-Spinosi and Schlechtriem to redraft Art. 1:13 in the light of Art. 18 (2) of the UNCITRAL Convention on Assignment of Receivables in International Trade. The new draft Art. 1:13 read as follows:

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

210. The Group adopted this new draft Art. 1:13.

*Article 1:14 (Rights related to the claim assigned)**An assignment of rights transfers to the assignee :*

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

211. No observations having been made, the Group approved the article.

*Article 1:15 (Assignor's undertakings)**The assignor undertakes towards the assignee that:*

- (a) the assigned right exists at the time of the assignment, unless the right is a future right;*
- (b) the assignor is entitled to assign the right;*
- (c) the right has not been previously assigned to another assignee, and it is free from any right or claim from a third party ;*
- (d) the obligor does not have any defences ;*
- (e) the obligor has not given notice of set-off concerning the assigned right and the assignor has not given and will not give any such notice;*
- (f) the assignor will reimburse the assignee for any payment received from the obligor before notice of the assignment was given.*

212. No observations having been made, the Group approved the article.

SECTION 2 : TRANSFER OF OBLIGATIONS

Article 2:1 (Definitions)

In these Principles, "transfer of an obligation" means the transfer by agreement from one person (the "old obligor") to another person (the "new obligor") of an obligation to pay money or render other performance.

213. Date Bah suggested that the term "old obligor" be replaced by "original obligor". It was so agreed.

214. In the context of the discussion of Art. 2:5 (see *infra*. paragraphs 233-243) the Group adopted a new title and text of Art. 2:1 to read as follows :

" (Modes of transfer)

For the purposes of this Section, an obligation to pay money or render other performance may be transferred from one person (the "original obligor") to another person (the "new obligor") either

- (a) by an agreement between the original obligor and the new obligor, or*
- (b) by an agreement between the obligee and the new obligor, by which the new obligor assumes the obligation."*

Article 2:2 (Exclusion)

This Section does not apply to transfers of obligations in the course of transferring a business, made under the special rules governing such transfers.

215. Furmston suggested aligning the wording with the new wording adopted in the similar provision contained in Art. 1:2. Together with Farnsworth he suggested the following wording: “This section does not apply to transfers of obligations made under the special rules governing transfers of obligations in the course of transferring a business.”

216. The Group agreed on this wording.

Article 2:3 (Agreement between old and new obligor only with obligee’s consent)

An obligation may be transferred by an agreement between an old and a new obligor only with the consent of the obligee.

217. Huang suggested changing the title which in her view was somewhat misleading since what really was at stake was the transfer of the obligation and not the agreement between the parties to that effect.

218. Farnsworth agreed and suggested the following new title: “Requirement of obligee’s consent to transfer”.

219. It was so agreed.

220. Uchida suggested deleting the word “only” also from the text; after all it did not appear in Art.3:3 either, which deals with a similar situation.

221. It was so agreed.

222. After the adoption of the new text of Art. 2:1 (see supra paragraph 214), it was decided to redraft also this article so as to avoid any repetition and make it clear that Art. 2:1 describes the different ways in which an obligation may be transferred while Art. 2:3 lays down the requirement of the obligee’s consent in case of transfer by agreement between the original obligor and the new obligor. The new text of Art. 2:3 reads as follows:

“(Requirement of obligee’s consent to transfer)

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

Article 2:4 (Advance consent of obligee)

(1) The obligee may give its consent in advance.

(2) The transfer of the obligation becomes effective when notice of the transfer is given to the obligee or when the obligee acknowledges it.

223. Fontaine recalled that this was a new provision he had been asked to draft taking inspiration from a similar provision contained in Art. 3:4.

224. El Kohly and Hartkamp suggested including some additional language in paragraph 2 so as to make it clear that it applied only where the obligee has given its consent in advance.

225. It was decided to insert the word “then” between the words “obligation” and “becomes”.

226. Lando wondered whether the requirement the obligee’s acknowledgement of the transfer in paragraph 2 was a repetition of the requirement of the obligee’s consent in paragraph 1.

227. Fontaine denied. Even after having given its consent in advance to a possible transfer of the obligation at a later stage, the obligee has a legitimate interest in knowing whether and if so, when, such a transfer actually takes place. For this reason paragraph 2 requires that either notice of such a transfer is given to the obligee or alternatively that the obligee learns of it otherwise, i.e. acknowledges it.

228. Bonell mentioned in this context the German expression “zur Kenntnis nehmen”.

229. Lando was happy with the German expression but thought that the English term “to acknowledge” implied more, i.e. an agreement.

230. Farnsworth and Hartkamp thought that acknowledgement was not tantamount to consent but certainly did imply the giving of an external sign of having become aware of something.

231. Schlechtriem pointed out that ultimately it was a question of burden of proof, i.e. requiring “acknowledgement” by the offeree is not sufficient to claim the offeree’s knowledge of the transfer; there must be evidence of some external sign of the offeree’s becoming aware of it.

232. The article was adopted with the only modification being the inclusion of the word “then”.

Article 2:5 (Agreement between obligee and new obligor)

An obligation may be assumed by an agreement between the obligee and a new obligor.

233. Fontaine pointed out that at the comparative level there were normally two ways to transfer an obligation, i.e. by an agreement between the initial and the new obligor with the consent of the obligee or by an agreement between the obligee and the new obligor. This provision was intended to address the second alternative as explained in the Comments.

234. El Kohly had nothing against the provision but thought it unnecessary.

235. Hartkamp too had difficulties with the article which in his view introduced an entirely new concept, i.e. that an obligation may be “assumed”, but did not provide a definition of assumption and a clear indication of its effects. For instance, was the original obligor discharged or not?

236. Bonell drew attention to the subsequent Art. 2:6 which specifically addressed the effects of any kind of transfer of obligations.

237. Hartkamp objected that the opening words of paragraph 1 of Art. 2.6 (“When consenting, the obligee ...”) suggested that the article only referred to the transfer of obligations by agreement between the initial obligor and the new obligor.

238. Schlechtriem asked Hartkamp whether his concern could be met by changing the opening words of Art. 2:6 and expressly mentioning there also the case of assumption.

239. Date Bah went even further and suggested redrafting the definitional provision in Art. 2:1 to the same effect.

240. According to Hartkamp the new wording of Art. 2:1 could be more or less the following: “Under this chapter an obligation may be transferred either by an agreement between ...” (the present Art. 2:1) “or by an assumption of that agreement between the obligee and the obligor”.

241. Garro raised again the question as to the necessity of distinguishing between transfer of an obligation by agreement between the original and the new obligor and assumption of an obligation by agreement between the obligee and the new obligor.

242. Furmston felt that the two situations had to be distinguished since in the second the original obligor may even be by-passed.

243. It was decided that a small drafting group should prepare a new draft Art. 2:1 and to postpone the final decision as to Art. 2:5 until after discussion of this new draft article. The new text of Art. 2.1 as adopted by the Group reads as follows:

“ (Modes of transfer)

For the purposes of this Section, an obligation to pay money or render other performance may be transferred from one person (the “original obligor”) to another person (the “new obligor”) either

(b) by an agreement between the original obligor and the new obligor, or

(b) by an agreement between the obligee and the new obligor, by which the new obligor assumes the obligation.”

244. After the adoption of the new text of Art. 2:1 (see *supra* paragraph 214) the Group decided to delete Art. 2:5, the content of which is already contained in Art. 2:1.

Article 2:6 (Discharge of old obligor)

(1) When consenting, the obligee may discharge the old obligor.

(2) The obligee may also retain the old obligor as an obligor in case the new obligor does not perform properly.

(3) Otherwise the old obligor remains as an obligor, jointly and severally with the new obligor.

245. In the light of the new wording of Art. 2:1, Fontaine suggested deleting from paragraph 1 the opening words “when consenting”. It was so agreed.

246. Schlechtriem and El Kohly wondered whether in case of a transfer by means of assumption the old obligor is entitled to reject a possible discharge agreed upon between the obligee and the new obligor. Indeed the old obligor may have good reason to remain obliged vis-à-vis the obligee and the latter should not be able to change the former’s position against its will.

247. Fontaine agreed and drew attention to Comment 5 in which such a situation had been envisaged and a cross reference made to the chapter on third party rights containing a provision permitting the third party beneficiary to reject the benefit conferred on it by the agreement between the promisor and the promisee.

248. Finn and Hartkamp expressed reservations as to the very substance of the provision. From a commercial point of view it made little if any sense to envisage a transfer of obligation from the original obligor to the new obligor resulting in a situation where the original obligor nevertheless remains fully obliged vis-à-vis the obligee.

249. Schlechtriem, on the contrary, favoured the provision. In his view one had to distinguish between the underlying relationship between the original and the new obligor which is at the origin of their agreement to transfer the obligation, and the transfer of obligation as such. If the obligee did not consent to discharge the original obligor, this might well provide the latter with a remedy against the new obligor under their underlying relationship.

250. Fontaine agreed but observed that it could also be – and will frequently be the case – that the old obligor declares its intention to transfer the obligation on the condition that it would be discharged. In such a case the operation would not become effective if the obligee does not discharge the original obligor.

251. Finn wondered where the concept of “jointly and severally” was defined in the Principles.

252. Fontaine admitted that there was no such definition but that in substance it meant that the obligee could request payment indifferently from either the original or the new obligor, contrary to the situation envisaged in paragraph 2 where the original obligor may be sued only if the obligee is unable to get payment from the new obligor.

253. Crépeau agreed that this was the meaning of “solidairement” in French but wondered whether the two concepts were identical.

254. According to Garro there was no substantial difference between “jointly and severally” and “solidairement”.

255. On this understanding the Group adopted the article as it stood except for the two opening words in paragraph 1 and the replacement of “old obligor” by “original obligor” throughout the section.

Article 2:7 (Third party performance)

(1) Without the obligee’s consent, the obligor may contract with another person that this person will perform the obligation in place of the obligor, unless the obligation has an essentially personal character.

(2) The obligee retains its claim against the obligor.

256. Uchida, referring to the last paragraph of Comment 1, wondered whether it meant that the obligee may accept the performance offered by another person even without the consent of the obligor.

257. Fontaine denied and drew attention to the fact that the black letter rule only referred to situations where there is an agreement between the obligor and the intervening third person.

258. Furmston recalled that in practice the contract might expressly exclude the intervention of a third person even where the obligation was not of an essentially personal character and recommended that mention of this situation be made in the Comments.

259. Also in the light of this last intervention Bonell recalled that in the context of Art. 1:7 a similar wording had been changed with the addition of “in the circumstances” and wondered whether the same change should be made in the present article. It was so agreed.

Article 2:8 (Defences)

The new obligor may assert against the obligee all defences which the old obligor could assert against the obligee.

260. Schlechtriem proposed to express in the black letter rules what is presently stated only in Comment 3, namely that the new obligor cannot set off an obligation of the original obligor against the obligee.

261. It was agreed to add the words “except set-off” to the text of the article.

Article 2:9 (Rights related to the obligation transferred)

(1) The obligee may assert against the new obligor all its rights to payment or other performance under the contract in respect of the obligation transferred.

(2) If the old obligor is discharged under article 2:6 (1), a security granted by any person other than the new obligor for the performance of the obligation is discharged, unless that other person agrees that it should continue to be available to the obligee.

(3) Discharge of the old obligor also extends to any security of the old obligor given to the obligee for the performance of the obligation, unless the security is over an asset which is transferred as part of a transaction between the old and the new obligors.

262. Fontaine recalled that this article was new and reflected the deliberations of the Group at its last session. Thus, paragraph 1 had been reformulated to align the language along that of the corresponding provision on the assignment of rights while paragraphs 2 and 3 dealing with securities were new provisions inspired by PECL (Art. 13:101 (4) and (5)).

SECTION 3 : ASSIGNMENT OF CONTRACTS

Article 3:1 (Definitions)

In these Principles, “assignment of a contract” means the transfer by agreement from one person (the “assignor”) to another person (the “assignee”) of the assignor’s rights and obligations arising out of a contract with another person (the “other party”).

263. The article was accepted with no modifications.

Article 3:2 (Exclusion)

This Section does not apply to assignment of contracts in the course of transferring a business, made under the special rules governing such transfers.

264. Fontaine suggested rephrasing the article so as to align it with the new text of the corresponding provisions in Art. 1:2 and Art. 2:2. The new text would read as follows:

“This Section does not apply to assignment of contracts made under the special rules governing transfers of contracts in the course of transferring a business.”

265. It was so agreed.

Article 3:3 (Agreement between assignor, assignee and other party)

A contract may be assigned by an agreement between an assignor and an assignee with the consent of the other party.

266. Farnsworth, recalling the changes introduced in the corresponding Art. 2:3, wondered whether the present article should be aligned with it.

267. It was so agreed. The new title and text read as follows:

“(Requirement of consent of the other party)

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

Article 3:4 (Advance consent of the other party)

(1) The other party may give its consent in advance.

(2) The assignment of the contract becomes effective when notice of the assignment is given to the other party or when the other party acknowledges it.

268. The article was adopted with the inclusion of the word “then” between the words “the contract” and “becomes” in paragraph 2 so as to align it with a similar change made in Art. 2:4.

Article 3:5 (Discharge of the assignor)

(1) When consenting, the other party may discharge the assignor.

(2) The other party may also retain the assignor as an obligor in case the assignee does not perform properly.

(3) Otherwise the assignor remains as the other party’s obligor, jointly and severally with the assignee.

269. The article was adopted with the deletion of the words “when consenting” from paragraph 1 so as to align it with a similar change made in Art. 2:6.

Article 3:6 (Defences)

(1) To the extent that assignment of a contract involves an assignment of rights, article 1:13 applies accordingly.

(2) To the extent that assignment of a contract involves a transfer of obligations, article 2:8 applies accordingly.

270. El Kohly had no problem with the substance of the provision but wondered what was new in it. Did it not simply say that the assignment of a contract was a number of assignments of rights and of obligations?

271. Fontaine pointed out that there were a number of legal systems, including his own, which did not have any provisions on assignment of contracts, but there are others which do have special rules on this matter, and this latter approach is definitely preferable since assignment of contracts is a very important and common economic phenomenon. Even legally speaking assignment of the contract is more than simply an addition of assignment of rights and obligations. For that very reason the Principles also contain a section on assignment of contracts with special rules of the kind examined so far and among which Art. 3:3 was clearly the most important. Admittedly, there were some aspects where the rules on individual assignments of rights and transfers of obligations applied: Arts. 6 and 7 dealt with such aspects and, instead of repeating the general rules, they simply contained a reference to them.

272. The article was adopted with the sole modification of the number “2.8” to “2.7” in paragraph 2 to reflect the new numbering of the articles in the section.

Article 3:7 (Rights transferred with the contract)

(1) To the extent that assignment of a contract involves an assignment of rights, article 1:14 applies accordingly.

(2) To the extent that assignment of a contract involves a transfer of obligations, article 2:9 applies accordingly.

273. The article was adopted with the sole modification of the number “2.9” to “2.8” in paragraph 2 to reflect the new numbering of the articles in the section.

IV. SET-OFF

274. Before beginning the examination of the individual articles of the chapter, Uchida raised a general question concerning set-off among more than two parties. In practice so-called netting agreements were of considerable importance and becoming more and more frequent. He wondered whether the draft could contain a provision expressly stating that such agreements, implying set-off between more than two parties, are valid.

275. Bonell found it a very interesting idea but drew attention to the fact that on the basis of the general principle of party autonomy it went without saying that parties may enter into such agreements; moreover it would be the first time that the Principles, dealing with general contract law, specifically address a particular type of transaction.

Article 1 (Conditions of set-off)

Where two parties owe each other obligations to pay money or to render performance of the same kind, either of them, called the first party, may set off its obligation against its obligee, called the other party, if at the time of set-off,

(a) it is entitled to perform its obligation

(b) the other party's obligation is ascertained as to its existence and amount and performance is due.

276. Furmston suggested replacing the words “called the first party” and “called the other party” by “the first party” and “the other party” and placing them in brackets.

277. It was so agreed.

278. El Kohly doubted that it was enough to refer to “performance of the same kind” and suggested adding the words “and fungible” in order to make it clear that obligations of a strictly personal character could not be set off.

279. Bonell wondered whether “fungible” was a term known in English legal terminology. Finn confirmed that it was.

280. Lando and Garro favoured El Kohly’s proposal.

281. Schlechtriem and Hartkamp preferred keeping “obligations of the same kind” and recalled that Art. 13:101 PECL used the same expression. They suggested that the Comments state that what is meant by these words is mostly fungible goods.

282. Crépeau drew attention to Art. 1673 of the Civil Code of Quebec stating that set-off is possible between obligations to pay a sum of money or to render “fungible property identical in kind”.

283. Bonell asked for further support for El Kohly’s proposal. In the absence of such support he concluded that the majority of the Group was in favour of retaining the text as it stood.

284. Farnsworth suggested two small drafting changes in paragraph 1: first, the insertion of the word “other” between “render” and “performance” since the obligation to pay money too was an obligation of the same kind; second, the replacement in *lit.* (a) of “it” by “the first party”.

285. Komarov, referring to the last paragraph of Comment 6 stating that a party may set off also a time-barred obligation, wondered whether also other so-called natural obligations, i.e. obligations which are not enforceable but whose performance once rendered cannot be recovered, may likewise be capable of set-off. He had in mind particularly currency futures contracts which were very popular in his country in the late 1990s but were later declared non-enforceable by the courts in Russia. If however claims arising out of these contracts are eligible for set-off, then they can be assigned or

sold to the debtors of the main creditor for the purpose of set-off, a result which was certainly not desirable.

286. Schlechtriem recalled the special reasons which explain the exception of time-barred obligations. As to natural obligations, the possibility of setting them off should depend on the law declaring such obligations non-enforceable. Perhaps the Comments should state that if for certain policy reasons certain obligations are made unenforceable by special legislation of a State, it is a question of interpretation of that legislation whether this means also the exclusion of set-off.

287. It was so decided.

288. Hartkamp expressed doubts as to the appropriateness of the strict requirement of ascertainment laid down in *lit.* (b). If, as may well be the case, the other party's obligation is unascertained only above a certain limit, then there is no reason why it may not be used for set-off under that limit. Precisely for this reason Art. 13:102 (1) provides: "A debtor may not set off a claim which is unascertained as to its existence or value unless the set-off will not prejudice the interests of the other party." In the example he gave, if the debtor sets off up to the ascertained amount of the claim, the other party's interest is certainly not prejudiced by that set-off.

289. Schlechtriem agreed but in view of the fact that this provision had already been discussed at length he suggested not changing the black letter rule but adding in the Comments a statement to the effect that in the example given by Hartkamp obviously set-off is possible up to the amount ascertained.

290. It was so agreed.

Article 2 (Unascertained obligations)

An obligor may also set off an obligation which is not ascertained as to its existence or to its amount, provided obligations of both parties arise from the same contract.

291. According to Hartkamp this article had been drafted in the wrong way. Indeed while Art. 1 states that either party may set off its obligation against its obligee provided that the other party's obligation is ascertained, Art. 2, which is clearly intended to introduce an exception to the rule laid down in Art. 1, refers to the obligation of the party that is setting off. In order to make sense it should instead state that either party may under certain circumstances set off its obligation against its obligee even if the other party's obligation is not ascertained.

292. Schlechtriem agreed with Hartkamp but in his view it was Art. 1 that was incorrectly structured since what was at stake was whether a party may set off its obligation even if that obligation is not ascertained.

293. Hartkamp disagreed: set-off relates to a situation where there is a debtor who has a debt and a claim against the other party. According to Art. 1 that debtor may set

off its debt against its claim if its claim is ascertained. Art. 2 in its present form states that the debtor may set off its debt even if it is not ascertained, while it should state that the debtor may set off its debt even if its claim, i.e. the other party's debt, is not ascertained.

294. Lando wondered whether the question of ascertainment should not be dealt with in one and the same article and in this context referred to the approach taken by Art. 13:102 PECL.

295. Finn had no difficulties with the present wording of Art. 2. In his view the premise of Art. 1, *lit.* (a) is that the parties' obligation is ascertained and Art. 2 introduces an exception to that rule.

296. Bonell, recalling the lengthy discussion which led to the two present articles, pointed out that, rather than an exception to the supposed general rule laid down in Art. 1, Art. 2 dealt with a different kind of set-off.

297. Furmston agreed. Art. 1 related to what in English law is known as "legal set-off" while Art. 2 related to "equitable set-off". He gave the following example of the second kind of set-off. A makes a contract to sell to B one thousand pounds worth of bananas. Suppose A brings a claim for a thousand pounds and B says "I have the bananas but they are not as good as they should have been, so I should only pay you nine hundred". Now the quality of the bananas may be a matter which is not fully ascertained and how much B should deduct may likewise not be fully ascertained. English law finds it extremely convenient to allow B in this situation to pay nine hundred pounds, which means that B may set off its claim for damages against its debt to pay the price even though its claim is not yet ascertained as to its amount and perhaps not even as to its existence.

298. Jauffret-Spinosi recalled that PECL uses two different terms, i.e. obligation and claim. She wondered whether such terminology would not avoid any misunderstanding.

299. El Kohly confessed having great difficulty in understanding the whole Art. 2. How could an obligation whose existence is still in doubt be the object of a set-off. He felt that perhaps there was some mix up of set-off and right of retention. A party may retain part of its obligation until the other party accepts to pay the fine or the liquidated damages or whatever but this is not setoff.

300. According to Farnsworth, if Bonell and Furmston were right, Art. 2 should be redrafted in a manner parallel to Art. 1. In particular the condition that both obligations arise from the same contract should be stated at the beginning of the article.

301. Hartkamp insisted on the necessity to refer in Art. 2 to the obligation of the other party.

302. Schlechtriem and Lando agreed. After all, a party is always free to set off its debt even if as yet unascertained since at the very moment that debt is set off it is ascertained by the said party as to both its existence and amount.

303. Hartkamp suggested the following new wording of Art. 2: “The first party may also set off its obligation against the obligation of the other party which is not ascertained as to its existence or amount, provided the obligations ...”.

304. Farnsworth suggested putting the last part of the sentence at the beginning starting with “if”.

305. El Kohly wondered what, under this rule, would be the solution in the following case, one which quite frequently occurs in the context of construction contracts: the employer owes the contractor an amount of money but the contractor is late in performing. The employer withholds payment because according to it the contractor owes it liquidated damages. The contractor objects to this set-off, arguing, as the case may be, that its obligation to pay liquidated damages is not ascertained either as to its existence or as to its exact amount, or both. In his view in such cases set-off was not admissible. Was Art. 2 intended to permit set-off in such cases? If so, he was lost.

306. Hartkamp and Furmston confirmed that Art. 2 was intended to permit set-off in such cases.

307. Schlechtriem felt that El Kohly’s problem was basically a problem of how the court’s judgment will be phrased. The court could say “In this proceeding the damages claim was ascertained up to a certain amount and therefore the set-off declared by the employer was valid up to that amount”. Or the court could say “The set-off will take place only after the amount of damages has been ascertained in this proceeding”, and if set-off operates retroactively, the result will be the same. It was all a question of the wording of the judgment.

308. El Kohly denied because in his view it was much more than that. The employer will retain payment and this was not set-off but retention. The payment will be retained until there was a court decision but before that decision there was no set-off. At least the Comments should make it clear that the set-off envisaged in Art. 2 is subject to confirmation by the court.

309. Bonell recalled that throughout the Principles the general tendency is to avoid the need to resort to a court. This however does not prevent a party from invoking court intervention whenever it intends to challenge the appropriateness of a certain course of action taken by the other party, e.g. to terminate the contract or to set off.

310. The Group ultimately decided to combine the present Art. 1 and Art. 2 into a single article to read as follows:

“Article 1: (Conditions of set-off)

(1) Where two parties owe each other obligations to pay money or to render other performance of the same kind, either of them (“the first party”) may set off its obligation against its obligee (“the other party”) if at the time of set-off,

(a) the first party is entitled to perform its obligation,

(b) the other party’s obligation is ascertained as to its existence and amount and performance is due.

(2) If the obligations of both parties arise from the same contract, the first party may also set off its obligation against an obligation of the other party which is not ascertained as to its existence or to its amount.”

Article 3 (Foreign currency set-off)

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

311. Huang felt that the first sentence in Comment 1 was too absolute. In her view obligations to pay a sum of money are by their very nature of the same kind. So she suggested deleting the sentence which, after all, was not necessary since the essence of the rule was the distinction, for the purpose of set-off, between monetary obligations relating to freely convertible currencies and monetary obligations relating to currencies that are not freely convertible.

312. El Kohly wondered whether one should not add something about rates of exchange. Should it be the rate of sale or of purchase?

313. Garro felt that in Illustration 2 it was unnecessary to envisage, in addition to the different currencies, different places for payment. The black letter rule did not address the issue of the possibility of set-off in this latter case nor who is going to bear the costs involved.

314. Furmston suggested using in the English text the English name of the capital city of Viet Nam, i.e. Ho Chi Min City.

315. The Group adopted the article with no changes.

Article 4 (Set-off by notice)

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

316. El Kohly suggested merging Art. 4 and Art. 5.

317. Uchida argued that the last sentence of the Comment was too absolute since in practice it may well be that a party sends a notice of set-off even before the conditions for set-off have been fulfilled knowing that for instance the obligation will become due in a week’s time.

318. Schlechtriem agreed adding that what should not be permitted was a notice of set-off subject to a condition (e.g. “This set-off should take place if a war breaks out within the next month”).

319. Hartkamp suggested rephrasing the last sentence to read as follows: “Legal certainty requires that a notice of set-off must be precise. It may not be conditional. But it may be sent a few days before the debt falls due”.

320. The Group adopted the article with no changes.

Article 5 (Content of Notice)

The notice must sufficiently identify the obligations to which it relates.

321. According to Hartkamp the provision was, at least at first sight, far from clear. In every case of set-off two obligations are involved, and only after reading the Comment would one realise that the provision addresses the very special case where the first party has either more than one debt or more than one claim vis-à-vis the other party.

322. Schlechtriem recalled that Art. 6.1.12 addresses the same situation with respect to the obligation of payment. He suggested aligning the language of the present article along that of Art. 6.1.12 – which would basically mean replacing the word “identify” with “specify” and using the singular form of the word “obligation” – and making a cross reference in the Comments to Art. 6.1.12.

323. It was so agreed.

324. For Hartkamp the problem was that the article read “The notice *must* sufficiently identify” meaning that if it does not sufficiently identify the obligation, the notice is ineffective. But such a sanction would be correct only where the first party has more than one claim, in which case it must indicate which claim it is going to set off. On the contrary, if the first party has more than one debt, failure on its part to specify the debt it intends to set off should not result in ineffectiveness but in the application of the rules on imputation of payment. Of course one might argue that this can all be explained in the Comments but he felt that this would put too much of a strain on the Comments against the text.

325. Schlechtriem, Date Bah and Lando supported Hartkamp and urged a redraft of the present article along the lines of Art. 13:105 PECL.

326. Jauffret-Spinosi submitted a first redraft and the Group ultimately agreed on the following new text:

“(Content of notice)

(1) The notice must sufficiently specify the obligation to which it relates.

(2) If notice does not specify the obligation of the other party which must be set off, the notice is ineffective.

(3) If notice does not specify the obligation the first party wants to set off, the rules in Art. 6.1.12 will apply with appropriate modifications.

Article 6 (Effect of set-off)

(1) Set-off discharges the obligations.

(2) If obligations differ in amount, set-off discharges the obligations up to the amount of the lesser obligation.

(3) Set-off takes effect at the time the right of set-off could have been exercised.

327. El Kohly wondered whether the rule laid down in paragraph 1 did not need a further qualification to the effect that discharge takes place only in case of a lawful set-off. Moreover he questioned the advisability of the retroactive effect: if a person entitled to a set-off decides for commercial reasons to wait six months before declaring it, why should it be retroactive?

328. Hartkamp took a very strong stand against the envisaged retroactive effect of set-off. In his view it could create all kinds of unexpected effects in practice. For instance, if one of the parties has a debt and a claim and its claim bears interest but, for perfectly sound commercial reasons, that party invokes set-off only a year later, all the interest paid over that year by the other party should be returned because it had been paid on no legal basis because the legal basis had disappeared retroactively. Or, take the case of a claim being secured by pledge, mortgage or whatever security, it then turns out after a year that all the proprietary effects had been different over the last year from what the parties and third persons had imagined.

329. Lando entirely agreed and recalled that after a lengthy discussion the Commission on European Contract Law had opted for the non-retroactive effect of set-off.

330. Schlechtriem admitted that earlier on when discussing set-off between obligations in different currencies he had had difficulty with the retroactivity rule because it would undoubtedly favour the debtor who could speculate in the sense that, for example if the dollar was weak weeks ago the debtor could set off, while if the dollar was now, the debtor would pay in money. In general however he still favoured retroactivity, and this for two reasons: first, every business persons looking at its books and seeing debts and claims thinks “I am even”; second, there is a risk that the opposite rule will encourage business persons to set off as early as possible and this did not seem to be a good policy.

331. Garro too favoured retroactivity. As far as Hartkamp’s concern relating to third party rights was concerned, he wondered whether it could not be met by adding in the black letter rule that third party rights should not be prejudiced or affected.

332. Finn on the contrary supported Hartkamp's view. As to Garro's proposal it did not solve the problem of interest paid between the parties.

333. Hartkamp felt that at least the Comments should provide further explanation as to the reasons which prompted the Group to adopt the old fashioned retroactivity rule contrary to the modern trend going in the other direction (Scandinavian law, new Dutch Civil Code, PECL).

334. El Kohly – who recalled that even the Egyptian Civil Code, heavily influenced by French law, on this point took a different stand by denying retroactive effect of set-off – and Finn supported Hartkamp and recommended the adoption of the opposite rule.

335. Before asking for an indicative vote on this admittedly rather sensitive issue Bonell pointed out that in view of the fact that the Group seemed now fairly divided, it would be for policy reasons very unfortunate if the Group ultimately decided only by a slim majority to retain the retroactivity rule. Indeed PECL had adopted the opposite rule and everybody would wonder why the UNIDROIT Principles on the contrary preferred the retroactivity rule. If it then turned out that such a significant departure had been decided only by a very close vote and without compelling reasons, this would certainly not be to the advantage of the UNIDROIT Principles.

336. Bonell then put the proposal to reject the present solution, i.e. retroactivity of set-off, in favour of the opposite solution, i.e. set-off taking effect as from the time of notice, to a vote. The proposal was adopted with ten votes in favour, three against and one abstention.

337. The new text of paragraph 3 of Art. 6 reads as follows:

“(3) Set-off takes effect as from the time of notice.”

V. ELECTRONIC COMMERCE

338. Bonell recalled the decision taken by the Group at its first session in 1998 to consider whether and if so, to what extent, the present edition of the Principles required additions or amendments to the black letter rules and/or to the Comments in the light of the practice of electronic contracting (*cf.* UNIDROIT 1998 Study L – Misc. 20, paras. 362-367). At the Group's request, Uchida prepared a position paper (UNIDROIT 1999 Study L – Doc. 60) in which he compared some basic provisions of the Principles and the corresponding provisions of the 1996 UNICTRAL Model Law on Electronic Commerce and made several suggestions for possible changes in the Principles. At its last session held in 2001, the Group agreed that it would be advisable to collect additional information and comments on e-commerce and the UNIDROIT Principles and invited all members to contact to this effect experts in their respective countries (*cf.* UNIDROIT 2001 Study L – Misc. 23, para. 650).

339. In introducing the document “UNIDROIT Principles and Electronic Commerce” (UNIDROIT 2002 Study L – Doc. 77) Bonell stated that, taking advantage of his stay at Columbia Law School, he had prepared, together with Farnsworth, a questionnaire which had then been submitted to a number of experts in the field of electronic contracting. The paper contained, together with the questionnaire, the written replies received from Professors A.H. Boss (Temple University School of Law; American Law Institute Council), J. Ginsburg (Columbia Law School) and C. Ramberg (University of Stockholm). Bonell also mentioned that Professor M.A. Eisenberg (University of California School of Law, Berkeley) had announced that his comments were forthcoming.^(*)

340. Bonell also drew attention to a document Uchida had prepared and circulated among the members of the Group during the session and invited Uchida to introduce it.

341. Uchida first of all pointed out that he completely shared the views expressed by the experts consulted by Bonell and Farnsworth. On his part he wanted to draw attention to some possible amendments, or at least solicit comments on how certain provisions of the Principles should be understood in the light of electronic commerce. To begin with there were six provisions referring to “writing”: Arts. 1.2, 1.10, 2.9, 2.12, 2.17 and 2.18. He felt that the texts of Arts. 1.2 and 2.18 needed to be amended while the texts of the others could remain unchanged on the understanding that the word “writing” included electronic messages. Moreover Art. 2.8 should be reconsidered in order to make it less closely linked to specific and in part outdated modes of communication.

342. Bonell opened the discussion and asked for comments on Art. 1.2.

343. Uchida suggested the replacement of the word “writing” by the words “paper document”.

344. Schlechtriem objected that this could be taken to mean that, on the contrary, other formal requirements including electronic communications were required under the Principles.

345. Bonell wondered whether language such as “nothing in these Principles requires a contract to be concluded in or evidenced by a particular form ...” would avoid any misunderstanding.

346. Uchida, Furmston and Schlechtriem supported the proposal.

347. The new text of Art. 1.2 as adopted by the Group reads as follows:

“Nothing in these Principles requires a contract to be concluded in or evidenced by a particular form. It may be proved by any means, including witnesses.”

^(*) The comments of Prof. Eisenberg are contained in the revised version of the document: cf. UNIDROIT 2002 Study L – Doc. 77rev. (August 2002).

348. Bonell asked for comments on Art. 1.10.

349. The Group felt that no changes were necessary.

350. Bonell asked for comments on Art. 2.18.

351. Uchida suggested the replacement of the word “writing” in the third line by “specific mode of communication”.

352. Hartkamp wondered why such replacement should be made in this article and not also in all the other articles referring to “writing”. In his view the problem had already been taken care of by the broad definition of “writing” in Art. 1.10.

353. Bonell drew attention to Professor Boss’s remark that it should be made clear that parties may well insist on paper. The present text, on the contrary, seemed to suggest that even if parties insist on “writing”, in the light of the broad definition of Art. 1.10, electronic communications would suffice.

354. Furmston pointed out that what was at stake in the context of this article had nothing to do with “specific modes of communication” but with particular formal requirements. He therefore suggested the replacement of the word “writing” in the third line by “in a particular form”.

355. Farnsworth agreed and suggested changing also the title so as to read: “Modification in particular form”.

356. It was so agreed.

357. Schlechtriem suggested deleting the words “in writing” in the first line since in practice it could well be that parties conclude their contract orally and nevertheless agree that any modifications have to be made in a particular form.

358. Finn and Farnsworth disagreed.

359. Farnsworth observed that Schlechtriem’s proposal was as such not linked to the specific context of e-contracting and therefore suggested not pursuing discussion on it in the present context.

360. The Group ultimately agreed on the following new title and text of Art. 2.18:

“(Modification in particular form)

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

361. Bonell asked for comments on Art. 2.8 (1).

362. Uchida explained the two new alternative texts he had prepared: “[1] A period of time for acceptance fixed by the offeror begins to run from the moment of dispatch or from the moment shown in the offer. [2] A period of time for acceptance fixed by the offeror begins to run from the moment that offer reaches the offeree or from the moment shown in the offer.” Both versions had the merit of avoiding any reference to specific modes of communication, some of which (e.g. telegrams) are clearly outdated.

363. Bonell drew attention to the comments made by the experts consulted focusing on the question as to whether electronic messages could always be considered “means of instantaneous communication”, and coming to different conclusions.

364. Schlechtriem felt that a distinction should be made between electronic messages which are clearly instantaneous such as those exchanged in a chat room context and others which might well not be instantaneous at all.

365. Farnsworth recalled that Professor Boss had suggested treating all electronic messages as an instantaneous communication.

366. Furmston objected that for instance messages sent by fax are not instantaneous at all as confirmed by the House of Lords which stated that it made a difference whether or not one sends a fax to somebody during ordinary working hours and whether or not on the recipient’s side there is a central fax collection office which keeps the fax messages until they are picked up by the addressees.

367. El Kohly was against the deletion of telegrams which were still being used in many parts of the world.

368. Lando pointed out that PECL took a more agnostic approach. In other words, PECL does not contain a special provision, similar to Art. 2.8 of the UNIDROIT Principles, on the questions as to when a fixed period starts to run and the effect of holidays during that period. PECL has only a general rule that an offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time.

369. Bonell recalled that also the UNIDROIT Principles contain a similar rule in Art. 2.7 which however provides a special rule on oral offers and therefore might pose additional problems with respect to “instantaneous” electronic communications.

370. Schlechtriem thought that it had been decided to leave the second sentence of Art. 2.8 as it stood because of the difficulty in determining what is instantaneous in cyberspace. As to the first sentence he thought one could take up Uchida’s proposal to replace the “dispatch of a telegram by handing it in” by “dispatch”. The Comments could explain that in the case of a telegram this means handing it in at the post office or from wherever it is sent, and in the case of an electronic messages it is the dispatching by the server of the sender. As to the date shown on the letter, it should be the date shown on the acceptance or on the communication and if no such date is shown, the date shown on the envelope. It would then be necessary to deal with the date in the case

of e-messages: if it is not in the text of the e-message itself it is indicated in the heading of the e-message.

371. Finn proposed the following amendment: “A period of time for acceptance fixed by the offeror in a communication in writing runs from the date specified in the communication or, if no such date is specified, then from the date of the communication”.

372. Date Bah proposed to focus on non-instantaneous modes of electronic communication and to leave the text as it stood.

373. Farnsworth expressed support for Finn’s proposal but felt that it should be refined so as to make it clear how to deal with the case of a letter dated the 10th and postmarked on the 12th or of a system of electronic communications in which there is one time of dispatch and another time of receipt on the communication. One ought also to specify which date is the date of the communication.

374. Furmston expressed some misgivings as to the development of the discussion. Arts. 2.7 and 2.8 had a long history going back to the ULFC and CISG and he wondered whether at this late hour the Group really wanted to introduce substantial amendments to the black letter rule.

375. In summing up the discussion Bonell saw the emergence of basically three different approaches with respect to Art. 2.8: to leave the text of paragraph 1 as it stood with a possible additional reference to non-instantaneous electronic communications; to replace it with a much shorter and media-neutral wording such as the one suggested by Uchida and Finn; to delete the entire article altogether. He invited all members of the Group to give some further thought to the question so as to be in a position to take a final view at the next session. At any rate he wanted to express his and the Group’s gratitude to Professors Boss, Eisenberg, Ginsburg and Ramberg for their most valuable contributions.

VI. WAIVER

376. In introducing his paper “Waiver and Related Issues” (UNIDROIT 2002 Study L – Doc. 78) Finn pointed out that he had made an attempt to determine to what extent the Principles as presently formulated deal adequately with the circumstances in which contractual rights and obligations may be modified, suspended, lost or renounced. To this effect he had addressed separately modification, suspension, loss or renunciation of rights as a consequence of unilateral action and reliance/inconsistent behaviour. While with respect to the former set of questions his conclusions were that no additional provisions were needed, with respect to the latter he felt that consideration should be given to the adoption of a new provision addressing in general terms what is commonly known as estoppel or *venire contra factum proprium*.

377. Bonell thanked Finn for his excellent study. He invited comments even if only of a general nature in view of the fact that the document had been distributed only at the beginning of the session.

378. Komarov strongly supported the idea of having in Chapter 1 a new provision on *venire contra factum proprium*.

379. Lando also expressed interest in such a solution but recalled that PECL did not contain such a provision since it had been felt unnecessary given the presence of the general clause on good faith.

380. Farnsworth wanted to express some caution about leaning too much on the general provision on good faith. There were many common law countries where good faith was not accepted as a general principle and therefore putting some Comments to expand good faith would not be sufficient for them and perhaps not even for his own system notwithstanding the fact that the U.C.C. contained an express provision on good faith. Normally good faith was considered a contractual duty so that if one acted in bad faith someone else might claim damages or resort to other remedies. On the contrary what Finn had addressed was the question of one's being barred or precluded from taking some course because of its behaviour. In order to cope with addition Comments to the provision on good faith would not be sufficient. A new provision specifically addressing such situations commonly known as waiver and estoppel was needed.

381. Hartkamp was in principle also in favour of a rule on estoppel but thought it would be difficult to draft it. At the same time he urged the adoption of special provisions, one dealing with the renunciation of the right to invoke limitation after the period has run out, the other dealing with discharge of the original obligor where a new obligor assumes the obligation by an agreement with the obligee.

382. Schlechtriem favoured a general provision on estoppel to be included in Chapter 1. As to the suggested special provision on renunciation of the right to invoke limitation, he was willing to prepare a preliminary draft over night for discussion the following day.

383. According to El Kohly the two envisaged special provisions should be inspired by the following principles: first, that a renunciation cannot be presumed; second, that in a dual relationship, renunciation by one party cannot be imposed on the other.

384. Crépeau thought that Finn should further develop the ideas expressed in this document and present the Group with what he believed to be basic rules reflecting certain policies that might not have already been included the Principles.

385. Furmston wondered whether the Group should not postpone an in depth discussion on the matter until its next session.

386. Garro strongly favoured the adoption of a general rule on estoppel but at the same time also favoured special provisions on the matters mentioned by Hartkamp.

387. Bonell invited Schlechtriem to give more information on the content of the provision he had offered to draft.

388. Schlechtriem recalled the rule already contained in the chapter on limitation periods (Art. 4) according to which acknowledgement by the obligor of the obligee's right while the period of limitation was still running produced the interruption of the limitation period. Should one address also the case where the obligor "acknowledges" the obligee's right after the expiry of the limitation period, thereby renouncing its right to invoke the limitation period? And if so, should there be a special provision or was it sufficient to refer to it in the Comments? Obviously this latter approach would have been sufficient if there was a general provision on estoppel, in which case one could just make a reference to it.

389. It was agreed that Finn would prepare for the next day a draft provision on estoppel based on the text proposed in his position paper (at page 8: "*A party, having the right to raise a set-off, may by notice to the other party renounce that right in relation to the claim or claims of the other party that are specified in the notice.*").

390. Finn submitted two alternative proposals:

"Article X: (Inconsistent behaviour)

A party whose conduct

(a) has induced the other party to adopt an assumption concerning the contract, its performance or enforcement; or

(b) has confirmed such an assumption by the other party

is not permitted to act inconsistently with [to depart from] that assumption if the other party reasonably has acted in reliance upon it, unless, by the giving of reasonable notice, payment for expenses incurred or otherwise, it can avoid any unfairness [detriment] to that other party in consequence of its having so acted in reliance."

"Article X: (Inconsistent behaviour)

A party is not permitted to act inconsistently with an assumption it has induced the other party to adopt and upon which that other party reasonably has relied, unless it can do so without occasioning detriment to that other party in consequence of it having so relied."

391. Finn explained that the two articles were obviously alternatives. The first one was intended to be comprehensive, covering both conduct amounting to a representation (*lit. (a)*) or silence where there is a duty to speak in the circumstances (*lit. (b)*), such as where performance starts to deviate from agreed performance and is allowed to continue by the other contracting party. Equally it covered representations of fact and representations of intention. The remaining part of the provision made it clear that the reliance must be reasonable in the circumstances and in this respect one had to consider whether there should be a general rule on reasonableness such as the one contained in Art. 1.302 PECL. The second alternative proposal was obviously much shorter and

somewhat narrower since it did not expressly deal with silence where in the circumstances there is a duty to speak, nor did it spell out remedial consequences.

392. Schlechtriem also submitted a “Proposal on waiver and estoppel” reading as follows:

“A party causing either by a communication or by behaviour the other party good reason to believe that it will not exercise a right or invoke a defence against the other party may no longer exercise its right or invoke its defence if the other party acted in reasonable reliance on that communication or behaviour.”

393. Schlechtriem pointed out that his proposal could become either a black letter rule or the text of an additional Comment to Art. 1.7. Basically the proposal dealt with the loss of a right or a defence because a party having a right or having a defence causes, either by communication or by its behaviour, the other party to believe that it will no longer exercise its right or invoke its defence and the other party was acting in reasonable reliance on such conduct, with the result that the first party was estopped from invoking the right or the defence it had previously.

394. Bonell recalled that at an earlier stage of the discussion Schlechtriem had announced some draft proposals for the chapter on limitation periods and asked Schlechtriem what the relationship between the present proposal and those announced was.

395. Schlechtriem said that his idea was to refer in the chapter on the limitation period to his present proposal which could take the form of either a black letter rule or a Comment to Art. 1.7.

396. Lando pointed out that the principle of good faith had a number of important applications, of which *venire contra factum proprium* was only one. Other, equally important applications, were *abus de droit* and the duty of co-operation between the parties. PECL specifically addressed only the latter. If the Principles were going to contain also a rule on estoppel, he wondered whether *abus de droit* would not also have to be dealt with in order to avoid giving the impression that the Principles, by not addressing it, had rejected it. As to Finn’s and Schlechtriem’s proposals he expressed a preference for Finn’s second alternative.

397. Crépeau supported Lando’s proposal to deal also with *abus de droit*. He quoted Art. 7 of the Civil Code of Quebec which states: “No right may be exercised with the intent of injuring another or in an excessive or unreasonable manner which is contrary to the requirement of good faith”.

398. El Kohly agreed and quoted Art. 5 of the Egyptian Civil Code according to which the exercise of a right is considered unlawful (a) if the sole aim thereof is to harm another person, (b) if the benefit it was intended to realise is out of proportion to the harm caused thereby to another person, and (c) if the benefit it is intended to realise was unlawful.

399. Hartkamp found both Finn's second alternative and Schlechtriem's draft interesting. The difference between the two seemed to him that Schlechtriem's draft was really restricted to waiver, i.e. not to exercise a right or not to invoke a defence, while Finn's had a larger scope insofar as it could be read to cover even the creation of a right by assumption, for instance when a party leads the other party to believe that there was an obligation so that that other party would be entitled to require performance of it. Intellectually speaking, he had a preference for Finn's approach since it was more consistent to accept the doctrine of reliance both in a positive way – in the sense that it can create obligations – and in a negative way – in the sense that it can bar a person from exercising a right or invoking a defence. From a practical point of view however he wondered whether such a wide rule would be properly understood in the business world.

400. Furmston too expressed his preference for Finn's second proposal. He did not share Hartkamp's worries about business people. Business people were always surprised when told that they ought to behave honestly, but a rule such as the one suggested by Finn might well be more easily understood by them than the more general provision on good faith.

401. Komarov also preferred Finn's second proposal. However he had difficulty in understanding the exact meaning of the word "assumption".

402. Huang and Jauffret-Spinosi expressed the same concern.

403. Uchida agreed that Finn's proposal was much broader in scope than Schlechtriem's. He wondered whether Finn's proposal also applied to pre-contractual negotiation. If one party breaks off pre-contractual negotiations in bad faith, according to Art. 2.15 the remedy was damages. He was afraid that under Finn's proposal the result could even be the enforcement of the contract.

404. Bonell recalled that under Art. 2.4 (b) the sanction for the offeror's inducing the offeree to assume that it would not revoke the offer was that the offer became irrevocable leading, in case of acceptance, to a binding contract even against the offeror's will.

405. Farnsworth felt that precisely because of the special rule in Art. 2.4 (b) it was important to make it clear whether under the general rule on estoppel there were other cases of creation of a right by inducing a party to assume that it existed. Moreover he suggested replacing the opening words of Finn's proposal "a party is not permitted" with more general language such as "a party is barred" or "a party is precluded" from doing something. Finally he was attracted by the last sentence of Finn's first proposal: the possibility of setting things right by compensating for the reliance or detriment seemed to be an interesting idea worth being further explored.

406. Bonell invited Finn and Schlechtriem to comment on the comments made on their proposals.

407. Finn first of all agreed with Hartkamp that his proposal was wide in scope. As to the word “assumption” he took it that it had to be replaced by a clearer expression. The word “belief” was insufficient as it had to capture more than that. As to Uchida’s concern he would have thought that where a matter is dealt with specifically in the Principles, the specific provision rather than a general provision would apply and that this was the case also with bad faith negotiation specifically addressed in Art. 2.15. With respect to Farnsworth’s interest in the possibility of reversing the state of affairs, he promised to develop it further in the Comments. Finally, and more in general, he entirely agreed with Farnsworth’s remarks concerning the advisability of having an explicit rule on estoppel notwithstanding the general clause on good faith, and like Furmston, he was convinced that even business people would appreciate such a clarification.

408. Schlechtriem felt that the first question to be answered by the Group was whether it agreed with the principle that one can lose a right or a defence by behaviour or some kind of communication on which the other side reasonably relied. If this was agreed it should be decided whether to have it stated in a black letter rule or merely in the Comments. Only if both questions were answered in the negative would he feel obliged to prepare a specific provision to this effect in the context of the chapter on limitation periods. As to the relationship between his and Finn’s proposal, he like Hartkamp was a bit afraid that the more far reaching proposal made by Finn might create too many new obligations in certain situations.

409. Garro definitely favoured the adoption of a new black letter rule on estoppel. As to Finn’s second proposal he had difficulty understanding the last part of it (“unless it can do so without occasioning detriment to that other party in consequence of it having so relied”). With respect to Schlechtriem’s proposal he suggested putting at the beginning of the provision what is now in the middle, i.e. that a party shall lose a right or a defence.

410. Schlechtriem raised the question as to whether the envisaged new provision on estoppel should become a separate article or an additional paragraph in Art. 1.7.

411. Bonell expressed his preference for the first solution also in view of the fact that other applications of the general principle of good faith such as the duty of co-operation or the rule on negotiation in good faith also appeared in separate articles.

412. Hartkamp thought that it all depended on which proposal – Finn’s or Schlechtriem’s – was to be adopted. Schlechtriem’s was clearly a mere application of the good faith principle. Not Finn’s, which was much broader and could lead to conclusions not directly following from the good faith principle. Indeed, as already observed by Uchida, for instance, reliance on a promise could result in the obligor being bound, or where a party during negotiations gives the other party the impression that it may rely on the coming into existence of the contract, that party could be bound to conclude the contract and not only to pay damages as presently stated in Art. 2.15.

413. Finn agreed with Hartkamp and pointed out that the principle of estoppel as commonly understood was capable of creating new rights and obligations. He offered to

prepare a more elaborate version of his proposal together with comments sometime in January 2003. The draft could then be circulated among the members of the Group so as to permit them to comment on it even before its next plenary session.

414. Furmston strongly supported this proposal. In his view the Group could hardly go further at this time and take a firmer view.

415. Farnsworth wondered whether Finn could prepare two alternative texts, one of which, possibly without using the word “assumption”, would express his idea that estoppel creates rights as well, and the other would be more reflective of Schlechtriem’s proposal, meaning that estoppel would simply eliminate rights or defences.

416. Hartkamp recalled a proposal he had made at an earlier stage, i.e. to have a rule on discharge of an obligation which should make it clear whether to this effect a creditor may act unilaterally or the debtor’s consent was required.

417. Lando and Farnsworth express their support for such an idea.

418. Bonell asked Hartkamp whether he was prepared to undertake this task.

419. Hartkamp agreed.

420. Crépeau, recalling the suggestion to have also a new provision on *abus de droit*, declared that he was prepared to prepare a draft for the next session.

421. Bonell thanked both Hartkamp and Crépeau for their co-operation and expressed his confidence that thanks to their efforts the Group might be in a position at its next session to take a final decision not only with respect to the envisaged provision on estoppel but also on the possibility of having additional provisions dealing with discharge of an obligation and *abus de droit*.

VII. FUTURE WORK

422. Bonell recalled that in the final stage of preparation of the first edition of the Principles each Rapporteur had been assigned a Co-Rapporteur whose task it was to review the draft Comments and make observations and suggestions for amendment. He felt that the same procedure should be adopted also with respect to the new draft chapters and made the following suggestions as to possible Co-Rapporteurs: Crépeau for the draft chapter on Authority of Agents; Farnsworth for the draft chapter on Limitation Periods; Date Bah for the draft chapter on Assignment of Rights, Transfer of Obligations, Assignment of Contracts; Hartkamp for the draft chapter on Third Party Rights; and Finn for the draft chapter on Set-off. The suggested nominees declared that they were prepared to undertake this task and the Group as a whole agreed on their appointment. It was agreed that the Rapporteurs would send the draft Comments together with the black letter rules of their respective chapters to their Co-Rapporteurs as soon as possible, and that the Co-Rapporteurs would send them back with their

observations to the Rapporteurs by the end of February 2003 at the latest. This would permit the Rapporteurs to finalise the Comments of their draft chapters by the end of March 2003 at the latest, in time for circulation among all members of the Group well in advance of the next plenary session scheduled for the first week in June 2003.

423. El Kohly announced that he would be delighted to do his best to host the Group's next plenary session in Egypt.

424. Bonell and Kronke thanked El Kohly for this generous offer, but clearly a final decision could only be taken once further details concerning the organisation of the meeting have been provided.

APPENDIX I

WORKING GROUP FOR THE PREPARATION OF PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Fifth session

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LIST OF PARTICIPANTS

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Draft Chapter on Third Party Rights

Article 1

(Contracts in favour of third parties)

(1) Parties (the “promisor” and the “promisee”) may confer by express or implied agreement a right on a third party (the “beneficiary”).

(2) The existence and content of the beneficiary’s right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement.

Article 2

(Third Party Identifiable)

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

Article 3

(Exclusion and Limitation Clauses)

For the purposes of this chapter, the conferment of rights in the beneficiary includes the right to invoke a clause in the contract which excludes or limits the liability of the beneficiary.

Article 4

(Defences)

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

Article 5

(Revocation)

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

Article 6

(Renunciation)

The beneficiary may renounce a right conferred on it.

Draft Chapter on Limitation Periods

Article 1 *(Scope of the chapter)*

(1) The exercise of rights governed by these Principles is barred by expiration of a period of time, referred to as “limitation period”, according to the rules of this chapter.

(2) This chapter does not govern the time within which one party is required under these Principles, as a condition for the acquisition or exercise of its right, to give notice to the other party or perform any act other than the institution of legal proceedings.

Article 2 *(Limitation periods)*

(1) The general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee’s right can be exercised or the obligor’s performance can be required.

(2) In any event, the maximum limitation period is ten years beginning on the day after the day the right can be exercised or the obligor’s performance can be required.

Article 3 *(Modification of Limitation Periods by the Parties)*

- (1) The parties may modify the limitation periods.**
- (2) However they may not**
 - (a) shorten the general limitation period to less than one year;**
 - (b) shorten the maximum limitation period to less than 4 years;**
 - (c) extend the maximum limitation period to more than 15 years.**

Article 4 *(New Limitation Period by Acknowledgement)*

(1) Where the obligor, before the expiration of the general limitation period, acknowledges the right of the obligee, a new general limitation period begins on the day after the day of the acknowledgement.

(2) The maximum limitation period does not begin to run again, but may be exceeded by the beginning of a new general limitation period under Art. 2 (1).

Article 5

(Suspension by Judicial Proceedings)

(1) The running of the limitation period shall be suspended

a) when the obligee performs any act, by commencing judicial proceedings or in judicial proceedings already instituted, that is recognised by the law of the court as asserting the obligee's right against the obligor;

b) in the case of the obligor's insolvency when the obligee has asserted its rights in the insolvency proceedings; or

c) in the case of proceedings for dissolution of the entity which is the obligor when the obligee has asserted its rights in the dissolution proceedings.

(2) Suspension lasts until a final decision has been issued or until the case has been otherwise disposed of.

Article 6

(Suspension by Arbitral Proceedings)

(1) The running of the limitation period shall be suspended when the obligee performs any act, by commencing arbitral proceedings or in arbitral proceedings already instituted, that is recognised by the law of the arbitral tribunal as asserting the obligee's right against the obligor. In the absence of regulations for an arbitral proceeding or provisions determining the exact date of the commencement of an arbitral proceeding, proceeding shall be deemed to commence on the date on which a request that the right in dispute should be adjudicated reaches the obligor.

(2) Suspension lasts until a binding decision has been issued or until the case has been otherwise disposed of.

Article 7

(Alternative Dispute Resolution)

The provisions of Arts. 5 and 6 apply with appropriate modifications to other proceedings whereby parties request a third person to assist them in their attempt to reach an amicable settlement of their dispute.

Article 8

(Suspension in case of force majeure, death or incapacity)

(1) Where the obligee has been prevented by an impediment that is beyond its control and that it could neither avoid nor overcome, from causing a limitation period to cease to run under the preceding articles, the limitation period is suspended so as not to expire before one year after the relevant impediment has ceased to exist.

(2) Where the impediment consists of the incapacity or death of the obligee or obligor, suspension ceases when a representative for the incapacitated or deceased party or its estate has been appointed or a successor inherited the respective party's position; the additional one-year period under para. 1 applies respectively.

Article 9

(Effect of Expiration of a Limitation Period)

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

(2) The obligor may do so in any judicial, arbitral or administrative proceeding.

Article 10

(Set Off After Expiration of the Limitation Period)

Notwithstanding the expiration of the limitation period for a right, the obligee may rely on its right as a defence [or for the purpose of set off against a claim asserted by the obligor].

Article 11

(Restitution)

Where there was performance in order to discharge an obligation, there is no right to restitution merely because the period of limitation had expired.

Draft Chapter on Assignment of Rights, Transfer of
Obligations, Assignment of Contracts

SECTION 1: ASSIGNMENT OF RIGHTS

Article 1.1
(Definitions)

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

Article 1.2
(Exclusions)

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

- (a) of instruments, or**
- (b) of rights in the course of transferring a business.**

Article 1.3
(Assignability of non-monetary rights)

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

Article 1.4
(Partial assignment)

(1) A right to payment of a monetary sum may be assigned partially.

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

Article 1.5
(Future rights)

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

Article 1.6

(Rights assigned without individual specification)

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

Article 1.7

(Agreement between assignor and assignee sufficient)

(1) A right is assigned by mere agreement between assignor and assignee, without notice to the obligor.

(2) The consent of the obligor is not required, unless the obligation, in the circumstances, is of an essentially personal character.

Article 1.8

(Obligor's additional costs)

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

Article 1.9

(Non-assignment clauses)

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

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

Article 1.10

(Notice to the obligor)

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

(2) After receiving such a notice, the obligor is discharged only by paying the assignee.

Article 1.11
(Successive assignments)

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

Article 1.12
(Adequate proof of assignment)

(1) If notice of the assignment is given by the assignee, the obligor may request the assignee to provide within a reasonable time adequate proof that the assignment has been made.

(2) Until adequate proof is provided, the obligor may withhold payment.

(3) Unless adequate proof is provided, notice is not effective.

(3) Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

Article 1.13
(Defences)

(1) The obligor may assert against the assignee all defences which the obligor could assert if the claim was made by the assignor.

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

Article 1.14
(Rights related to the claim assigned)

Assignment of a right transfers to the assignee :

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

(b) all rights securing such performance.

Article 1.15
(Assignor's undertakings)

The assignor undertakes towards the assignee that :

- (a) the assigned right exists at the time of the assignment, unless the right is a future right;**
- (b) the assignor is entitled to assign the right;**
- (c) the right has not been previously assigned to another assignee, and it is free from any right or claim from a third party;**
- (d) the obligor does not have any defences;**
- (e) the obligor has not given notice of set-off concerning the assigned right and the assignor has not given any such notice;**
- (f) the assignor will reimburse the assignee for any payment received from the obligor before notice of the assignment was given.**

SECTION 2 : TRANSFER OF OBLIGATIONS

Article 2.1
(Modes of transfer)

For the purposes of this Section, an obligation to pay money or render other performance may be transferred from one person (“the original obligor”) to another person (“the new obligor”) either

- (a) by an agreement between the original obligor and the new obligor, or**
- (b) by an agreement between the obligee and the new obligor, by which the new obligor assumes the obligation.**

Article 2.2
(Exclusion)

This Section does not apply to transfers of obligations made under the special rules governing transfers of obligations in the course of transferring a business.

Article 2.3
(Requirement of obligee's consent to transfer)

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

Article 2.4
(Advance consent of obligee)

- (1) The obligee may give its consent in advance.**
- (2) The transfer of the obligation becomes then effective when notice of the transfer is given to the obligee or when the obligee acknowledges it.**

Article 2.5
(Discharge of old obligor)

- (1) The obligee may discharge the original obligor.**
- (2) The obligee may also retain the original obligor as an obligor in case the new obligor does not perform properly.**
- (3) Otherwise the original obligor remains as an obligor, jointly and severally with the new obligor.**

Article 2.6
(Third party performance)

- (1) Without the obligee's consent, the obligor may contract with another person that this person will perform the obligation in place of the obligor, unless the obligation, in the circumstances, has an essentially personal character.**
- (2) The obligee retains its claim against the obligor.**

Article 2.7
(Defences)

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

Article 2.8
(Rights related to the obligation transferred)

- (1) The obligee may assert against the new obligor all its rights to payment or other performance under the contract in respect of the obligation transferred.**
- (2) If the original obligor is discharged under Article 2.5 (1), a security granted by any person other than the new obligor for the performance of the obligation is discharged, unless that other person agrees that it should continue to be available to the obligee.**
- (3) Discharge of the original obligor also extends to any security of the old obligor given to the obligee for the performance of the obligation, unless the security is over an**

asset which is transferred as part of a transaction between the old and the new obligors.

SECTION 3 : ASSIGNMENT OF CONTRACTS

Article 3.1
(Definitions)

In these Principles, “assignment of a contract” means the transfer by agreement from one person (“the assignor”) to another person (“the assignee”) of the assignor’s rights and obligations arising out a contract with another person (“the other party”).

Article 3.2
(Exclusion)

This Section does not apply to assignment of contracts made under the special rules governing transfers of contracts in the course of transferring a business.

Article 3.3
(Request of consent of the other party)

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

Article 3.4
(Advance consent of the other party)

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

Article 3.5
(Discharge of the assignor)

- (1) The other party may discharge the assignor.**
- (2) The other party may also retain the assignor as an obligor in case the assignee does not perform properly.**
- (3) Otherwise the assignor remains as the other party’s obligor, jointly and severally with the assignee.**

Article 3.6
(Defences)

- (1) To the extent that assignment of a contract involves an assignment of rights, article 1.13 applies accordingly.**
- (2) To the extent that assignment of a contract involves a transfer of obligations, article 2.7 applies accordingly.**

Article 3.7
(Rights transferred with the contract)

- (1) To the extent that assignment of a contract involves an assignment of rights, article 1.14 applies accordingly.**
- (2) To the extent that assignment of a contract involves a transfer of obligations, article 2.8 applies accordingly.**

Draft Chapter on Set-off

Article 1 *(Conditions of set-off)*

(1) Where two parties owe each other obligations to pay money or to render other performance of the same kind, either of them (“the first party”) may set off its obligation against its obligee (“the other party”) if at the time of set-off

**(a) the first party is entitled to perform its obligation,
(b) the other party’s obligation is ascertained as to its existence and amount and performance is due.**

(2) If the obligations of both parties arise from the same contract, the first party may also set off its obligation against an obligation of the other party which is not ascertained as to its existence or to its amount.

Article 2 *(Foreign currency set-off)*

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

Article 3 *(Set-off by notice)*

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

Article 4 *(Content of Notice)*

(1) The notice must sufficiently specify the obligation to which it relates.

(2) If notice does not specify the obligation of the other party which must be set off, the notice is ineffective.

(3) If notice does not specify the obligation the first party wants to set off, the rules in Art. 6.1.12 will apply with appropriate modifications.

Article 5
(*Effect of set-off*)

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