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Study L – WP.11
(English only)

UNIDROIT

International Institute for the Unification of Private Law
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WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

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

Consolidated edition of Part I and Part II of the Principles of International Commercial Contracts: Decided Amendments & Open Questions

(Memorandum prepared by the Secretariat)

Rome, December 2002

I. DECIDED AMENDMENTS TO PART I

A. Black letter rules

- **Model Clause**

  UNIDROIT 1999 - C.D. (78) 23: *The Governing Council noted with satisfaction the information communicated by the Secretariat and expressed its best wishes to the Working Group for every success in its work. It also approved the addition of the following text as a footnote to Paragraph 2 of the Preamble of the Principles:*

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

  "This contract shall be governed by the UNIDROIT Principles (1994) [**except as to Articles …**]**"**

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

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

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

- **Article 1.2 of Part I**

  (Report on the 2002 session of the Working Group, para. 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."

- **Article 2.18 of Part I**

  (Report of the 2002 session of the Working Group, para. 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."

B. Comments

- **E-commerce**

UNIDROIT 2001 - Doc. 77 rev.:

Article 1.9: *"(1) Where notice is required it may be given by any means appropriate to the circumstances […]."*

Question: Should there be a provision expressly stating that notice may be given by way of electronic data message or would language to this effect in the comments be sufficient?

A.B. It would be helpful here to give illustrations of when electronic notice is and when it is not appropriate. For example, if the entire contract is in writing, and there has been no prior communications electronically, would electronic notice be appropriate? It may not serve the necessary purpose in some instances - as the recipient may have not reason to know to expect such a communication.
J.G. Again, I think commentary suffices. The issue would be whether electronic communications are "appropriate to the circumstances." That would depend on the particular parties, e.g., do they both regularly use email? If only one party enjoyed regular email access, email might not be appropriate in those circumstances.
C.R. To my opinion the Article does not need to be supplemented. In the comments it should be emphasized that for an electronic message to be "appropriate in the circumstances", the addressee must somehow have communicated its willingness to receive electronic communication in the way it was sent by the sender (see for inspiration the US UETA).

Article 1.9: *"[…] (2) A notice is effective when it reaches the person to whom it is given. (3) For the purpose of paragraph (2) a notice "reaches" a person when given to that person orally or delivered at that person's place of business or mailing address."*

Question: As to the definition of "reaches" in the context of electronic forms of communications do you think that there is a need of a special provision, e.g. of the kind of Article 15(2) of the 1996 UNCITRAL Model Law on Electronic Commerce[1], or would a reference to it in the comments be sufficient? For this

[1] "Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:
(a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:
(i) at the time when the data message enters the designated information system; or
(ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;
(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee."

latter approach see e.g. with respect to question when a funds transfer becomes effective, Art. 6.1.8(2) UNIDROIT Principles and Comment 2 to it.

A.B. Given that these are principles, not a statute, references in the comments is an acceptable way of referencing another work without having to repeat it verbatim. [Query: would a reference such as that be sufficient to preclude use of contrary domestic principles.] The difficulty I have, however, is that the formulation you use here is the notice "reaches" a person rather than notice is "received by" a person. This might introduce some questions about whether the two are identical. A second (substantive) issue: is the receipt rule for notice always appropriate?

J.G. While I think it is important to elaborate on the meaning of "reaches," I also think this can (and should) be done in commentary. I read the next black letter paragraph in 1.9 ("For the purpose of . . .) as only a partial definition of "reaches." As a result, the commentary can elaborate further. Moreover, I think that "mailing address" can include email address. Similarly, "delivered at that person's place of business" can mean both a physical office, and a computer whose files are designated for that business (even though the computer is physically located somewhere else). The commentary could elaborate further, perhaps in the manner indicated in UNCITRAL art. 15(1).

In general, I think "reaches" may be a difficult concept, but its difficulty is not necessarily limited to electronic communications. E.g., a letter may "reach" its intended reader when the letter arrives at the office, but it may not in fact be *read* till some considerable time thereafter. This may not only because of the reader's absence from the office, but because of some misstep in the mail room, that resulted in losing the letter or delaying its actual delivery to the reader. In light of this sort of problem with traditional mail, I do not know that the problems with electronic mail (e.g. virus in central office computer that initially receives the communication) are qualitatively different.

Note that e-mail might make realization of the concept of "reaches" easier and more certain: if the sender programs the communication to "request receipt," the sender will receive a notification when the recipient opens the email.

C.R. This is not an easy question to answer. I am generally very much against making any changes in UPICC unless it is absolutely necessary. Practitioners do not like changes. This Article is quite controversial to my opinion and it has – at least in Sweden - been criticized. In case the fundamental Article 1.9(1) is to be changed it could be advisable to also in 9.1(2) clarify the precise meaning of "reaches" in the electronic setting. If the fundamental rule is not to be changed, I suggest that the "reaches" clarification is better dealt with in the comments.

Article 2.1: "A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement."

Question: Given the practice of purely automated contracting in the context of electronic contracting do you think there is a need of amending the text of this provision, e.g. along the lines of Art. 202(a) of the U.S. Uniform Computer Information Transaction Act,[2] or would it be sufficient to mention in the comments the possibility of automated contracting ?

A.B. I would think a reference in the comments to automated contracting should be sufficient. I would be *extremely* wary of any reference to UCITA - it has not been well received in the US.

J.G. The term "conduct of the parties" is sufficiently broad, I believe, to cover electronic communications, or, for that matter, automatic procedures upon which the parties have agreed. The commentary could adopt a formulation similar to UCITA's (bearing in mind, however, that UCITA is a very controversial document, albeit not on this specific point). In general, I think the concept of "conduct" can extend to mutual consent to set in motion a series of self-executing electronic actions. Perhaps it would be desirable for the commentary to specify that the parties should understand what the automated contracting does and means.

C.R. I would definitely not change the article to expressly encompass automated contracting. The very beauty of this Article is that it is general in nature. The Article would be destroyed if UNIDROIT started to make specifications. I am sceptical as to whether it is necessary even to comment on automated transactions. If UNIDROIT decides to make a comment, please do not make it longer than one sentence!

Article 2.4: "(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance."

Question: As to the definition of "dispatched" in the context of electronic forms of communications do you think that there is a need of a special provision, e.g. of the kind of Article 15(1) of the UNCITRAL Model Law[3], or would a reference to it in the comments be sufficient?

A.B. A reference should suffice.

M.E. Here clarifications are required, in the text or comment, concerning when an electronic communication "reaches" a recipient. I assume it is when the message first shows up on the recipient's screen, in the case of a person or an organization, or first enters a receiving electronic agent's processing apparatus, in the case of an electronic agent.

[2] "A contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties *or operation of electronic agents* which recognize the existence of a contract." (emphasis added)

[3] "Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator."

J.G. "Dispatched" is a very broad term that, it seems to me, covers all modes of communication (including by Pony Express). Therefore, commentary should suffice. Whatever "dispatched" means in the electronic context (I don't know how helpful the UNCITRAL suggestion here is), it would need to be a means that assigns a reliable date and time to the sending of the communication. Otherwise it will not be possible to know whether the revocation was sent before the acceptance "reached" its destination.

C.R. : I do not think that it is necessary to clarify the meaning of "dispatched" in the black letter text. A short comment suffices.

II. OPEN QUESTIONS IN PART I & PART II

A. Black letter rules

- **Model clause**

The Governing Council at its 1999 session approved the inclusion of the Model Clause as prepared by Professor Farnsworth with the additional sentence: "If such a clause is used together with an arbitration clause, the parties should take care to ensure that the two clauses are not incompatible." Does it make sense? (Does it not suggest that if parties agree on an arbitration clause there might be problems, while this is not the case if the dispute is brought before a domestic court (which of course is nonsense) Suggestion: why not recommend that parties should agree together with such a clause to arbitrate?)

- **Preamble**

(1) The present text makes no reference to the possible use of the Principles
- as a guideline in contract negotiation,
- as a means of interpreting and supplementing the applicable domestic law,

notwithstanding the fact that in practice the Principles are widely used for these two purposes

Question: should the Preamble contain an express reference to them?

(2) The present text of the Principles states that
"[The Principles] may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law."

In practice it appears that such use of the Principles as a substitute for the otherwise applicable domestic law has never occurred.

Question: should the reference to such a use be deleted?

NOTE: If a reference to the possible use of the Principles as a means of interpreting and supplementing the applicable domestic law were to be included, the deletion of the present reference to the possible use of the Principles as a substitute for the otherwise applicable domestic law might be advisable in order to avoid any risk of confusion.

(3) The European Principles state that

"These Principles may be applied when the parties […] have not chosen any system or rules of law to govern their contract".

Question: Should a similar provision be added in the Preamble of the Principles, also in view of the fact that there is a growing body of international case law where arbitrators applied the Principles as the *lex contractus* in case of negative choice of law by the parties?

NOTE: A provision of this kind appeared in the preliminary drafts of the Principles and was deleted at the very last moment by the Governing Council by a 10 to 8 majority with one abstention. To be precise, the provision on which the Council took the vote was a combination of the provision in question and the present paragraph 4 of the Preamble and read as follows: "[The Principles] may also provide a solution to an issue raised when the parties have not chosen any law to govern their contract, or when it proves impossible to establish the relevant rule of the applicable law." The Council decided to delete the first part of the provision (UNIDROIT 1993 – C.D. (72) 19, p. 22).

- **Articles 2.8 and 2.7 of Part I**

(Report of the 2002 session of the Working Group):

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.[4]

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.

Question: What to do?

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[4] *Article 2:206): Time Limit for Acceptance*
(1) In order to be effective, acceptance of an offer must reach the offeror within the time fixed by it.
(2) If no time has been fixed by the offeror acceptance must reach it within a reasonable time.
(3) In the case of an acceptance by an act of performance under art. 2:205 (3), that act must be performed within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.

NOTE: UNIDROIT Principles Art. 2.7: special rule on oral offers. What about electronic communication, at least those to be considered "instantaneous mode of communication" (e.g. chat room communications and voice over the internet)?

- **General provision stating that all references in the Principles to contracts would include unilateral acts**

(Report on the 1999 session of the Working Group):

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

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

Authority of Agents: Article 9
(8) Ratification is subject to no requirement as to form. It may be express or may be inferred from the conduct of the principal.

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

NOTE: Art. 1.2: "Nothing in these Principles requires **a contract** to be concluded in or evidenced by a particular form …"

Question: What to do?

- **"Reliance" only or "reasonable reliance"?**

(Report on the 2002 session of the Working Group):

Chapter [...] on Third Party Rights
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.

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.
35. Furmston … 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.
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.

NOTE: Articles containing reference to "reliance" only:
current edition: 2.18, 3.5 (1) (b), 3.10 (3), 3.11 (2), 3.13 (1); Art. 5 Third party rights.
Articles containing reference to "reliance" together with "reasonable":
current edition: 2.4 (2) (b); see also Art. 5 (2) Authority of agents.

Question: What to do?

- **Article 9 of the Chapter on Authority of Agents**

  Preliminary draft (1999)

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

  (Report on the 1999 session of the Working Group) :

  201. Hartkamp pointed out that the European Principles contained two short provisions (cf. Article 3:207) which were the equivalent of the first paragraph of this draft Article. He suggested dealing with paragraphs 2 and 3 together and invited comments on whether the content of the paragraphs would be an issue for consideration in the chapter on agency.
  202. Farnsworth thought that it would be useful to include these provisions and Hartkamp offered some alternative wordings along the following lines: "Ratification shall take no effect if the third party at any time before ratification gives notice of its refusal to become bound by the ratification unless the third party knew or ought to have known about the lack of authority of the agent."
  203. Schlechtriem wondered whether Hartkamp had given up the idea of a time limit for refusal. Hartkamp suggested that a second sentence could be added as follows: "The third party may specify a reasonable time for ratification."
  204. El Kholy did not see the justification for the rule. He wanted to know why the third party should be permitted to get out of the contract. Hartkamp replied that this was because the third party was in good faith. Bonell expressed sympathy for El Kholy's concern: it was essential to distinguish between the question as to when the third party is entitled to pull out of the contract and whether the third party is entitled to set a time limit for ratification.
  205. Di Majo suggested that the issue of ratification was an issue between the agent and the principal and not one for the third party to get involved. He therefore proposed the deletion of paragraphs two and three.
  206. Uchida supported the retention of paragraphs two and three because the principal's freedom to choose for or against the contract could lead to speculations to the detriment of the third party unless the third party was protected by having the right to refuse to be bound by the contract.

207. Schlechtriem thought that it would be a good idea to set a time limit for ratification in the first paragraph so that the third party would not be 'in limbo' indefinitely. Bonell warned that paragraphs two and three would be an invitation to litigate. He agreed with Schlechtriem that setting a time limit for ratification would help to solve this problem. A time limit would make it clear to the principal that ratification could not be considered indefinitely and it would give the third party the opportunity to put an end to the period of uncertainty.
208. The Group decided by a majority of 7:5 not to include paragraphs 2 and 3 in the chapter on agency. Hartkamp suggested returning to the question of the time limit after the other paragraphs had been discussed and he invited comments on paragraph 4.

Question: In the light of the small majority in favour of the deletion of paras. 2 and 3 of the draft which had been taken literally from Art. 15 of the Geneva Convention, would it not be advisable to add to Art. 9 of the draft a sentence stating that if the third party was unaware that it was dealing with a false agent, it would have the right to withdraw from the contract prior to ratification (or, what would amount to the same result, the right to notify the principal that it would refuse to be bound by the ratification. This solution would correspond to most domestic laws (for further references to civil law systems cf. H. Kötz, European Contract Law, p. 234; but see also § 4.05 of the Draft Restatement Third on Agency).

- **Article 10 of Chapter […] on Limitation Periods**

Queston: To be revisited after the decision against the retroactive effect of set-off? What about the title?

- **Chapter […] on Assignment**

(1) Titles of Articles 1.1 and 3.1 = "Definitions", while title of Article 2:1 = "Modes of transfer".

(2) Opening words of Articles 1.1 and 3.1 = "In these Principles"; of Article 2.1 = "For the purposes of this section".

(3) Art. 1.9 (Non-assignment clauses):
Text adopted in Rome 2001 on the assumption that the UNCITRAL Convention takes the same approach.

(Report on the 2002 session of the Working Group):

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.

[UNIDROIT Factoring]

Article 5

As between the parties to the factoring contract:

(a) a provision in the factoring contract for the assignment of existing or future receivables shall not be rendered invalid by the fact that the contract does not specify them individually, if at the time of conclusion of the contract or when they come into existence they can be identified to the contract;

(b) a provision in the factoring contract by which future receivables are assigned operates to transfer the receivables to the factor when they come into existence without the need for any new act of transfer.

Article 6

1. - The assignment of a receivable by the supplier to the factor shall be effective notwithstanding any agreement between the supplier and the debtor prohibiting such assignment.
2. - However, such assignment shall not be effective against the debtor when, at the time of conclusion of the contract of sale of goods, it has its place of business in a Contracting State which has made a declaration under Article 18 of this Convention.
3. - Nothing in paragraph 1 shall affect any obligation of good faith owed by the supplier to the debtor or any liability of the supplier to the debtor in respect of an assignment made in breach of the terms of the contract of sale of goods.

[UNCITRAL Receivables] Article 9
Contractual limitations on assignments

1. An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor's right to assign its receivables.
2. Nothing in this article affects any obligation or liability of the assignor for breach of such an agreement, but the other party to such agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.
3. This article applies only to assignments of receivables:
(a) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of real property;
(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;
(c) Representing the payment obligation for a credit card transaction; or
(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

PECL

ARTICLE 11:301: CONTRACTUAL PROHIBITION OF ASSIGNMENT

(1) An assignment which is prohibited by or is otherwise not in conformity with the contract under which the assigned claim arises is not effective against the debtor unless:
  (a) the debtor has consented to it; or
  (b) the assignee neither knew nor ought to have known of the non-conformity; or
  (c) the assignment is made under a contract for the assignment of future rights to payment of money.
(2) Nothing in the preceding paragraph affects the assignor's liability for the non-conformity.

Question: What to do?

(4) Align language in Art. 1:13(1) with 2:7 (which is also the formula used in Art. 4 of the chapter on third party rights).

(5) In Article 2.3 "an" original obligor and "a" new obligor: should it not be aligned with Art. 2.1 (a)?

(6) Art. 2.7: "except set-off" better at the end?

(7) Title of Article 3:3 "Request" should be "Requirement".

(8) Art. 3:4: include word "then" between "contract" and "becomes". Cf. Art. 2:4.

- **Chapter […] on Set-off**

Camille's/Paul's revised version of the draft reads as follows (compare with text in WP.10):

Article 1

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

Article 5

(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] at the time of notice.

Question: Confirm version of WP.10?

B. Comments

- **General statement specifying that agreements may be not only express but also implied? Where?**

(Report on the 2001 session of the Working Group):

Limitation Periods: Article 7:
Where the obligor, before the expiration of the limitation period, acknowledges expressly or impliedly the right of the obligee, a new general limitation period begins on the date of the acknowledgement but the maximum limitation period is not affected.

124. Schlechtriem recalled that in the previous version of the draft (UNIDROIT 1999 – Study L Doc. 64) the article contained a second paragraph stating that acknowledgement could be either express or implied, orally or in writing, and providing some examples of implied acknowledgement such as part performance, payment of interest, etc. Following the decision the Group took in Cairo to delete paragraph 2, what was left of this paragraph were the words "expressly or impliedly" which appeared in the present version of Article 7.
125. Farnsworth pointed out that a matter of general drafting policy was involved, i.e. whether to specify that agreements may be not only express but also implied whenever the question arises or to have such a principle stated once and for all in a general provision. He felt that the matter should, in any case, be considered in the context of the general revision of the Principles in view of their new edition.
130. The Group decided to delete the words "expressly or impliedly". (2001 Report)

NOTE: Articles containing the wording "expressly or impliedly":
current edition: 3.12 and 5.1; Art. 2 (1) Authority of agents, Art. 1 (1) Third party rights

Question: What to do?

- **Agreement to negotiate in good faith enforceable?**

(Report on the 1998 session of the Working Group):

6. Farnsworth […] He was personally involved as an expert witness in an ICC arbitration where the arbitrators thought that the Principles were relevant even though the contract in question had been entered into long before the Principles had been published. One of the questions that had been put to him was whether, if there was an agreement to negotiate in good faith, specific performance was an appropriate remedy. He explained that there was a section in the Principles stating that specific performance was an appropriate remedy while another section provided that if parties negotiated in bad faith the remedy was essentially recovery

of the reliance interest and that the question was how the two provisions could be reconciled. He suggested that when the existing Principles were revised, a comment could be inserted addressing the issue but he did not consider it a defect in the present edition.

Question: What to do?

- **Date of expiry falling on a holiday**

(Report on the 1999 session of the Working Group):

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

Question: What to do?

- **Comment 2 to Art. 9 (Ratification) of the draft Chapter on Authority of Agents**

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

213. Farnsworth thought that the first sentence of paragraph 5 was unnecessary but stated that the second sentence might be useful. He could not exclude the possibility that in the United States it was possible to revoke ratification once it was effective and suggested to keep the second sentence so as to clarify that according to the Principles an effective ratification could not be revoked.
214. Finn agreed. However he expressed his concern about the fact that revocation had been raised as a possibility. This issue would seem incompatible with the second sentence of paragraph 1 where it was implied that ratification would create a contract. Discussing the possibility of a revocation of ratification would, in the light of paragraph 1, amount to discussing the unilateral revocation of a contract. This did not seem to be compatible with the Principles. Hartkamp explained that paragraph 1 would merely explain the effect of a ratification and that this effect could be reversed by making provision for revocation.

215. Furmston thought that in most legal systems a contract, once concluded, could hardly be rejected and that this principle was confirmed by the first paragraph. He suggested that the deletion of paragraph 5 would not alter this situation and that the second sentence of paragraph 5 would subsequently be otiose.
216. Bonell also thought that the second sentence of paragraph 5 would be superfluous. He was, however, concerned about Farnsworth's intervention. Bonell wished to know whether Farnsworth was in favour of permitting revocation or whether he was simply explaining the uncertainty to which a lack of an explicit rule stating that ratification once effective could not be revoked might cause to lawyers in the United States. Bonell thought that if the latter was the case, a note in the Comments would perhaps be sufficient to overcome the uncertainty. Farnsworth said that he would be happy with having an appropriate note added in the Comments.

The present version of the draft Comments is:

"2. Effects of ratification
On ratification the agent's acts produce the same effect as if they had been carried out from the outset with authority (paragraph 1). It follows that the third party may refuse partial ratification as it amounts to a proposal by the principal to modify the contract the third party has concluded with the agent."

Question: Should a sentence be added stating that ratification once brought to the attention of the third party may no longer be revoked by the principal?

- **New Comment 4 to Art. 10 (Termination) of the draft Chapter on Authority of Agents**

The Comments to Art. 3:209 of the European Principles (which correspond to Art. 10 of the UNIDROIT draft contain a statement according to which "The rules of Art. 3:209 apply *mutatis mutandis* to modifications of an agent's authority, especially to restrictions."

Question: No such statement appears in the Comments to Art. 10 of the UNIDROIT draft; should there be one?