

ADDENDUM

II. OPEN QUESTIONS IN PART I & PART II

A. Black letter rules

- **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).

- **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).

B. Comments

- **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?